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COURT FINDS CHIEF CONSTABLE BREACHED ARTICLE 2 BY FAILING TO PRODUCE HET REPORT INTO ACTIVITIES OF GLENANNE GANG

Summary of Judgment

Mr Justice Treacy, sitting today in the High Court in Belfast, found that the families of the victims of the Hillcrest pub bombing had a legitimate expectation that the Historical Enquiries Team ("HET") would publish an overarching thematic report regarding this case and its linkage to other murders and offences carried out by the Glenanne Gang. He also found that the Chief Constable's decision to transfer the work of the HET into a branch of the PSNI was fundamentally inconsistent with Article 2 and frustrated any possibility that there would be an effective investigation in the Glenanne cases.

The application was brought by Edward Barnard ("the applicant"), the older brother of Patrick Barnard who 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. The Historical Enquiries Team ("HET") considered that the bombing was part of the "Glenanne series" of cases. The applicant sought relief arising from a failure/refusal on the part of the HET to conduct a lawful, effective and independent investigation into the murder of his brother, particularly the failure/refusal of the HET to complete and publish an overarching thematic report regarding the linked Glennane Gang cases.

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, 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.

The Historical Enquiries Team

Between 2000 and 2003, the European Court of Human Rights ("ECtHR") applied the criteria for Article 2 ECHR to a number of complaints concerning deaths in Northern Ireland during "the Troubles" in which there had been State involvement. These cases were known as the McKerr cases. In each case, it was concluded that the Article 2 rights of the deceased had been violated by a failure of the State to put in place an adequate and effective investigation to protect the right to life. Following the ECtHR's findings, the UK

Government presented the Committee of Ministers ("CM"), the body responsible for the implementation of judgments, with a "Package of Measures" designed to address the Court's findings and to prevent such failings from happening again.

The HET was established in 2005 as part of the Package of Measures. It was initially part of the PSNI's Serious Crimes Review Team but this quickly evolved into an independent unit of the PSNI which reported directly to the Chief Constable. 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 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 to have two teams, one staffed by officers seconded from police forces outside NI which would deal exclusively with cases in which independence from the PSNI was seen as a pre-requisite. The second team was staffed by a mix of police officers and civilian staff recruited from both the PSNI and externally. In 2006, the Director of the HET indicated that a third team ("the White Team") was being established. He said it would be based in England to reinforce independence and would be "largely analytically driven and examine the collusion issues". He said the HET was "not set up to deal with Glenanne but to meet the families. Glenanne has come into the process and we are devising a structure by which we hope to be able to deal with it". In materials provided to the CM it was also stated that the type of cases being handled by the White Team would be referred to the Police Ombudsman for Northern Ireland ("PONI") who would conduct a parallel investigation into allegations of police misconduct.

In 2010, the practices of the HET underwent a fundamental change. This occurred because of a recommendation by the PONI that the PSNI should re-investigate a series of serious crimes identified by Operation Ballast (later renamed Operation Stafford). The then Chief Constable, Hugh Orde, referred these cases to the HET.

The HET was unable to properly resource these investigations alongside its other work and in 2014, the new Chief Constable, Matt Baggott, announced that the Operation Stafford investigation would transfer back into the PSNI. He further decided that "all cases with potential evidential opportunities" would be transferred to the PSNI for further investigation instead of being investigated "in-house" by the HET. The Chief Constable later told the Policing Board in 2014 that it was his intention to draw together all the legacy operations of the PSNI (including those previously conducted by the White Team in England) under one single command known as the Legacy Investigations Branch ("LIB"). New terms of reference for the LIB, which took over from the HET, were drafted. These stated that the role of the LIB was to refer to PONI any matter arising from its work which raises a concern of possible police criminality or serious misconduct. They further stated

that the LIB "cannot undertake wide ranging reviews into the broader context of "the Troubles" in Northern Ireland.

