Neutral Citation No: [2023] NIKB 42 ***Judgment: approved by the court for handing down (subject to editorial corrections)****	***Ref:*** **SCO12122** ***ICOS No:*** **21/014639/01** ***Delivered:*** **30/03/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GERALDINE FINUCANE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

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RULING ON POST-JUDGMENT ISSUES

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SCOFFIELD J

Introduction

[1] I previously gave a judgment on the substance of the applicant's claim in the above proceedings: see *Re Finucane's Application* [2022] NIKB 37. This short ruling should be read in conjunction with that previous judgment. I allowed the applicant's application for judicial review and made a declaration to the effect that, at the date of the judgment in December 2022, there had still not been an article 2 compliant inquiry into the death of her husband, Patrick Finucane. In addition, I quashed the Secretary of State's decision of 30 November 2020; and made a declaration that it had been unlawful for the respondent to fail to reconsider his decision at the point when he learned that the PSNI review process had concluded in May 2021. Subject only to the fact that an appeal is now being pursued by the respondent in respect of the entirety of the judgment, no issue arises for present purposes about any of the above orders.

[2] In addition, I indicated that I intended to make a further order requiring the respondent to reconsider the Government's response to the Supreme Court's declaration of 27 February 2019 in Ms Finucane's case, including by incorporating a specific timeframe within which the outcome of such a further decision should be communicated, unless a satisfactory equivalent undertaking to the court was provided. This was expressly not for the purpose of ongoing supervision by the

High Court in these proceedings of the substance of any fresh decision but, rather, merely as a means of ensuring that a fresh decision would be taken and communicated to the applicant without undue delay. In the event, the respondent indicated that he would be prepared (and would prefer) to give an undertaking to the court in this respect and this was duly done, and recorded in an order of the court, and the following terms:

> "On or before 31 March 2023, the Secretary of State shall communicate to the Applicant a further decision on the response of the United Kingdom government to the decision of the Supreme Court in *Re Finucane* [2019] UKSC 7."

[3] I also said that I would give the parties an opportunity to make brief submissions, should they wish, on the question of damages. The consequence of my judgment on the principal issue between the parties was that the United Kingdom remains in a state of breach of the reasonable expedition requirement under article 2. In light of the fact that damages had already been awarded in respect of the respondent's delay up to 30 November 2020, I indicated my provisional view as being that, in terms of the delay arising thereafter (particularly by virtue of the respondent's failure to reconsider the matter when the PSNI review process came to nothing), the findings in my judgment represented just satisfaction in the circumstances. In the event, the parties did wish to make further submissions and have done so. The applicant seeks an additional award of damages, and the respondent opposes this.

[4] As mentioned above, the respondent has now appealed against my judgment in these proceedings, as is his right. He did so by way of service of a notice of appeal on 23 February 2023. The applicant (the respondent to the appeal) is seeking an expedited hearing before the Court of Appeal. However, I am informed that the Court of Appeal does not wish to progress the appeal until all issues in the court below have been resolved, particularly the outstanding question of damages. In light of an appeal having now been lodged, the respondent also seeks to be relieved of the obligation imposed by his undertaking to the court pending determination of the appeal. This ruling therefore deals with both of these ancillary issues.

[5] The various parties remain represented by the counsel identified in my earlier judgment, although further argument on the two issues identified above has been confined to the two principal parties. I am grateful to their counsel for the further assistance I have gained from their helpful written submissions.

The damages issue

[6] The starting point for the court's consideration of this issue, since damages are sought for breach of a Convention right, is section 8 of the Human Rights Act 1998 (HRA). Section 8(3) and (4) provide as follows:

"(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.

[7] The applicant submits that where there is a finding of breach of the article 2 obligation to act with reasonable expedition (including a second or subsequent such finding) just satisfaction requires an award of damages, even where there has been an award of damages for previous delay in breach of article 2. She submits that the relevant case law demonstrates that where there is such finding an award of damages is warranted; and, conversely, that there are few if any cases where such a finding has not been accompanied by an award of damages in circumstances where these have been sought. She relies on the Strasbourg cases of *Shanaghan v United Kingdom* (App No 37715/97), at paras 144-145; *McKerr v United Kingdom* (App No 28883/95), at paras 181-182; *Jordan v UK* (App No 24746/94), at paras 170-171; and *Kelly and Others v United Kingdom* (App No 30054/96), at paras 164-165; as well as other cases including *McShane v United Kingdom* (2002) 35 EHRR 23, at paras 113, 124-127 and 156-157.

