Neutral Citation No: [2022] NIQB 32	*Ref:*	**HUM11830**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**10/05/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MICHAEL ARMSTRONG FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Jude Bunting QC (instructed by Phoenix Law) for the Applicant
Tony McGleenan QC and Laura Curran (instructed by the Crown Solicitor's Office) for the proposed Respondent

---

HUMPHREYS J

Introduction

[1] On 3 March 1991 the applicant's brother, Thomas Armstrong, was one of four men murdered in a terrorist attack at Boyle's Bar, Cappagh, Co Tyrone. This application for leave to apply for judicial review seeks to challenge what is described as the 'continued failure' by the proposed respondent, the Chief Constable of the Police Service of Northern Ireland ('PSNI'), to ensure an effective and independent investigation into the murder, contrary to article 2 of the European Convention on Human Rights ('ECHR').

[2] The Cappagh attack was claimed by loyalist paramilitaries but the applicant's case is that state agents were involved in the killings. There are a number of legacy inquests and civil cases brought against the proposed respondent and the Ministry of Defence in relation to deaths in the Mid Ulster area which are said to be linked by an importation of weapons by loyalist paramilitaries in 1987.

[3] The police investigation at the time did not lead to anyone being made amenable for the killings.

The HET Investigation

[4] The evidence of the applicant is that his family were first contacted by the Historical Enquiries Team ('HET') in 2005/2006 in relation to its investigation of the Cappagh killings. On 18 September 2012 a meeting took place, at which the applicant was not present, during which suspected collusion was discussed including the involvement of UDR members. The minute exhibited to the applicant's affidavit states:

> "The witness who came forward links UDR soldiers to the case … [he] was a member of the UDR as well"

[5] A further meeting was held on 5 December 2012, again without the applicant attending, when more detail around the alleged collusion was given. The minute says:

> "Four others were arrested included three UDR members … Rifle muzzle cover found at scene was similar to one used by British Army/UDR soldiers. Reference was made to sketch of bar being made by UDR patrol possible a week before the attack … HET said there was weapon linkage with Cappagh incident to other murders/attempted murders. The weapons used in murders/ attempted murders were two VZ58 assault rifles."

[6] The applicant states that he has seen these minutes and has had discussions with representatives of other families of the deceased, although his evidence is somewhat coy on his state and sources of knowledge.

[7] In September 2014 the HET was wound up and the matter fell into the caseload of the Legacy Investigation Branch ('LIB'). Around this time, the solicitors then acting for the applicant sought a copy of the HET report. He was informed that this had been refused. He states that this decision:

> "… shook my confidence in the PSNI as being able to have any independent role in the investigation into the murders of our loved ones … The HET was supposed to have been established to give us the truth, but instead it felt like the PSNI closed it down to prevent the truth coming out."

[8] The applicant further states his fears that the PSNI would not remain neutral were confirmed by the following:

(i) Rumours that the RUC had been involved in his brother's death;

(ii) The investigative failures in the initial RUC investigation; and

(iii) The PSNI seeking to prevent the disclosure of the HET report

[9] On 20 February 2020 the LIB disclosed a copy of the draft HET report to the applicant and his family. This report linked members of the UDR to the murders at Cappagh. Three of the suspects arrested were part time members of the UDR and had been named in intelligence reports as being involved in the murders. It also identified the VZ58 weapons involved which were used in other attacks between 1988 and 1993.

[10] The report addressed the initial investigation and concluded:

> "The original investigation was comprehensive and correctly focused on members of the UVF. Appropriate co-ordination with other linked investigations was a feature." [page 38]

[11] The applicant's view of the independence of the PSNI is bolstered by the findings of the 2016 Police Ombudsman report into the 1994 Loughinisland attack and by the content of the BBC series 'The Troubles: A Secret History', broadcast in 2019. The applicant also relies on a number of reports in relation to Mid Ulster killings which were carried out by the HET. The conclusion drawn by him is that these murders all are linked and that members of the UDR were involved in the killings which were facilitated by police officers.