The Applicant's Challenge

The applicant referred to a number of HET reports to the families of those killed in the Hillcrest pub bombing which stated that it had found no evidence to suggest there was any collusion between the security forces and loyalist paramilitary organisations in the murders. The reports further stated that "the HET will continue to review a number of cases, collectively referred to as the Glenanne series, to further examine allegations of collusion. This case is regarded as part of the overall series because of links to suspects such as Busby. Any further developments in this regard will be notified to the family". It was noted that the HET White Team was examining 89 incidents that occurred between July 1972 and June 1978 as part of its Glenanne Inquiry and this included 46 murder cases (involving a total of 80 deaths). In its reports to the family of Joseph Kelly, the HET stated that it intended to produce an over-arching report on a number of these linked cases in the near future. Other reports to families whose members were thought to have been murdered by the "Glenanne Gang" also referred to a specific "Glenanne" Inquiry.

On 11 March 2014, the applicant's legal representatives wrote to the Chief Constable and to the HET to state that it was understood that an overarching thematic report was due to be prepared by the HET under the auspices of the PSNI. The letter asked who took the decision not to produce an overarching thematic report, when was that decision taken, and whether it was taken by the HET on a standalone basis or whether the decision was made pursuant to engagement with PSNI and/or any other agencies. The legal representatives further noted that the HET report into the killing of Patrick Barnard did not include any reference to a series of linked cases carried out by the Glenanne Gang and asked for confirmation that his case had been linked to the others and for access to the investigative end product.

On 12 June 2014, ACC Drew Harris replied saying that the HET was committed to the preparation of bespoke family reports but the preparation of "an overarching report would not provide any evidential opportunities not currently being considered during the Review process. The HET does not intend to prepare an overarching thematic report into those cases referred to as the "Glenanne Gang linked cases". To prepare such a report would divert HET resources from their central role of conducting a review and preparing a report for families specific to the death of their loved ones".

The applicant sought an order quashing this decision and compelling the conduct of a lawful investigation and publication of an overarching thematic report. This was on the grounds that the decision was in breach of Article 2 ECHR as the murders and activities of the Glenanne Gang could be considered to be part of "state practice" and the HET had failed to conduct an effective, independent investigation into the murder of Patrick Barnard. The applicant further contended the decision was irrational as it failed to take into account that the HET had completed approximately 80% of the overarching report by May 2010 and had access to a database which provided them with unique ability to establish links between the interrelated Glenanne Gang cases.

The Respondent's argument

Counsel for the Chief Constable ("the respondent") made a number of points including that the HET no longer exists and it is now obviously impossible for it to complete the work. It was contended that the applicant had not raised an issue about the preparation of the report until March 2014 by which stage the author had ceased employment with the HET. The Court heard that the draft overarching report prepared by the HET has been disclosed to the applicant for the purpose of the proceedings and does not include or seek to include the Hillcrest bar bombing. The respondent submitted that the applicant's Article 2 argument was based on the false premise that the HET was the State's means of discharging the Article 2 investigative obligations and said that, at most, the HET could only contribute to the discharge of the obligations as it was involved in review and not investigation.

Discussion and Decision

Mr Justice Treacy said it was clear from the material before the Court that there were always intended to be two main strands to the work of the HET:

- The "individual strand" which involved interacting directly and personally with the families of each separate victim of the Troubles killed between 1968 and 1998. The purpose was to "bring a measure of resolution" to those families and to "identify and address issues and questions that are unresolved from the families' perspective";
- The "collective strand" which was reflected in Objectives 2 and 3 of the HET namely to "re-examine [the] deaths … and to ensure that ALL investigative and evidential opportunities are subject to a thorough, professional examination in a manner that satisfied the PSNI's obligation of an "effective investigation" in conformity with the PSNI Code of Ethics as far as possible". There was also an undertaking to do so in a way that commands the confidence of the community.

The judge said the material were less clear about how this collective function might be discharged. This was because in 2007 it was not clear where the evidence to facilitate the "collective" aspect of the review might come from or what it might consist of: "However it was understood that effective discharge of the collective strand and discharge of the general duty to conduct these inquiries in a manner that commanded the confidence of the wider community requires something more than the simple re-examination of individual past crimes".

