Neutral Citation No: [2020] NIQB 11 ***Judgment: approved by the Court for handing down*** ***(subject to editorial corrections)****	***Ref:*** **McC11193** ***Delivered:*** **12/02/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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[17/054802/1]

IN THE MATTER OF AN APPLICATION BY COLM CAMERON

FOR JUDICIAL REVIEW

v

CHIEF CONSTABLE OF THE POLICE SERVICE (NI)

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McCLOSKEY LJ

Introduction

[1] This is one of several cases in which the question of whether there should be a continuing stay at this juncture arises.

The Challenge

[2] These proceedings, which are now of over three years vintage, entail an application for judicial review whereby Colm Cameron (the Applicant) challenges the legality of the investigation by the Chief Constable of PSNI (the "*Chief Constable*") into the killing of James Cameron (the "*deceased*"), one of two workers alleged to have been murdered by the UFF on 26 October 1993. The Applicant is the son of the deceased. His case is encapsulated in the following passages extracted from counsels' skeleton argument dated 31 October 2019:

> "2. *The Applicant is challenging the failure of …… PSNI to complete and/or release findings of their investigation into the murder. The Applicant argues that delay breaches* [Article 2 ECHR] *and/or a legitimate expectation.*
>
> 3. *The Applicant is also challenging the independence of the Legacy Investigations Branch (LIB) (which is now*

responsible for the investigation) on the basis that it is not compliant with Article 2. The Applicant places particular weight on historic failures to investigate the murder as well as objective material questioning the independence of LIB."

Procedural History

[3] Proceedings having been initiated on 07 June 2017, leave to apply for judicial review was granted by the court by its order dated 20 October 2017. The court has made a total of 12 case management orders, the first dated 20 October 2017 and the most recent dated 25 November 2019.

[4] During the intervening period there have been provisional listings of the case for substantive hearing on 26 November 2018 and 26 November 2019. In this court's general legacy cases CMD order of 20 June 2019 this case was identified as one in which a stay was in operation. Previous case management orders had required the parties to complete their respective affidavit evidence and, further, to compile a completed Form LC1: see *inter alia* the orders of 09 February 2018 and 24 May 2018.

The McQuillan Case Factor

[5] This factor has loomed large throughout the history digested above. By order dated 21 November 2019 the Court of Appeal granted leave to appeal to UKSC in the case of ***Margaret McQuillan*** [2019] NICA 13 in which the public authority respondents are PSNI, SOSNI and DOJ. The court's preceding substantive order had entailed two declarations whereby the Chief Constable of PSNI (a) is obliged to conduct further investigations into a 1972 death in a manner which satisfies the State's procedural obligation under Article 2 ECHR and (b) is required to take prompt steps to secure the practical independence of the investigators in a manner compliant with Article 2 ECHR. The grant of leave on the Article 2 ECHR ground in ***McQuillan*** is unconstrained.

[6] On the same date leave to appeal to UKSC in ***McGuigan and McKenna*** [2019] NICA 46 was refused. Petitions for leave to appeal have subsequently been submitted to UKSC.

[7] In ***McQuillan*** it was common case that there was fresh evidence (certain military communication logs) satisfying the ***Brecknell*** principles. The question was whether the "*genuine connection*" test, with its twin elements of "*temporal connection*" and "*procedural acts and omissions*" was satisfied. The COA determined this issue in the affirmative, differing from the trial judge. Its reasoning prayed in aid the UKSC decision in ***Re Finucane,*** the COA considering that the passage of time should attract very little weight only.

[8] In summary there are two central issues in ***McQuillan*** namely (a) the independence of PSNI and (b) the Article 2 ECHR investigative obligation in the context of a death preceding the effective date of HRA 1998 by some 30 years.

[9] The link between the present case and ***McQuillan*** has been repeatedly acknowledged at earlier stages of these proceedings in the orders of the court: see the extensive litigation history rehearsed above.

Order

[10] The Applicant has applied for removal of the stay of these proceedings. This is driven mainly by the delay factor which, in juridical terms, is linked in the main to the several procedural duties imposed on the State via the procedural dimension of Article 2 ECHR and section 6 HRA 1998. It is essential to be mindful that the court is a public authority to which section 6 applies.

[11] As the litigation history rehearsed above demonstrates, the court has been active and energetic at all stages in its attempt to perform what I consider to be a fundamental judicial duty namely the expeditious adjudication and completion of every type of litigation.