[12] As a result, the applicant asserts:

> "In light of the allegations of collusion between the police, army and loyalist paramilitaries implicated in the shootings at Boyle's bar and the wider Mid-Ulster cases, that the PSNI is not the body that should carry out this investigation. I would have no faith or trust whatsoever in the PSNI conducting such investigation."

[13] On 23 March 2020 solicitors acting for the applicant wrote a pre-action protocol ('PAP') letter to the proposed respondent seeking confirmation that a wholly independent police investigation would be put in place in relation to the Cappagh killings. It was claimed that the PSNI lacked institutional and practical independence and any investigation carried out by it would not meet the requirements of article 2 ECHR. In its response, dated 14 May 2020, the proposed respondent stated that responsibility for investigation rested with the LIB and denied that the PSNI lacked the requisite independence.

Delay

[14] Order 53 rule 4 of the Rules of the Court of Judicature (NI) 1980 provides:

> "An application for leave to apply for judicial review shall be made within three months of the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[15] Proceedings were issued in this case on 28 May 2020. The proposed respondent asserts that this application seeks, in effect, to challenge the transfer of the investigation from the HET to the LIB in 2014 and/or the alleged deficiencies in the police investigation which pre-date that event. It is argued that there is no open-ended right to seek relief for alleged public law wrongs nor does administrative law recognise a 'continuing act' for the purposes of Order 53 rule 4. The applicant's response is that there is continuing illegality in the form of an ongoing breach of article 2 rights.

[16] The leading case in this jurisdiction on the question of delay and the extension of time is *Re Laverty's Application* [2015] NICA 75. The Court of Appeal stated

> "If there has been delay, the application for leave should include (a) an application to extend time stating the grounds relied on and (b) an affidavit explaining all aspects of the delay."

[17] The applicant has not sought any relief by way of an extension of time in his Order 53 statement, nor has any evidence on the question of delay been adduced, despite it having been raised as an issue in the proposed respondent's PAP response.

[18] In *Re Allister* [2022] NICA 15, the Court of Appeal held that the date when the grounds to challenge the Northern Ireland Protocol first arose was 29 January 2020, which was the date of the ratification of the Withdrawal Agreement. Judicial review proceedings ought therefore to have been commenced by 29 April 2020. The fact that the Protocol remained in force and effect after that date, and Regulations were made giving effect to the Withdrawal Agreement, did not mean the applicants enjoyed an ongoing right to commence proceedings at a time of their choosing. The first set of applicants, including Mr Allister, has not sought an extension of time. That position was contrasted with the applicant Mr Peoples, who had sought an extension, a decision described as 'wise' by the Court of Appeal. Ultimately the court held that the applications were out of time but granted extensions on the basis that these were cases of considerable constitutional significance. Keegan LCJ stated:

> "Whilst this court in very many cases would in these circumstances refuse an application to extend time this is not

> one of those cases. This is a unique set of circumstances which should not form the basis for argument regarding extension of time in other cases where in judicial review challenges have to be made in a more expeditious fashion given the issues at stake and in the interests of certainty." [para 58]

[19] In *O'Connor v Bar Standards Board* [2017] UKSC 78, the Supreme Court ruled that disciplinary proceedings brought against a barrister were not time barred since they amounted to a single continuous course of conduct. This was in the context of an argument that section 7(5)(a) of the Human Rights Act 1998 which provides that proceedings alleging breach must be brought before the end of:

> "The period of one year beginning with the date on which the act complained of took place."

Lord Lloyd-Jones found:

> "The expression 'the date on which the act complained of took place' is apt to address a single event. However, the provision should not be read narrowly. There will be many situations in which the conduct which gives rise to the infringement of a Convention right will not be an instantaneous act but a course of conduct. The words of section 7(5)(a) should be given a meaning which enables them to apply to a continuing act of alleged incompatibility."

