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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **13/04/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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No. 15/57619/02

IN THE MATTER OF AN APPLICATION BY MARGARET McQUILLAN FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS AND ON-GOING FAILURES OF THE SECRETARY OF STATE FOR NORTHERN IRELAND, THE MINISTER OF JUSTICE FOR NORTHERN IRELAND AND THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

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SUPPLEMENTARY JUDGMENT

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MAGUIRE J

Introduction

[1] The court delivered its judgment in this case on 3 March 2017 following a three day hearing of the substantive judicial review.

[2] The judgment and order of the court was made the subject of an appeal by the Police Service of Northern Ireland ("PSNI") and the appeal was listed for hearing on 6 December 2017.

[3] As a result of a hearing on that date the Court of Appeal made an order after hearing from the parties.

[4] This order, in its material part for present purposes, reads:

> "The Court –
>
> (1) ALLOWS the appellant to withdraw the concessions made in the lower court.
>
> (2) ALLOWS the respondent to amend the Order 53 Statement by 13 December 2017.
>
> (3) LISTS the matter before Mr Justice Maguire on 18 December 2017 … Mr Justice Maguire is to hear any additional points in the amended Order 53 statement and any points arising from the withdrawal of the concession."

[5] In the light of the above, the court on 18 December 2017 set a day for a further hearing which took place on 5 February 2018.

[6] It is as a result of this further hearing that the court produces this supplementary judgment which it will add to its original judgment.

The withdrawal of the concession

[7] This is no dispute between the parties that at the substantive hearing of the applicant's judicial review the PSNI made a concession that Article 2 ECHR applied to the circumstances of the applicant's case and that this was, accordingly, not an issue the court had to determine. The basis for the concession was alluded to at paragraph [52] of the court's original judgment where it is recorded that:

> "Whether or not Article 2 could enter the case by other routes, it entered it by means of the operation of the approach adopted by the European Court of Human Rights in Brecknell v United Kingdom (2008) 46 EHRR 957."

[8] The court, in the following paragraphs, went on to explain what the Brecknell approach was. It is not necessary to set out here all of what the court said but the pith of the matter is referred to at paragraph [54] where it is noted that:

> "In the present case the parties all accept that Article 2 has been revived because of the uncovering of the military logs. The consequence is that the authorities found themselves under an obligation to investigate."

[9] There was no dispute, further, that in any Brecknell type case, where there had been a revival of the Article 2 obligation, this gives rise to the need for any

investigation which had to be conducted to be conducted in accordance, *inter alia*, with a requirement of independence: see paragraphs [55]-[57] of the original judgment. The matter was expressed at its plainest at paragraph [57] of the original judgment where it is recorded that:

> "The respondent accepts that the requirement of independence applies to any police investigation in the future in respect of Mrs Smyth's death."

[10] The issue that was left for the court to determine in its original judgment was that of whether "the LIB as part of PSNI lacks independence today to investigate the case of the deceased's death" (see paragraph [62] of the original judgment).

[11] Ultimately, the court held that the answer to this question was in the affirmative. Consequently, the court decided to "grant a declaration that the proposed investigation by the LIB of Mrs Smyth's death conflicts with the requirements of Article 2 ECHR as the LIB lacks the requisite independence required to perform an Article 2 compliant investigation in respect of this death" – see paragraph [127] of the original judgment.

[12] The above history of the matter is worth bringing to mind because if it had not been for the concession made by the PSNI aforesaid, it seems clear, from a review of the skeleton arguments prepared for the substantive hearing of the judicial review, that the court would have had to determine whether Article 2, as a matter of domestic law, applied on the facts of the case.

[13] For present purposes, this court is not concerned with the wisdom or otherwise of the course the PSNI has adopted in relation to the conduct of its appeal. It is to be simply recorded that the Court of Appeal has decided (as its Order indicates) to allow the PSNI to withdraw the concession *supra* made in this court. This court, accordingly, must adapt to these new circumstances.

[14] The task of this court now is to decide what would have been the outcome if the concession has never been made. This can be described as the issue of the application of Article 2 as a matter of domestic law as applied to the facts of the present case.