[12] There are multiple judicial discretions exercisable in civil proceedings. Many of these are of the procedural variety. The exercise of the discretion to stay proceedings probably belongs to the outer limits of the notional spectrum. This has been recognised by the UKSC in *Prince Abdulaziz Bin* [2014] UKSC 64 at [13]:

> *"… Accordingly, at least as at present advised, I consider that the view taken by Vos J and the Court of Appeal, namely that a direction requiring personal signing of disclosure statements reflected the normal practice, was correct. However, that is not, in my view, the essential question when it comes to challenging paras 14 and 15 of the Order. The essential question is whether it was a direction which Vos J could properly have given. Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it, unless it was "plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree" as Lewison LJ expressed it in Broughton v Kop Football (Cayman) Ltd [2012] EWCA Civ 1743, para 51."*

The UKSC approved the approach of Lewison LJ in *Broughton v Kop Football (Cayman) Limited* [2012] EWCA Civ 1743 at [51]:

> *"Case management decisions …Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance*

judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained. "

[13] It is instructive to formulate certain guiding principles of a general nature:

(i) Every litigant has a right to adjudication of his claim within a reasonable period. Moreover, judicial review proceedings and remedies have traditionally been regarded as requiring expedition.

(ii) It falls to the court to allocate to every case an appropriate share of the court's resources, while taking into account that resources must be invested in every case in the system.

(iii) It is incumbent on the court to conduct its business both in individual cases and generally with a view to saving expense.

[14] Each of the above principles is enshrined in the overriding objective. Certain more specific principles can also be formulated:

(a) The fact that this case has consistently been linked to ***McQuillan*** is not determinative of whether this link should continue in the form of perpetuating the stay.

(b) Neither party is bound by the stance which it previously adopted in relation to staying the proceedings.

(c) Where a party proposes to revise its previous stance in the manner just explained the court will scrutinise with care the reasons proffered for so doing.

(d) The court will take into account its approach in other comparable cases.

(e) The court will also be mindful of the overall period of delay, extending beyond the boundaries of the duration of the litigation.

(f) The court will also take into account any case specific facts or factors brought to its attention by any party.

A judicial balancing exercise of a familiar kind falls to be performed.

[15] The decision of the UKSC in ***McQuillan*** will determine certain issues of law which arise directly in the present case. This court will be bound by the decision. Pending the decision of the UKSC this court is bound by the decision of the COA in the same case. There can be no guarantee that the UKSC will endorse, fully or partly, the reasoning and conclusions of the COA. The issues of law in play have not been comprehensively or conclusively determined by the UKSC in any previous case. They partake of an unmistakeably Northern Irish identity.

[16] This court's general legacy cases CMD order of 20 June 2019 is undergoing the process of being updated with a view to issuing a new order. The current draft of the new order indicates that there are approximately 30 "legacy" judicial review cases pending in the High Court. The oldest of these cases date from 2014. There are some 30 extant cases in the cohort, representing around one fifth of all extant judicial review cases in this jurisdiction. These cases mean a lot to the litigants and families concerned. Of this cohort approximately one quarter raises ***McQuillan*** type issues of law. The present case belongs to this discrete cohort of eight cases. Of this group two cases are now the subject of renewed judicial case management pursuant to the Presiding Coroner's public statement of 20 November 2019 [appended to this judgment].

[17] The choice is a binary one: it lies between perpetuating the extant stay and removing it. There is no other alternative in the mix. My assessment is as follows. First, it would be open to this court to remove the stay, proceed to a substantive hearing and promulgate its judgment. Were this court to do so it would not have the benefit of the binding guidance which will be provided by the UKSC when it determines ***McQuillan***. Second, it is in the highest degree likely that the judgment of this court will be challenged by appeal to the COA. Third, it is equally likely that the COA would not attempt to determine the appeal until the UKSC decision in ***McQuillan*** becomes available. Fourth, there is a clear possibility that following the latter event the COA would remit the appeal to this court under s 38(1)(b) of the Judicature (NI) Act 1978 for further consideration and adjudication. That would give rise to a second judgment of this court. Fifth, it is highly probable that the latter judgment would also be challenged on appeal. Sixth, the COA decision on the notional appeal mooted may well be the subject of an attempted appeal to the UKSC.