[20] In Scotland, section 27A of the Court of Session Act 1988 provides for a statutory time limit similar to that enshrined in Order 53 rule 4, requiring proceedings to be brought "before the end of the period of 3 months beginning with the date on which the grounds giving rise to the application first arise." In *S v Scottish Ministers* [2021] CSOH 23, the Outer House of the Court of Session considered a challenge to the prosecution of serious sexual offences during the Covid-19 pandemic. Lady Poole found:

> "It could not be the case that in challenges to legislation, administrative conduct or policy with continuing effect the commencement of time limits rolled forward for as long as those matters continued to apply, otherwise there would effectively be no time limit at all. Grounds of challenge arose when a person was first affected by the challenged policy (*R(Delve) v Work and Pensions Secretary [2020] EWCA Civ 1119 paragraphs 125-127*). In this case, the relevant date was at the latest 2 June 2020 when it was made public that judge only trials were no longer being considered. The petition should have been brought by 1

> September 2020 but was not lodged until 9 February 2021. It was therefore outwith the three month period … If what is being challenged has a continuing effect, that may be relevant to the issue of equitable extension under Section 27A(1)(b), but the three month period will apply from when the grounds for the challenge first arose." [paras 15 & 16]

[21] Shortly thereafter, the Inner House dealt with an appeal in relation to a decision to ban telephone contact between two prisoners. In *O'Neill v Scottish Ministers* [2021] CSIH 66, Lady Dorrian considered case law under section 7(5)(a) of the HRA, a statutory test and provision which she described as "quite different" to that which applies to applications for judicial review. The court held:

> "The best guide to the proper interpretation of section 27A lies in the wording of the provision itself, which is quite clear and does not admit of ambiguity … The essence of the petitioners' argument is that in the circumstances of a case such as the present, there is no time limit for bringing judicial review proceedings. He frankly submitted that such proceedings could be brought even if the circumstances in question had persisted for 5, or even 10, years. This is entirely inconsistent with the mischief at which the legislation was directed." [paras 10 & 11]

[22] The Court of Appeal in England & Wales also considered this question in *R (Delve) v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199, a case relating to the compatibility of pensions legislation with Convention rights. In the court's reasoning:

> "124 … 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.

125. Given that this case does not involve a series of acts, when did the time limit in CPR 54.5 start to run? The principles governing the application of the time limit for bringing judicial review proceedings were recently reviewed by this Court in *R (Badmus) and others v Secretary of State for the Home Department [2020] EWCA Civ 657*. That case concerned a challenge to the rate of pay fixed by the respondent for work carried out by detainees in immigration detention centres. The regime introducing a standard rate of pay for paid work across all detention centres was implemented through a Detention Services Order starting in 2008 and reviewed periodically thereafter. The applicants in *Badmus* had become subject to immigration detention and challenged the legality of the flat rate they were paid for work between August 2017 and July 2018. The question was when the grounds to make the claim "first arose" for the purposes of CPR 54.5(1).

126. The Court held at [77] that the correct principle was that the grounds for making a judicial review claim first arise when a person is affected by the application to him or her of the challenged policy or practice. That is the case at least where the legislation is mandatory and involves no independent consideration by anyone as to whether or not it should be applied in the particular case. The claimants were not affected by the flat rate rule until they were detained in a detention centre in which that rule applied. It was only then that they had the standing and the grounds to bring their claim, and that was when time started to run: [78]. The Court recognised that this enabled a claimant to undermine a long established rule, policy or practice that had been applied to many people in the interim. That could operate to the detriment of

> good public administration and create legal uncertainty. The answer to that was that the three month time limit for judicial review applications and the one year time limit for bringing proceedings under section 7 of the Human Rights Act 1998 would in practice constrain the number of former detainees who could pursue proceedings."

[23] In this case, on his own evidence, the applicant did not believe the PSNI possessed the necessary quality of independence at the time information was imparted to him in or around 2012 and this concern was underlined by the closure of the HET in 2014. The grounds to seek relief from the court in respect of this lack of independence therefore arose in 2012 or, at the latest, in 2014. The report from the HET which was disclosed in 2020 only confirmed what the applicant knew already following the 2012 meetings.