[8] Domestically, the applicant relies upon the decision in *Jordan v Police Service of Northern Ireland* [2019] NICA 61; [2021] NI 149, at paras [29]-[30]. This last case is of particular assistance, not only because it is a recent domestic authority which is binding upon me, but also because it was an instance of a case where there had been an earlier award of damages (by the ECtHR in the sum of £10,000) and then an

additional award for a further period of culpable delay. In that case, the additional delay of 14 months resulted in a further award of £5,000 damages. The Court of Appeal also helpfully summarised the applicable legal principles at paras [18]-[22] of the judgment of Morgan LCJ. I accept the applicant's submission that the further award of damages was in respect of that 14 month period from March 2007 to May 2008 rather than (as Stephens J had approached the matter in the High Court) the 10 year period from the earlier damages award (see paras [26]-[27] of the decision on appeal).

[9] The applicant submits that the period of delay at issue in this case runs from the date of the impugned decision on 30 November 2020 to the present time, representing a delay of well over two years. It is further submitted that this period of delay is "a matter of increased gravity for the applicant" because she was entitled to expect that the respondent would respond promptly following the Supreme Court judgement and the subsequent High Court declaration; and, perhaps more importantly, because with each further period of delay there is an increased chance that the possibility of an article 2 compliant investigation "will be definitively compromised." She draws attention to the fact that the respondent previously agreed to pay a sum of £7,500 in damages for periods of delay between the Supreme Court judgment on 27 February 2019 and the decision on 30 November 2020.

[10] It is accepted that, when the ECtHR gave judgment in *Finucane v UK* (App No 29178/95) in 2003, including finding a breach of the requirement of reasonable expedition, it declined to award damages because the applicant requested it *not* to do so (see para 90 of the judgment). The applicant at that time was concerned that an award of damages in Strasbourg may have had adverse consequences for efforts in the future to enforce the article 2 investigative obligation in the domestic courts, although that has not proven to be the case.

[11] The respondent also draws attention to the fact that, in December 2020, the parties agreed (and the High Court approved) the payment of damages in the sum of £7,500 in relation to delay since the decision of the Supreme Court in February 2019. The basis of this award is recorded on the face of the order of the court, including that the time taken by the Secretary of State to respond to the Supreme Court judgment was excessive and incompatible with the article 2 right to promptness and reasonable expedition. He asserts that the present application on the part of the applicant is "therefore unusual insofar as it involves a third claim for enforcement of the "reasonable expedition" obligation and a second request for damages." He also relies upon the fact that the damages claim is made "at a time when the possibility remains of further investigative steps and, if such further steps are taken, further consequential delay while they are taken."

[12] In summary, the respondent submits that an award of further damages is not *necessary* to afford just satisfaction in this case. He also relies on the case of *Jordan* in the Court of Appeal and agrees that it is the leading authority in this jurisdiction on article 2 delay damages claims. He submits, however, that the approach of the Court

of Appeal in that case was to focus upon unreasonable conduct which results in delay, variously described as "unjustified delay" or "culpable delay." He does not consider his actions can be so categorised, particularly since some elements of the applicant's claim (such as her irrationality challenge) failed. He further submits that this court should be guided by a clear and consistent practice of the Strasbourg Court and that no such practice is evident in respect of *subsequent* claims for damages where a monetary remedy has already been granted for article 2 delay.

[13] I do not consider the absence of Strasbourg cases evidencing a practice of subsequent damages awards being made in respect of an ongoing article 2 breach to be determinative. As the respondent's submissions recognise, there may be a number of reasons for this, principally that the ECtHR only considers a claim once domestic remedies have been exhausted and that (as in this case) once an article 2 breach is found enforcement is then overseen by the Committee of Ministers rather than by the ECtHR itself. The *Jordan* case referred to above illustrates that separate damages awards are in principle permissible for further discrete periods of delay which give rise to a breach of the article 2 requirement of expedition.

[14] It is right that I must take into account the previous damages award in this case both in order to ensure that any award I might make does not result in double-counting but also because section 8(3) HRA requires me to take into account all of the circumstances of the case, of which the previous award is one.