Amendments to the Order 53 statement

[15] As a result of the hearing before the Court of Appeal on 6 December 2017 the Court of Appeal also made a decision to allow the applicant to make amendments to her Order 53 statement. Again, this court wishes to indicate that it has played no part in this aspect of the matter. However, amendments to the Order 53 statement have been made, it would appear under the general authorisation of the Court of Appeal, and by reason of this the following further points are said to arise:

(a) Whether the applicant has a legitimate expectation that any investigation or investigatory steps undertaken in relation to Mrs Smyth's death will be undertaken in a manner compatible with Article 2.

(b) Whether there is a common law obligation to ensure an independent investigation into Mrs Smyth's death.

[16] In what follows the court will deal first with the issue of Article 2's application to the case before looking, briefly, at the issues arising from the amendments made to the Order 53 statement.

The application of Article 2 in domestic law

[17] It is unnecessary for the court to do more than refer to its original judgment in this case for a description of the circumstances of the deceased's death and the investigation thereafter. These matters are dealt with in some detail at paragraphs [5]-[51] of the original judgment.

[18] In its simplest form, the key facts are as follows:

- The death occurred on 8/9 June 1972.
- This was followed by a police investigation in its immediate aftermath.
- An inquest was held into the death and completed on 9 November 1972.
- An intelligence report was apparently received by the police in 1975.
- Nothing of note occurred thereafter for over 20 years.
- There was a Historical Enquiries Team ("HET") review in the period 2006-2008 culminating in a review summary report dated 21 July 2008.
- A single witness was interviewed by the HET on 10 September 2008.
- There was later – in 2014 – the discovery of military logs in respect of the night/morning of the deceased's death which provided information as to what had been occurring in West Belfast at that time.

[19] The issue of the domestic application of Article 2 in the context of deaths which pre-date the coming into force of the Human Rights Act ("HRA") (on 2 October 2000) has been the subject of extensive legal argument over a prolonged period.

[20] As this court has recently considered the matter in some detail in its decision in Re McGuigan's Application; Re McKenna's Application [2017] NIQB 96 ("the Hooded Men case"), it will adopt the approach to the issue which is found in that judgment, without repeating it: see, in particular, Parts E and F of the judgment.

[21] At Part F of the judgment the methodology of the court is referred to. At paragraph [238] it is indicated that in considering the application of Article 2 to deaths which occurred prior to 2 October 2000 the court would look at two questions: the first was whether it is likely that the European Court of Human Rights would, on the facts, find Article 2 to be engaged and/or breached and the second was whether it would be open to a domestic court to hold that Article 2 was engaged and/or breached.

[22] The route map to the answers to these questions is traced in the court's judgment between paragraphs [240]-[263] in respect of the first question and paragraphs [264]-[274] in respect of the second.

The first question

[23] In accordance with the approach in the Hooded Men case the court should ask, under the aegis of what would Strasbourg do, whether there is a genuine connection between the death in question and the critical date. However for this purpose the critical date, as explained at paragraph [240] of the Hooded Men judgment, involves an artificial approach under which this is viewed not as the date when a State acceded to the Convention or agreed to the right of individual petition but as the date of the coming into force of the Human Rights Act *viz* 2 October 2000.

[24] The genuine connection test can be met either by establishing that the temporal gap between the death and the critical date is reasonably short or by establishing that the majority of the investigation has or should have taken place after the critical date.

[25] In the light of the fact that "reasonably short" under the Strasbourg jurisprudence is usually viewed as not exceeding ten years (though there may be room for an element of flexibility), the gap in this case of in the region of 38 years is simply too long to establish a genuine connection under this head.

[26] In these circumstances the court must then consider what the balance of the process of investigation has been as between the period prior to the critical date and the period after it. The essence of this question involves taking into account whether much of the investigation into the death took place or ought to have taken place in the period following the critical date.

[27] In the court's opinion, this is not a case where it can be said that the majority of the investigation has or should have taken place after the critical date. This sub-issue therefore cannot be answered in a way favourable to the applicant.

[28] It must be concluded, it follows, that neither limb of the genuine connection test has been satisfied in this case.

[29] This is not, however, the end of the matter as another route open which may bring a case within the temporal jurisdiction of the Strasbourg court is where what is described as the "Convention values" test is met.

[30] The nature of this test is described in the Hooded Men case at paragraphs [247]-[258]. As the court noted in that judgment, fulfilment of the test will not be easily achieved.