[24] I entirely agree with Lady Dorrian's analysis of the meaning and purpose of the time limit which exists for bringing judicial review proceedings. On the analysis put forward by the applicant, these proceedings could have been commenced at any time within the last 10 years since there is a 'continuing breach' of article 2. I do not accept this. The phrase "within three months of the date when grounds for the application first arose" connotes a quite different test from "before the end of the period of one year beginning with the date on which the act complained of took place" in section 7(5)(a) of the HRA. In the latter case, on the reasoning in *O'Connor,* time may not run until the continuing illegal act has ceased but in the former, time runs from when the illegal act first occurs, whether it continues or not.

[25] The pre action correspondence does not assist the applicant. As Lewis LJ observed in *R (AK) v Secretary of State for the Home Department* [2021] EWCA Civ 119:

> "A claimant cannot avoid the application of the time-limits by writing to the defendant and then seeking to characterise a response as a fresh decision." [para 50]

[26] The interpretation also respects the mischief at which the time limit is directed, namely the need for challenges to public law decisions to be brought promptly. Equally, it ought not to cause any substantive injustice to applicants for judicial review since the courts enjoy a broad discretion to extend the time for the bringing of an application if 'good reason' can be shown.

[27] The application for leave to apply for judicial review is out of time and no application having been made for an extension of time, it is hereby dismissed.

The Application for Leave

[28] Since I heard full argument on the issues, I propose in any event to address the question of the merits of the applicant's case. In doing so, I bear in mind the test for leave which obliges the applicant to demonstrate an arguable case with realistic prospects of success.

The Grounds for Judicial Review

[29] The Supreme Court recently considered the questions of the application of the article 2 investigative obligation and the independence of the PSNI in *Re McQuillan* [2021] UKSC 55 where the applicant sought a declaration that the LIB were not sufficiently independent to carry out the investigation into a legacy killing.

(1) The *Brecknell* Test

[30] An article 2 investigative obligation could revive after an investigation is closed where new evidence comes to light in line with the Strasbourg decision in *Brecknell v UK* [2008] 46 EHRR 42 where in it is stated:

> "The court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation" [para 71]

[31] The applicant contends that the *Brecknell* test is met on the facts of this case by reason of the following:

(i) The information received relating to the suspected role of three UDR members in the killings;

(ii) The use of the weapons in other terrorist attacks;

(iii) The links between these weapons and state agents; and

(iv) The BBC programme containing an interview with the claim that information was provided to loyalists by police officers.

[32] However, the information in relation to the UDR suspects was known in 2012. This is not 'new' evidence. The same can be said of the evidence relating to the weapons. The alleged links between the weapons and state agents are not clear from

the HET report. The claim in the BBC series does not relate specifically to the Cappagh attack or those who carried it out.

[33] I am not therefore satisfied, even on the basis of the test of arguability, that the *Brecknell* test is met on the evidence in this case. There is nothing new in claims of collusion. In fact, as the applicant's evidence reveals, they were the subject of a detailed report compiled by Relatives for Justice in February 2016.

(2) The Genuine Connection Test

[34] It is now clear from the Supreme Court's reasoning in *McQuillan* that the *Brecknell* test is itself subject to the 'genuine connection' requirement. It analysed the Strasbourg decision in *Janowiec v Russia* [2014] 58 EHRR 30 as saying:

> "The Grand Chamber explained that, in accordance with *Šilih*, the Strasbourg court's temporal jurisdiction in relation to such a claim requires either (1) a 'genuine connection' with the death which constitutes the triggering event for the obligation consisting of (a) a reasonably short period of time between the death and the entry into force of the Convention for the state in question, not in excess of ten years, and (b) a requirement that the major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention for that state, or (2) in extraordinary situations which do not meet the 'genuine connection' test, where there is a need to ensure that the guarantees and the underlying values of the Convention are protected (the 'Convention values' test)." [para 135]

[35] The court went on to say:

> "It is clear that the Grand Chamber had the investigative obligation revival principle in *Brecknell* directly in mind when writing this passage and that in the last sentence of para 144 it specifically intended to limit the operation of that principle in relation to deaths occurring before the critical date by reference to the "genuine connection" test and the "Convention values" test." [para 137]

[36] It is not sufficient therefore merely to refer to some new evidence which may have come to light – in order to bring proceedings an applicant must also demonstrate that it is at least arguable that the genuine connection test has been met.