[15] On further reflection and with the benefit of additional argument, I have been persuaded to depart from my provisional view expressed in para [126](6) of my earlier judgment. The kernel of the court's earlier judgment was that the respondent erred in law in concluding that the two further processes he proposed to await (the PSNI review and the PONI investigations) *could* be sufficient to satisfy the requirements of article 2 in the case. Even if they were capable of doing so as a matter of principle however, it was additionally a breach of the reasonable expedition requirement to simply await their outcome in light of the length of time they were known to be likely to take. Those processes were both notoriously beset with delay. No expedition whatever was evident. I have already concluded (see para [113] of my earlier judgment) that this approach amounted to culpable delay.

[16] 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.

[17] As at the date of the respondent's impugned decision in November 2020, a further decision on the part of the government in response to the Supreme Court's declaration of February 2019 was many years away. As I have recognised (see para [78] of the earlier judgment), in those circumstances I can understand the applicant harbouring suspicion that there was a strategy to 'time out' any feasible article 2 investigation – although there is no evidence on the basis of which I could properly conclude that any such improper motivation was in play. When matters moved on in May 2021, with one of the processes the Secretary of State was awaiting then concluded, and the PONI outcome still being many years off, it was no doubt a further source of anxiety and distress that the respondent would not reconsider. His later acceptance shortly before the hearing that he would do so after these proceedings had concluded would have come as little comfort. In particular, as to the respondent's failure to reconsider the matter once the PSNI review process (such as it was) came to an end, in my view there was no good reason for the respondent not to reconsider at that point in light of his article 2 obligations.

[18] I accept the respondent's point that he is not responsible for the delay inherent in either the LIB's or PONI's legacy investigations. Those are systemic issues and devolved responsibilities in respect of which it would not be appropriate to award damages against the Secretary of State, if at all. However, that is to miss the point. In the particular circumstances of this case, the Secretary of State had taken upon himself the responsibility of responding on behalf of the government to the declaration made by the Supreme Court. It is his decision to *await* the outcome of other processes which were known to be tardy – or, in his words, to *defer* a final decision – which gives rise to article 2 liability. As I said in para [77] of the judgment, in the circumstances of *this* case, I am satisfied that he is "the appropriate respondent to represent the state authorities in response to the present claim and either bears, or has assumed, responsibility for the state's response to the declaration issued by the Supreme Court."

[19] The fact that supervision of the execution of earlier ECtHR judgment has been reopened by the Committee of Ministers, along with the deep concern the Committee has expressed about the lack of clarity on intended next steps, is a further basis on which I conclude that just satisfaction in this case requires more than the remedies already secured. Although the applicant has secured an undertaking from the respondent as to the taking of a further decision (subject to the consideration of this issue below), that also applied at the earlier stage when an award of damages was agreed.

[20] I further reject the respondent's submission that the actions of the applicant caused or materially contributed to the delay in taking a fresh decision because she unsuccessfully sought a mandatory order for the establishment of a public inquiry in circumstances where he had committed to taking a further decision at the end of these proceedings. The proceedings were required to run their course in order to deal with the respondent's contention that the further processes he intended to await could or would discharge the state's article 2 obligations.

[21] In summary, I accept there to be force in Ms Doherty's submissions that, in view of the court's findings and the matters summarised above, there was culpable delay on the part of the respondent as a result of his actions and decisions which were impugned in this case and that just satisfaction requires this to be marked by more than the declaratory relief, quashing order and undertaking already secured. I also take into account, as I observed in the earlier ruling, that the applicant's preferred manner of proceedings, namely the establishment of a public inquiry, is also unlikely to give rise to a speedy resolution. Although the applicant would clearly have welcomed this, had the respondent determined to establish an inquiry substantive investigation of the case might not yet be much further forward. I also take into account the earlier award of damages and the general quantum of damages previously awarded for such delay in this jurisdiction and in Strasbourg cases where the United Kingdom was the respondent.

[22] I do not consider it appropriate to stay the question of damages in respect of this additional period for determination at some later unspecified date. I do not consider anything is to be gained by that approach. As Lady Hale stated when the *Jordan* case reached the Supreme Court on the question of staying a damages claim pending conclusion of the inquest, it must be borne in mind that it is the delay itself which constitutes a breach of the claimant's Convention rights and gives rise to a right to bring proceedings. The breach does not crystallise only at the end of the process and the claimant is entitled to bring proceedings as soon as the delay reaches the requisite threshold: see *Re Jordan's Application* [2019] UKSC 9; [2020] NI 570, at para [25]. This case does not exhibit the complexity where there is good reason for a stay, as discussed at para [36] of that judgment.

[23] I consider an award of £5,000 for the period from November 2020 to now to represent an appropriate sum to afford just satisfaction.