[31] On the facts of the present case, the court is unable to say that the extremely high hurdle of the Convention values test is overcome by the applicant in this case. Tragic though the death of Mrs Smyth was, it could not be regarded as amounting to the negation of the very foundations of the Convention or its underlying values.

[32] The net result therefore of the above consideration of what the position would be, as judged by the Strasbourg Court, is that the court believes that the only remaining route which may be open, would be the Brecknell route.

[33] The Brecknell route is discussed in the Hooded Men judgment at paragraphs [225]-[232] and [259]-[263].

[34] It seems to the court that this is a case which meets the requirements of paragraph [71] of the Brecknell judgment *viz* that as a result of the uncovering of the military logs in 2014, there does exist "a plausible, or credible, allegation, piece of information or item of relevance to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing". The question of taking further investigative measures, therefore, may arise.

[35] However, it may be that there is a problem in this case about whether the satisfaction of the paragraph [71] test is enough, given the date of the death.

[36] This issue arises because of the language used by the Grand Chamber in the case of Janowiec v Russia (2014) 58 EHRR 30 (which is the subject of lengthy discussion in the Hooded Men judgment).

[37] The Grand Chamber in that case said at paragraph 144:

> "Should new material emerge in the post entry into force period and should it be sufficiently weighty and compelling to warrant a new round of proceedings, the court will have to satisfy itself that the respondent State has discharged its procedural obligation under Article 2 in a manner compatible with the principles enunciated in its case-law. However, if the triggering event lies outside the court's jurisdiction *ratione temporis*, the discovery of new material after the

> critical date may give rise to a fresh obligation to investigate only if either the 'genuine connection' test or the 'Convention values' test, discussed below, has been met."

[38] If the critical date, for the purpose of this analysis, is to be viewed as the date of the commencement of the HRA – 2 October 2000 – then the requirements contained in the above paragraph would not be satisfied, though self-evidently this would not be so if the earlier dates referred to at [23] above were used *i.e.* the date of the United Kingdom's accession or the date when the United Kingdom agreed to the right of individual petition.

[39] It seems to this court therefore that, if it is correct that the date of 2 October 2000 be used as the critical date for the purpose of analysis, the Strasbourg Court, if presented with the case of Mrs Smyth's death, would probably not view it as engaging Article 2 in the light of the application to it of the tests set down in Janowiec.

[40] On the other hand, the court accepts that in this case, if the earlier dates referred to, constitute the critical date then the result would be different and probably the Strasbourg Court would hold that the requirements of Article 2 would, by virtue of the engagement of the Brecknell doctrine, have revived.

The second question

[41] The second question is concerned with whether a domestic court can hold that there is a breach of Article 2 on the facts of this case where the death in question occurred in 1972.

[42] The way in which the second question is to be considered was discussed at length in the Hooded Men case: see paragraphs [191]-[224] and [264]-[274].

[43] The position adopted by this court in the Hooded Men case ultimately was that the decision in In Re McKerr [2004] 1 WLR 807 remained the governing domestic law authority. If this approach is adopted in the present case, as the date of the death long pre-dates the commencement of the Human Rights Act, it will follow that Article 2 will have no application to any future investigation of the death, as a matter of domestic law.

[44] Moreover, it is clear from this court's judgment in the Hooded Men case that this position would apply even if the court was of the opinion that the outcome in Strasbourg, in accordance with the first question, would have been different. This was the stance of the England and Wales Court of Appeal in Keyu which this court felt should be followed. While this might abrade with the so-called "mirror principle", this court in the Hooded Men case preferred this approach pending the

resolution of the status of the McKerr decision by the Supreme Court (see paragraph [273]).

[45] At paragraph [268] of the court's judgment in the Hooded Men case, the court indicated that it would follow the interpretation given by the England and Wales Court of Appeal in Keyu "unless there was a good reason for adopting a contrary position".

[46] In the present case, at the further hearing on 5 February 2018, it was suggested that the court should adopt a contrary position on the basis that it should regard the case of Re McCaughey [2012] 1 AC 725 as having a broader reach than that which had been recognised by the England and Wales Court of Appeal in Keyu.

[47] In particular, it was argued that the factual matrix in the present case was, in a material respect, much closer to that in McCaughey and was different to that in Keyu. The key factual difference, it was argued, lay in the fact that in the present case the PSNI had since 2014 decided to hold a further investigation into the deceased's death. It had, therefore, committed itself to a further course of conduct, to which, it was argued, Article 2 should be held to apply.