The Court heard that it was originally agreed that an analytical team would be set up to gather the materials that might facilitate this work and that there would be a general commitment to undertaking this work which would underpin the entire mechanism and be a main pillar of the rationale for the existence of the entire mechanism. The work was understood to be cumulative and evolving in its nature. So as the re-examination of each death progressed the details of each case were to be stored in an evolving database. The explanation given by the UK authorities to the CM was that the whole process is underpinned by a developing analytical database which contains details relevant to each

case and which can be used to identify both links between cases (intelligence or forensic/ballistic), gaps in intelligence or any other trends/evidential opportunities:

> "So in the original conception of the work of the HET it was always intended to develop a database to facilitate the cross-referencing of material and the quest for evidential links and patterns which might not appear from review of individual cases alone. The development of this element of the HET process appears to be the UK's proposal for addressing the systemic nature of some of the failings identified in the McKerr series."

The nature of this collective element of the HET review was further elaborated in the CM's Interim Report of 2007 which summarised the UK's proposals for delivering Article 2 compliant investigations in cases where there are allegations of collusion. The Report stated that the White Team would look for evidence of offences which might be characterised as "collusion" and examine any links between cases. These cases would also be referred to the PONI and where there is sufficient evidence of offences it would be submitted to the PPS for consideration and a decision on prosecution.

Mr Justice Treacy said this described a system in which HET teams staffed by officers from outside NI investigated the available materials specifically looking for evidence of collusion and this investigation would also examine any links which would likely be facilitated by the developing analytical database:

> "So the system proposed by the UK for dealing with potential "collusion" cases involved two elements. First, there would be an investigation of each case conducted in-house by the HET's White Team and Complex Inquiry Team both of which were based in England and comprised investigators recruited from outside NI and who had no prior link with the RUC and/or the PSNI. Those investigators were to conduct their enquiries with the specific purpose of "looking for evidence of offences which might be characterised as "collusion". In addition to the in-house HET re-investigation of these cases they would also be referred to the PONI who would conduct a parallel investigation focussed on the conduct of any police officers potentially linked to the offence".

On the understanding that the UK would handle such cases by the mechanisms described in its Package of Measures, the CM closed its examination into the investigation of historical cases on 19 March 2009 "as the HET has the structure and capacities to finalise its work".

Mr Justice Treacy considered that the Chief Constable's decisions in 2010 that the operation of the HET and all cases with potential evidential opportunities be transferred to the PSNI began "the process of dismantling the UK's Package of Measures which the CM had signed off in 2009". Another important change occurred in 2014 when the Chief Constable said the PSNI was drawing together its legacy operations into the LIB, which was part of the Crime

Operations Department, due to severe budgetary pressures. He said these were the decisions which gave rise to the present proceedings.

Mr Justice Treacy said it was clear from the terms of reference of the LIB that it was specifically prohibiting itself from any active investigation of linkages between individual historical crimes and from the active pursuit of new evidential leads/unused opportunities for investigation which might have arisen due to the compartmentalisation of the earlier investigations into individual crimes which might form part of a linked series. He said the LIB is further limiting itself strictly to a review and referral role and is expressly excluding any element of investigation from its work. The judge considered this differed significantly from the role and objectives of the HET which were originally approved by the CM and which included a role to investigate the possibility of linkages/new evidential leads arising from its re-examination of individual and linked historic cases and if any such link was uncovered then the files were to be forwarded to the PPS and/or the PONI. He said the new terms of reference agreed for the LIB specifically eschewed the role of active investigation of potential evidential leads arising out of reviews of linked cases.

Mr Justice Treacy considered that the other change to the operation of the HET which underlies the proceedings is the decision not to prepare an overriding thematic report into cases referred to as the "Glenanne Gang linked cases":

> "The changes in the structure and process introduced after 2009 makes it clear that the structure and process now in place lacks most, if not all, of the essential safeguards which the UK Government agreed with the CM to put in place for future investigations of cases of this nature in order to comply with the decision of the ECtHR in the McKerr series of cases. These changes came about apparently as a result of the decisions of the Chief Constable and the Assistant Chief Constable."

Mr Justice Treacy said the ability of the LIB to continue the work of the HET is undermined by the fact that it has less resources, significantly reduced scope and is not independent in the manner required by Article 2 and the Package of Measures. He said the LIB lacks structural and operational independence as well as functional reach and meaningful output. He concluded that the changes introduced by the Chief Constable are "fundamentally inconsistent with Article 2 and the package of measures" and that the current LIB cannot comply with even the required minimum elements.