[18] Having regard to the foregoing, my evaluative assessment is that the overriding objective would not be furthered if this court were to remove the extant stay. This conclusion is fortified by the heavy volumes of other business in the Judicial Review Court and the serious limitations on judicial manpower arising out of ongoing recruitment difficulties. Furthermore, this court has been assured that both parties in the ***McQuillan*** appeal will urge the UKSC to process it with expedition. <u>I direct that this ruling be included in all such applications.</u>

[19] Mr Cameron has the sympathies of the court. The death giving rise to his legal challenge occurred some 27 years ago and his case is now of around two and half years

vintage. Thus the delay factor is one of obvious substance. However, I consider this to be outbalanced by the analysis in the preceding paragraph. Furthermore, if this court were to remove the stay in any member of this discrete group of cases it would be difficult to resist doing likewise in the others. This would simply magnify and multiply the expenditure of judicial, court administration and other public resources in a manner which I consider could not be justified. I conclude that the balance swings decisively in favour of perpetuating the extant stay in the present case.

[20] The order of the court is in the following terms:

> ***The stay of these proceedings shall be continued until (a) the UKSC has given judgment in the appeal of Margaret McQuillan and (b) the parties have, within 28 days thereafter, formulated a draft case management order for consideration by this court, whereupon further directions, to include expedition, will issue.***

APPENDIX

PRESIDING CORONER FOR NORTHERN IRELAND

STATEMENT IN RELATION TO LEGACY INQUESTS 20th NOVEMBER 2019

Good morning.

Thank you for coming today. I am grateful for the attendance of families, some of whom will have travelled quite a distance. I recognise that this will be a difficult day for many people and I want to thank the legal representatives for assisting with this process.

As the Presiding Coroner for Northern Ireland, it falls to me to decide the sequence in which legacy inquests will be heard during the period of the five year plan. The purpose of today is to announce those inquests which I hope will be heard during Year 1 of the Lord Chief Justice's five year plan for legacy inquests. I will also provide information regarding how the remaining inquests will be brought to the point where they are ready for listing.

These are very important decisions. In taking them, I have listened to all views expressed to me. There are no easy options when it comes to determining the sequencing of these inquests and there is no single correct way to approach the sequencing task. I assure you I have given the matter very anxious consideration to ensure that the approach I have taken is the best in this difficult context.

Before I proceed, I would like to emphasise that, within the coronial system, no legacy inquest is more important or of greater priority than any other. I am conscious that each inquest concerns somebody's loved one and that families have to live every day with their loss no matter when or how it occurred.

I recognise that inevitably some people will be disappointed with what I am going to say today. I want to offer you the reassurance that I have not undertaken this task lightly. I give you the commitment that my judicial colleagues and I will do everything in our power to complete legacy inquests within the five year timeframe. This is not something we can achieve in isolation. We will be relying on the cooperation of everyone involved – families, legal representatives and government bodies. I do not underestimate the enormity of the task, however, I have been heartened by the positive and forward-looking approach taken to the recent preliminary hearings. I strongly urge that you all strive to maintain this spirit of constructive and collaborative working as we move forward.

In my statement on 7th June, I said that I would engage with families during the process of determining the sequencing of inquests for hearing within the five year plan. I also said that I would take all views into account when reaching sequencing decisions. In order to do this, I held individual preliminary hearings into each pending legacy inquest over a three week period during September and October of this year. The total number of preliminary hearings was 41, with the 4 inquests

known collectively as the 'Stalker & Sampson' inquests being listed for 1 preliminary hearing.

The purpose of the preliminary hearings was to obtain information about factors which might impact on the state of readiness of each pending legacy inquest. This included information regarding inquest disclosure, ongoing civil and judicial review proceedings, on-going criminal investigations and Police Ombudsman's investigations. I heard about particular issues such as elderly or ill relatives and witnesses or potential issues in tracing military witnesses. I heard views regarding how ongoing or pending Police Ombudsman's investigations or ongoing civil litigation should, or should not, impact on sequencing and on where sequencing of particular inquests should sit within the five year plan. In some cases, where sufficient information was not available at the preliminary hearing, I directed that it be provided to me within a short timeframe.

Submissions were made in a number of preliminary hearings that effective case management would assist in getting inquests on for hearing. Additionally, I heard submissions which acknowledged that particular inquests were not ready for listing but that neither should they be put into 'cold storage'.