[48] It was submitted that this was a material factor which was not unlike the position in McCaughey where, even though the death had occurred in 1990, the Coroner had committed himself to an inquest which, after various delays, was still to be held at the time of the appeal to the Supreme Court being heard in 2012. It was pointed out that in McCaughey the assumption of State responsibility was an important element in the Supreme Court's decision.

[49] Additionally this element did not arise, it was argued, in the Keyu case.

[50] The court has given careful consideration to this argument but has decided that it should not deviate from the position it adopted in the Hooded Men case.

[51] In respect of the issue of difference as between the present case and McCaughey, the court would be slow to view this case as materially similar to McCaughey which was concerned with an inquest rather than the role of the police in respect of an investigation.

[52] Importantly, however, the Strasbourg Court has specifically averted to the role of the police in a revived investigation situation. At paragraph [70] of the Brecknell decision the European Court of Human Rights expressly stated that:

> "The fact that the State chooses to pursue some form of enquiry does not thereby have the effect of imposing Article 2 standards on the proceedings."

The court considers that this statement is in point and that it should pay heed to what the Strasbourg court has said in this regard. Accordingly, a voluntary commitment by the police to investigate in a Brecknell case which would otherwise be caught by McKerr should not have the effect of attracting the requirements of Article 2, on the basis of the approach taken by the Supreme Court in McCaughey, which dealt with a different factual matrix.

[53] The court will therefore follow the course set in the Hooded Men case and hold that, as in that case, due to the date of the death, McKerr applies.

[54] It follows from the above that this court should not hold that there has been a breach of Article 2, contrary to its original view.

Legitimate expectation

[55] The applicant seeks to make the case that she enjoyed a substantive legitimate expectation that the PSNI would apply the requirements of Article 2 ECHR to any further investigation into the deceased's death.

[56] This expectation, it is argued, arises from what, at various stages of this litigation, was said directly or indirectly to her or her legal representatives, by those representing the Chief Constable.

[57] In particular, the applicant relies on three matters which have been highlighted. These are:

(a) What was said on behalf of the police to her legal representatives in a letter sent by the Crown Solicitor's Office, which was acting for the police, on the eve of the leave hearing in this case.

(b) What was said in a skeleton argument on behalf of the PSNI filed for the substantive hearing in September 2016.

(c) What was said by counsel for the PSNI at the hearing before the Court of Appeal (after this court's original judgment) on 6 December 2017.

[58] As far as the first of the above is concerned, it is clear that the Crown Solicitor's Office wrote a substantial letter to the applicant's representatives on 3 December 2015. This was on the eve of the leave hearing in this case. It was asserted that PSNI did not consider that there was an Article 2 obligation arising in relation to any future investigation into the deceased's death, save insofar as such investigation arose from the discovery in 2014 of the military records which, the PSNI accepted, justified the taking of further investigative steps. Notably, there is no suggestion in this letter that anyone other than PSNI would carry out any

investigation required and no acceptance that a further investigation to be carried out by PSNI would breach Article 2.

[59] The author asserted that any investigative obligation which could be argued to arise under Article 2 from the emergence of the new materials "will now be discharged" but this was set against other parts of the letter which firmly rejected the view that a domestic law right to an Article 2 compliant investigation arose given the temporal requirements laid down in the decision of the House of Lords in McKerr, which was specifically referred to.

[60] Insofar as there was an obligation to carry out any further investigation, in line with the requirement of independence, the letter made it clear that the PSNI was, in the writer's opinion, independent.

[61] As far as the second of the above was concerned, there could be no serious dispute that the skeleton argument prepared on behalf of the PSNI for the substantive hearing in September 2016 contained a substantial volume of material which made the case that the McKerr approach was that which the court should adopt, with the consequence that Article 2 was not engaged as a matter of domestic law on the facts of this case.

[62] However, the skeleton argument at the same time indicated that PSNI did accept that the discovery of the military logs engaged the principles put forward in Brecknell. In the light of the uncovering of this new material, it was accepted on behalf of PSNI, that further investigative measures would be taken by PSNI in accordance with the Brecknell approach.

[63] Of particular importance, the skeleton argument at paragraph 47 noted that it was accepted that the criterion of independence would apply to investigative steps undertaken pursuant to the obligation under Brecknell. However, it was asserted that the PSNI met the requirement of independence.