[37] In this case, the deaths in question occurred in March 1991, well before the coming into force of the HRA but within the 10 year period contemplated as the outer limit of the 'reasonably short period' referred to in *Janowiec*.

[38] However, the genuine connection test also requires that "the major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention for that state." On the evidence in this case, the major part of the investigation was carried out well before October 2000. The interviews with witnesses, the arrest and interview of suspects, the search for and the testing of physical evidence and the ballistic forensics all took place well before the coming into force of the HRA. There is reference in the papers to a review in 2002 but there is no evidence to establish that the *Brecknell* requirement was met.

[39] On either the temporal ground or the investigative requirement, I am not satisfied that the applicant has made out an arguable case in relation to the genuine connection test.

(3) The Independence of the PSNI

[40] In delivering the judgment of a unanimous court in *McQuillan*, Lord Hodge held that, following the Strasbourg jurisprudence, investigative independence was essential but that article 2 did not require complete hierarchical or institutional independence. The touchstone was one of 'sufficient independence' of the persons or structures charged with the investigation. The adequacy of the degree of independence is a matter to be assessed in all the circumstances of the case rather than analysed in the abstract. On this basis:

> "… the nature of the requirement of practical independence as analysed by the Strasbourg court is such that it will rarely be possible to determine whether an investigation will not be effective because of a lack of practical independence until it has been completed." [para 196]

For this reason, the court agreed with the Court of Appeal's assessment that:

> "… there should be a strong presumption against a judicial review application challenging the practical independence of a police investigation before the conclusion of the investigation." [para 200]

[41] In relation to the challenge to the independence of the LIB, Lord Hodge stated:

> "In our view the Court of Appeal was correct to conclude that the LIB did not lack hierarchical and institutional

> independence from the military and the RUC. There is no evidence to support the view that the LIB has unacceptable connections with the perpetrators of the events which are the subject matter of these appeals and which occurred almost 50 years ago. This is in marked contrast to the Turkish cases referred to in *Nachova* (above) which concerned investigations that took place shortly after the relevant deaths. We are not persuaded that there is any reason for concluding in advance of an investigation that, as a matter of generality, the PSNI cannot carry out an effective investigation of a death or maltreatment in which the RUC, the military or the security services were implicated."

[42] Any challenge to the LIB on the basis of a lack of institutional independence is therefore doomed to fail. In *McQuillan* itself, the Supreme Court was persuaded that the lack of engagement with the family of the victim was sufficient to compromise the effectiveness of that particular investigation. It was emphasised that:

> "… nobody had given the family and others an explanation as to how it was proposed that the investigation would be conducted to achieve practical independence." [para 211]

[43] In the instant case, the solicitors for the proposed respondent wrote on 23 March 2022 advising that the LIB has in place a Family Engagement Strategy setting out the basis for meetings with families and ongoing communication during the review process. There is also a Conflict of Interest policy which is designed to ensure that steps can be taken to ensure the independence of the investigative team. The letter continues:

> "The composition of LIB at this stage is such that it has the capacity, in an appropriate case, to put together a review team with certain features among its personnel; for example, no military service experience in Northern Ireland, no military service experience at all, no RUC service experience prior to the date of death or no RUC service experience at all. There are matters which could, in an appropriate case and where relevant concerns were raised, be explored with the family at the outset of a review process."

[44] The LIB has specifically undertaken that the families will be given an opportunity to make representations in advance of the review and that reasonable steps will be taken to address those concerns.

[45] Given the LIB's Case Sequencing Model (cf. *Re Beatty* [2022] NICA 13), a review has not yet commenced into the Cappagh killings. There is no evidence in this case which could arguably lead to a rebuttal of the strong presumption in *McQuillan* that any specific challenge to the independence of such an investigation must await its outcome.

[46] I have therefore concluded that even if the delay point were overcome, the applicant has not established an arguable case sufficient for the grant of leave to apply for judicial review.

Conclusion

[47] For the reasons set out above the application for leave to apply for judicial review is dismissed. I am minded to make no order as to costs inter partes in accordance with the court's usual practice but I will hear counsel on this issue.