The applicant argued that the decision not to complete an overarching thematic report was a breach of Article 2 ECHR because:

- it amounts to a failure/refusal to consider and investigate the extent to which the murders and activities of the Glenanne Gang could be considered part of "State practice";
- the HET had failed to conduct and effective and independent investigation into the murder of Patrick Barnard which requires a wider examination; and

- the failure is compounded by the lack of opportunity to investigate the said "State practice" under the present system of investigating legacy cases.

The Court heard that the HET had considered that in at least three of the 89 Glennanne series of cases there was direct evidence of collusion and the remaining cases were linked by suspects, ballistics or intelligence. Mr Justice Treacy said there was therefore credible suspicion of collusion in respect of the remaining cases and a revived Article 2 duty arises. He noted that the HET had repeatedly acknowledged that its overarching thematic report was a key process by which it may be possible to unearth opportunities that were not capable of discovery by looking at cases in isolation:

> "Given that an Article 2 duty arose in respect of Patrick Barnard (and all other victims in the Glenanne series) there was a requirement on the State to carry out an effective investigation into his death. The duty of the HET in that context included seeking out credible evidential opportunities which would form the basis of such an effective investigation. In relation to Patrick Barnard (and the others) the HET recognised that its regular, non-White Team practice was insufficient to find evidential opportunities in collusion cases and put in place the analysis driven White Team to parse the evidence arising from a joined-up consideration of linked cases to meet its remit. The Chief Constable in halting that process which had been openly promised and which was acknowledged to be essential to the HET's purpose has turned his back on a potentially rich source of evidential opportunities. This decision frustrates any possibility of an effective investigation which would fulfil the Article 2 duty which now arises and has foreclosed any possibility that the Article 2 duty will be fulfilled."

Mr Justice Treacy said:

- the HET had made repeated representations to the families of the Hillcrest victims and to the Pat Finucane Centre to the effect that the Glenanne series would be separately analysed and that a report would be completed;
- the HET made representations to the Republic of Ireland's Joint Committee that individual reviews were not sufficient to identify evidence of collusion and instead that those issues would be specifically analysed by the White Team that would then issue a report; and
- the UK Government made representations to the CM wherein it indicated that the White Team would investigate allegations of collusion in linked cases and would identify links regardless of whether or not there was family involvement.

The judge said that in this case, there were clear and repeated promises to families of the Hillcrest victims through the HET review reports, the meetings with the Pat Finucane Centre, the information provided to the Committee of Ministers and the comments made by the Director of the HET to the Republic of Ireland's Joint Committee on the Barron

report to provide an overarching report. He therefore found that there was a relevant representation.

It remains to be decided then, whether the change of policy of the respondent amounted to an abuse of power. The judge referred to case law which stated that "conspicuous unfairness" amounted to abuse of power. The more extreme the unfairness, the more likely it is to be characterised as an abuse of power.

> "The unfairness here is extreme – where the applicant had believed that the murder of his brother would finally be considered in context for the purposes of discovering if there was any evidence of collusion in the murder, that process is now completed and will not be taken up by any other body. **The frustration of the HET commitment communicated by the ACC completely undermined the "…primary aim [of the HET] to address as far as possible, all the unresolved concerns that families have". It has completely undermined the confidence of the families whose concerns are not only still unresolved but compounded by the effects of the decisions taken by the then Chief Constable. It is a matter of very grave concern that almost two decades after the McKerr series of judgments decisions were taken apparently by the Chief Constable to dismantle and abandon the principles adopted and put forward to the CM to achieve art 2 compliance. There is a real risk that this will fuel in the minds of the families the fear that the state has resiled from its public commitments because it is not genuinely committed to addressing the unresolved concerns that the families have of state involvement. In the context of the Glennane series, as I said earlier, the principal unresolved concern of the families is to have identified and addressed the issues and questions regarding the nature, scope and extent of any collusion on the part of state actors in this series of atrocities including whether they could be regarded, as the applicant argued, as part of a 'state practice'. I consider 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."**

Mr Justice Treacy gave the parties until the start of September to try to reach an agreement on the appropriate form of relief.

NOTES TO EDITORS

1. 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 Court Service website (www.courtsni.gov.uk).

ENDS

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