[64] As regards the final of the three matters referred to above is concerned, PSNI counsel before the Court of Appeal on 6 December 2017 indicated to the court that it had been conceded at the substantive hearing in September 2016 that the requirements of Brecknell had been triggered because of the discovery of the military records. This meant that the PSNI was going to conduct an investigation which would comply with the minimum Article 2 standards but it was this concession that counsel applied successfully to the Court of Appeal to be released from.

[65] However at a later stage in exchanges between counsel and members of the Court of Appeal, counsel remarked (apparently looking to the future) that "it remains the position of PSNI that they will conduct the review in this case … into this death, and are intending to do [so] to Article 2 compliant standards".

[66] The applicant's side in these proceedings submits that these exchanges amount to a promise by PSNI which creates a substantive legitimate expectation. The promise, it is contended, consisted of a commitment that any further investigation to be carried out by PSNI would be compliant with Article 2 and would be consistent with its requirements, especially the requirement of independence.

[67] On this analysis, it is argued that the court should hold PSNI to its promise in accordance with the well-known legal doctrine which applies where a substantive legitimate expectation has been found to exist.

[68] While under that legal doctrine there are circumstances in which a public authority can lawfully resile from any promise it has made, it is argued that in this case the PSNI cannot bring itself within any of these circumstances.

[69] At the further hearing convened by this court on 5 February 2018 it was argued on behalf of PSNI that what had occurred in this case fell well short of the making by PSNI to the applicant a promise of the nature and scope of that which would give rise to an enforceable substantive expectation.

[70] In particular, it was put forward that at no time was any undertaking given to apply Article 2 to this case, other than where this resulted from a legal obligation binding on the police. On a proper analysis, it was suggested that the police position was at no time that it had voluntarily committed itself to apply Article 2 in any circumstance where it was not legally obliged to do so.

[71] Throughout, it was submitted, it was the police view that McKerr was the operative legal authority dealing with the temporal aspect of domestic law under the Human Rights Act. But it was accepted that the PSNI had mistakenly conceded that the engagement of the Brecknell principles necessarily and by themselves meant that the requirements of Article 2 applied, including the independence criterion.

[72] Counsel for the police indicated to this court that he had not intended by his remarks to the Court of Appeal to give the impression that Article 2 standards would be applied to any future investigation, come what may.

The Chief Constable's response

[73] At the hearing held before this court on 5 February 2018 the court invited the PSNI to file an affidavit from the Chief Constable setting out the position of PSNI on the above matters which had arisen at the hearing. It made this suggestion in the interests of achieving clarity as what exactly the position of the police was, as it seemed to the court that the applicant was entitled to be told of this.

[74] An affidavit was filed by the Chief Constable on 19 February 2018. However, this affidavit did not provide the clarity which the court had sought and the applicant raised this point with the court at a further hearing at the end of February 2018. In these circumstances, the court asked the Chief Constable to file a further affidavit, which he did, on 6 March 2018.

[75] As regards the first of the Chief Constable's affidavits, he averred at paragraph [6] that:

> "In preparation for the hearing in the High Court, the PSNI conceded that, as a matter of law, it was subject to an obligation under the Human Rights Act 1998 and Article 2 ECHR to carry out a review of the case …"

[76] Later at paragraph [7]-[9] he went on to say as follows:

> "7. I am advised that after the conclusion of the case in the High Court, my legal advisors formed a different view about the governing legal principles and the question of whether legal obligations under the Human Rights Act 1998 and Article 2 ECHR might apply in relation to cases like this one, where fresh material emerges in relation to historic deaths. Consequently, the concession made in the High Court in this case has not been repeated and in other similar cases, my legal advisors have maintained the position that obligations under the Human Rights Act 1998 and Article 2 ECHR do not apply. It is for this reason that my legal advisors sought the permission of the Court of Appeal to withdraw the concession which had been made in the High Court.
>
> 8. I understand that at the hearing of the appeal, during exchanges between the Court of Appeal and the PSNI, senior counsel instructed on my behalf indicated that the PSNI proposed to carry out a review of the case 'to Article 2 compliant standards'. I understand that this comment may have caused confusion as to PSNI intentions. I wish to make clear that this comment was not made on the basis of any instruction from the PSNI to change its approach to the concession, nor to signal any voluntary assumption by PSNI of any legal obligation which might arise under the Human Rights Act 1998 and