The respondent's undertaking

[24] As noted above, the respondent gave an undertaking to the court to the effect that he would reach a fresh decision on the UK Government's response to the Supreme Court's declaration, taking into account the decision of this court in these proceedings, on or before 30 March 2023. It was understood by all parties that this was subject to the respondent's right to appeal against my earlier judgment. Indeed, the order recording the undertaking expressly included liberty for the respondent to make further applications in relation to the terms of the undertaking in the event that a decision was made to appeal, as it now has been. The purpose of providing such liberty to apply was to ensure that a procedural opportunity was available to the respondent which was equivalent to that which would have been available under RCJ Order 42, rule 5 or RCJ Order 45, rule 9 had the court made a mandatory order.

[25] On foot of this provision, the respondent now seeks an order discharging his undertaking to the court and thereby releasing him from it pending the outcome of the appeal or until further order of this court or the Court of Appeal. This application was made by way of summons issued on 10 March 2023, supported by affidavit. Alternatively, the summons seeks that the undertaking be suspended, modified, varied or suspended pending the conclusion of the appeal proceedings. I have received brief representations in writing from both sides in respect of the matter. The respondent wishes to await the outcome of his appeal in these proceedings and, additionally, the decision of the Supreme Court in the appeal against the decision of the Court of Appeal in *Re Dalton's Application* [2020] NICA 26 before making a further decision in relation to Patrick Finucane's case. The *Dalton* appeal in the Supreme Court has been heard and judgment is awaited. In that case the Supreme Court has been invited to revisit the findings which it made in the *Finucane* case on the retrospective application of the article 2 investigative obligation under the HRA (although Ms Doherty submits that any such decision will in any event be without prejudice to the legal right in this applicant's favour established by the declaration in her particular case).

[26] An undertaking may be discharged on application to the court in the same way that an injunction may: see Bean, Parry & Burns, *Injunctions* (14th edition, 2022, Sweet & Maxwell) at sections 6-02 and 6-17. Although there is authority to the effect that an undertaking cannot be varied on the beneficiary's application to make it more onerous, since it is voluntarily given, I am satisfied that it can be varied or stayed upon the application of the party who gave the undertaking so as to make it less onerous; and no argument has been suggested to the contrary.

[27] The applicant's position is that the respondent should not be released from his undertaking since, in her view, his appeal is without merit. At the very most, she submits, the court should extend the time allowed for the respondent to reach his further decision and, in any event, this should not be extended beyond 30 June 2023 (the end of the High Court's Trinity Term) in order to prevent further avoidable delay in this case but to permit an expedited appeal hearing to proceed in the interim.

[28] In response, the Crown Solicitor's Office has indicated on behalf of the Secretary of State that, if the court were minded to permit him to be released from his current undertaking, he would instead offer an undertaking to communicate a further decision to the applicant on the response of the government to the decision of the Supreme Court "in accordance with such findings or decision as may be made by His Majesty's Court of Appeal in Northern Ireland." He contends that an extension to 30 June 2023 is inappropriate since it essentially seeks to fix a timescale for the hearing and determination of the appeal and pre-empts the outcome of the appeal.

[29] I do not consider the fresh 'offer' on the part of the respondent to amount to anything of substance. He would be bound to respond to the Court of Appeal judgment on his appeal in any event if the appeal is unsuccessful to any degree. In

addition, as a matter of principle I consider that it is for the Court of Appeal to provide for any consequential steps arising from its decision.

[30] I have determined that, rather than releasing the respondent from his undertaking entirely at this stage, I should extend the time available for compliance for a further period of six weeks until 12 May 2023. Allowing for the intervention of the Easter recess, this will permit the respondent (as appellant in the appeal) sufficient time to make an application to the Court of Appeal itself for release from, or a stay upon, the undertaking he has provided. I consider that the Court of Appeal should have the opportunity to determine that issue for itself, taking into account in particular the likely listing arrangements for the appeal as well as any other matter the Court considers relevant (such as any provisional view it may have as to the strength of the appeal or, for instance, the decision of the Supreme Court in the *Dalton* appeal, should it be available at that time).

Conclusion

[31] In summary, I make an order for the award of damages, payable by the respondent to the applicant, under section 8 of the Human Rights Act 1998, in the sum of £5,000. I extend the time available to the Secretary of State to provide a further decision to the applicant under his undertaking to the court until 12 May 2023 to enable him, should he so wish, to make a further application to the Court of Appeal in respect of that matter.

[32] I will hear the parties on the issue of the costs of these ancillary applications.