> Article 2 ECHR. **It reflects the fact that the review would be in accordance with current day standards for the conduct of such reviews, which reflect the requirements of Article 2 ECHR** (*this court's emphasis)*. I have consulted with my legal advisors and I believe that this comment was made unintentionally and as a result of a human error. If it has given rise to any confusion or misunderstanding on the part of the court or Applicant's family, this is regretted by me on behalf of this organisation.
>
> 9. In order to avoid any confusion as to the PSNI position, it intends to carry out a review and, if appropriate, further investigation into the death of Jean Smyth in the manner previously described. The PSNI does not accept that, as a matter of law, the review is governed by obligations arising under the Human Rights Act 1998 or Article 2 ECHR, but that if those obligations do apply, the review is capable of being undertaken by the PSNI in a manner which complies with any obligation of independence."

[77] At the hearing before the court at the end of February 2018 the contents of the above averments were subjected to criticism by counsel for the applicant. In particular, the contents of the fourth sentence within paragraph 8 (highlighted in the quotation above) gave rise, in the court's view, to difficulty in understanding the Chief Constable's current position, on behalf of PSNI. It was in these circumstances that the Chief Constable provided a second affidavit.

[78] As regards the Chief Constable's second affidavit, he has averred as follows:

> "1… In order to ensure clarity as to the PSNI position regarding the conduct of the review of the death of Jean Smyth, I wish to summarise as follows:
>
> (i) PSNI has brought an appeal against the original first instance decision in order to establish clearly whether Article 2 investigative obligations apply in this (and similar cases involving pre-2000 deaths) and, if they do apply, whether PSNI can meet the standards imposed by Article 2 in particular that of independence. The PSNI position is that Article 2 does not apply but that, if it did apply, any investigation conducted by PSNI

would meet the necessary standards including that of independence.

(ii) PSNI is committed to carrying out a further review into the circumstances of the death of Jean Smyth. It recognises that the Military Logs which have been identified represent new material which has not previously been considered by PSNI or RUC and that it may open new investigative opportunities to identify who was responsible for the shooting. Subject to the outcome of the litigation, PSNI therefore proposes to carry out a review of the case and, if appropriate, thereafter to take further investigative steps in relation to evidential or investigative opportunities which may be identified.

(iii) PSNI proposes to conduct the review in accordance with its current day standards and LIB operating procedures. These standards have been devised to reflect ECHR requirements of investigative effectiveness and are based on the assumption that PSNI can conduct the review in accordance with any applicable legal obligations relating to its independence and/or perception of bias.

(iv) For the reasons set out in my first affidavit, PSNI wishes to contend that it does not have a legal obligation to carry out the review, by reason of the Human Rights Act 1998 and Article 2 ECHR. PSNI considers that the parameters of its legal obligations under the 1998 [Act] is a matter of very considerable importance for the investigation and review of legacy cases. However, its desire to obtain clarity upon the extent of its legal obligations does not detract from its commitment to carry out a review in this case.

(v) PSNI also considers that, even if a legal obligation to conduct the review arises under the 1998 Act and ECHR, it will be able to do so in accordance with all applicable Article 2

ECHR standards, including those relating to the independence of the investigative body.

(vi) For the reasons set out in written submissions to this court, the PSNI does not accept that any obligation of independence which arises under Common Law and which may govern the conduct of the review, should result in an institutional prohibition upon any member of PSNI from conducting the review at any time and in any circumstances. PSNI considers that these issues should be considered and determined once arrangements are made to conduct the review.

(vii) In the event that the PSNI's legal contentions on the existence of a legal obligation of independence under the Human Rights Act 1998 and/or Common Law are not accepted by this court or any higher court, PSNI does not currently have any definitive plan regarding how such a review may be conducted or by whom. PSNI remains committed to ensuring that the review is conducted in a manner which accords with any applicable legal obligation. The precise manner in which a review is conducted is likely to be subject to a number of variable factors, including the precise findings by this and/or other courts and potentially upon political developments such as the establishment of the proposed Historical Investigations Unit."

The court's assessment in respect of legitimate expectation

[79] The court has carefully considered the material set out above, including the Chief Constable's two affidavits, as well as the submissions of counsel. Understandably, the applicant, while given the opportunity to reply to the Chief Constable's two affidavits, has not filed evidence in response.

[80] It seems to the court that it must view the argument in relation to the existence of a substantial legitimate expectation against the context of what has occurred in this case both prior to and after the court's earlier judgment herein.

[81] In approaching the matter in this way, the court will remind itself that the Court of Appeal has already sanctioned the PSNI step of withdrawing the concession it had made before this court at an earlier stage.

[82] The foundation for the existence of the alleged legitimate expectation which is based on (a) and (b) at paragraph [57] arose because of the concession made by the PSNI which PSNI has now been released from.

[83] In the court's view, in these circumstances neither (a) nor (b) in paragraph [57] can be said now to give rise in the circumstances which have transpired to a substantive legitimate expectation which could assist the applicant.

[84] The simple reality is that the PSNI made a concession based on its original understanding of the fulfilment of the Brecknell test by reason of the uncovering in 2014 of materials hitherto apparently not known about.

[85] The court has no serious doubt in its mind that at the time of the three day hearing before it, PSNI had approached the matter pragmatically and because of this did not see the need to pursue the issue of Article 2's domestic law applicability, given the date of the death. Article 2, as a matter of their legal analysis at that time, was in play, anyway, under the Brecknell doctrine, so rendering the McKerr issue moot in this case. What has occurred, latterly, simply has been a legal re-appraisal.

[86] The Court of Appeal has now held that PSNI is no longer bound by its concession and, it seems to the court, the applicant's attempt to rely on a legitimate expectation in respect of what was said in a letter and in a skeleton argument prior to the original hearing in this case, reflecting its legal analysis then, amounts simply to an impermissible attempt to restore the effect of the concession *via* a backdoor route.

[87] The court therefore rejects the above referred to sources as ones which, on a proper analysis, give rise to the existence now, in the events which have occurred, of a substantive legitimate expectation.

[88] This leaves the question of whether such an expectation can be culled from the remarks of PSNI counsel when the matter of the withdrawal of the concession was under discussion in the Court of Appeal in December 2017.

[89] On this issue the court is not persuaded that counsel had any intention by what he said to provide the applicant with a commitment that, irrespective of the true scope of PSNI's legal obligations, PSNI would voluntarily provide compliance with the legal requirements of Article 2. Nor, in the court's view, did the Chief Constable intend that counsel should make any such commitment, a point which he has made at paragraph 8 of his first affidavit. For the court's part, it is prepared to accept at face value the statement made by counsel for the police in open court

during the hearing of 5 February 2018, referred to at paragraph [72] above. Overall, while what was said to the Court of Appeal in December 2017 might be viewed as potentially misleading, the court doubts if it was a pre-meditated statement, arising as it did in the course of argument. The court does not believe that it amounted to, or properly could be read as, the expression of a promise or the giving of an assurance when the overall context is taken into account.

[90] In short, in this case the court is of the opinion that there is no evidence which comes close to the character of a contract, to use the language cited by Girvan LJ in Re Loreto Grammar School's Application [2012] NICA 1 at paragraph [42].

Is there a common law obligation to ensure an independent investigation into Mrs Smyth's death?

[91] The applicant, in an argument not raised before the court when the case was first argued, invites the court to take the view that, irrespective of whether Article 2 ECHR applies to the case, there is a common law obligation to carry out an independent investigation into the circumstances of this case which embraces similar requirements to those applying under Article 2 itself.

[92] In this regard, the applicant relies on the importance of vindicating values which are said to be elemental, such as maintaining and building public confidence and ensuring accountability, blame and retribution.

[93] In particular, the applicant relies in favour of her argument on a passage in a recent judgment of Treacy J (as he then was) in the case of Re Barnard's Application (Judgment on relief) [2017] NIQB 104. At paragraph [15] the learned judge said:

> "It would be surprising if the common law now offered less protection than the Convention in this area…It used to be said that the common law marches with the Convention. In the area of the right to life, I should have thought that this is in fact the case and that the common law might be expected to match, if not exceed, the minimum requirements of the Convention."

[94] The respondent, on the other hand, relies on the Supreme Court's judgment in Keyu and this court's judgment in the Hooded Men case, where the court found that the common law did not contain an obligation to investigate deaths analogous to Article 2 ECHR (see paragraphs [285]-[290]).

[95] In Keyu, speaking for the majority in the Supreme Court, Lord Neuberger stated at paragraphs [117]-[122] as follows:

"… it appears to be quite inappropriate for the courts to take it onto themselves, through the guise of developing the common law, to impose a further duty to hold an inquiry, particularly when it would be a duty which has such potentially wide and uncertain ramifications …

[118] This conclusion receives strong support from four of the five opinions given in the *McKerr* case …, whose authority on this point has in no way been diminished by any of the judgments in *McCaughey*. At para [30], Lord Nicholls, with whom Lord Rodger agreed, said that he had 'grave reservations about the appropriateness of the common law now fashioning a free-standing positive obligation of this far-reaching character', namely 'a common law obligation to arrange for an effective investigation into [a suspicious] death', simply because it was required by Article 2. However, he specifically rejected the notion of such a common law obligation on the ground that it 'would create an overriding common law obligation on the state, corresponding to Article 2 … in an area of the law for which Parliament had long legislated', namely coroners' inquests.

[119] At para [71], Lord Hoffmann, with whom Lord Rodger also agreed, as did Lord Brown, rejected the notion that there was:

> 'A broad common law principle equivalent to article 2 against which the whole of the complex set of rules which governed the earlier investigations can be tested and by which they can be found wanting and be ordered to be rerun under different rules'.

He added that 'the very notion of such a principle, capable of overriding detailed statutory and common law rules, is alien to the traditions of the common law'. Lord Brown, at para [91], also rejected the notion that the court should:

> 'condemn as contrary to the common law a series of procedures long since

> properly concluded in accordance with well-established domestic laws and never challenged save by reference to a substantially later European Court decision'.
>
> [120] Lord Steyn's position was a little different. At para [51], he referred to the fact that it would be necessary to take into account the fact that inquests were dealt with by statute. However, he considered that it was inappropriate for the common law to extend the law on investigating suspicious deaths given that 'the right to life is comprehensively protected under Article 2…as incorporated in our law by the 1998 Act'. However, he did then suggest that 'the impact of evolving customary international law on our domestic legal system is a subject of increasing importance': para [52].
>
> [121] However, the views of the other four Lords of Appeal were clear, and strongly supportive of the conclusion I have reached on this issue.
>
> [122] In these circumstances, I would reject the contention that customary international law, through the medium of the common law, requires the UK Government to hold an inquiry into the Killings. I also agree with the more general remarks made by Lord Mance JSC in paras 144-151 of his judgment in connection with the extent to which the common law incorporates principles of customary international law…".

[96] The respondent also relies on the fact that the PSNI has been made subject to specific statutory duties in the Police (Northern Ireland) Act 2000. None of these, however, are directed to a replication of the duties which exist where Article 2 ECHR requirements have to be met.

[97] In the court's assessment, it is bound to have regard and give weight to the decision of the Supreme Court and the House of Lord respectively in Keyu and in McKerr. In the court's opinion, the approach stated in these judgments is that which it should apply in this context, notwithstanding the general appeal of the sentiments expressed by Treacy J quoted above. If the law is to be developed in this area in the way in which the applicant seeks, it seems to this court that this should not be done by a judge of first instance in the face of the above referred to authorities.

[98] The court, therefore, holds that there is no legal obligation at common law which operates parallel to Article 2 and which brings with it the requirement of independence as that doctrine has been interpreted as a feature of the Convention.

Conclusion

[99] In the light of the unusual circumstances which have occurred in this case, this court now rules that:

(a) Article 2 ECHR is not engaged in this case as a matter of domestic law.

(b) The temporal aspect, as a matter of domestic law and the operation of the Human Rights Act 1998, is governed by Re McKerr for the reasons which the court has provided *supra* and in its judgment in the Hooded Men case.

(c) In the circumstances, the declaration made by the court in its original decision, being based on the premise that Article 2 was engaged, must be withdrawn.

(d) The court does not consider that PSNI is bound by any form of substantive legitimate expectation of the nature of that argued for by the applicant herein.

(e) This is not a case in which it can be said that there has been a breach of the common law. Indeed, the court has concluded that there is no parallel obligation to Article 2 ECHR existing at common law.

[104] While the court has every sympathy for the position of the applicant and her family, given the withdrawal of the concession which was made by the PSNI at the original hearing, it is unable to maintain the relief by way of declaration which it had originally provided.