I welcome an openness to different approaches because I am acutely aware that many of the pending inquests have been awaited for many years, exacerbating the distress of families and the anxieties of all those affected. Wherever possible, I wish to avoid that distress being compounded by the inquest process and so I am receptive to exploring any options which might make that less difficult. I do so confident that the experienced lawyers involved in the inquests will assist the process.

Also on 7th June, I stated that I would consider the merits of a thematic approach as part of the process of sequencing the pending legacy inquests. This arose due to concerns expressed by the international human rights community that the wider picture might be missed if we focused solely on a series of individual inquests.

The potential benefits of linking particular deaths into one inquest or group of inquests are well recognised. A number of the pending inquests, such as the inquests known as the Stalker & Sampson series, have already been linked. Additionally, there are a number of inquests which, as a result of information which emerged during Lord Justice Weir's review in 2016, I consider it appropriate to now treat as linked.

Against this background, I have considered the merits of linking pending legacy inquests where there appear to be common themes. However, I am conscious that linking cases might not be right for all inquests and so I intend to apply a flexible approach. That is because it was submitted during some preliminary hearings that individual deaths which, on the face of it, might appear to fit into a themed series should be treated as discrete incidents for inquest purposes. I appreciate that there are may be a number of reasons why this view might be taken, including because of concerns that inclusion in a themed series might lead to an inquest being held later

than would otherwise be the case.

More generally, I recognise that the number of deaths in which there is a pending legacy inquest is a very small proportion of the overall number of Troubles-related deaths. Additionally, a Coroner has no control over which deaths are reported or referred for coronial investigation. Once an inquest is within the Coroner's jurisdiction, the Coroner is under an obligation to deal with it in accordance with the relevant legal principles. It follows that, while themes or linkages between inquests may be identified, it is possible that the incidents with which the inquests are concerned may not include all deaths or incidents relevant to the theme. I am mindful therefore that it may not be possible for the inquest process to provide the full context or to properly reflect the wider picture.

Against that background of caution, I do consider that there is merit in provisionally grouping some inquests for case management purposes. This would allow for focused review and structured consideration of potential cross-referencing of information. Accordingly, I propose that there should be a provisional group comprising inquests into deaths in the Mid-Ulster area between 1990 and 2000 which were claimed by loyalist paramilitaries. I propose also that there should be a provisional grouping of inquests into deaths where it appears undercover soldiers may have been in situ prior to the fatal incident occurring.

This provisional grouping approach will be kept under review and revisited if necessary. I emphasise that groupings are for case management purposes. Inclusion within a grouping is not intended to be a factor in determining appropriate sequencing.

I turn now to those inquests which are to be listed in Year 1, that is between April 2020 and April 2021. Having given the matter much careful consideration, I have come to the view that, for practical reasons, state of readiness has to be the main factor in determining which inquests can be listed in the first year. With that in mind, I have identified the following inquests as suitable for listing during Year 1:

Year 1, Quarter 1:

1. Thomas Friel
2. Stephen Geddis
3. Neil McConville

Year 1, Quarter 2:

4. Patrick McElhone
5. Sean Brown

Year 1, Quarter 3:

6. Gareth Paul O'Connor
7. Leo Norney

Year 1, Quarter 4:

8. Daniel Doherty & William Fleming
9. Thomas Mills
10. Patrick Crawford.

These inquests will now be case managed to hearing. Case Management Protocol disclosure request letters in respect of the first five inquests will issue shortly and I will hold case management hearings in those cases in January 2020. Disclosure request letters will issue in the second five cases in early 2020.

I emphasise that the approach that I have taken to listing in Year 1 will not necessarily determine how inquests will be sequenced in later years. As other issues arise, they will be considered and taken into account throughout the five year plan.

I turn now to the remaining inquests.

Inquests not listed for hearing in Year 1 fall into two categories. The first category comprises inquests which require active judicial case management to be brought to the point where they are ready to be sequenced for hearing. The second category comprises inquests where there are other on-going investigations and the next of kin wish to await the outcome before the inquest proceeds.

Inquests falling within the first category will be subject to twice yearly case management reviews at the discretion of the Presiding Coroner. The aim of the reviews will be to ensure that there is informed forward planning and preparation throughout the five year plan. This means that inquests not listed in Year 1 will be looked at and timetabled for the following years on an on-going basis. The first of these reviews will take place in April 2020 at which point I hope that we will be in a position to consider provisional Year 2 listings. That exercise will continue each year thereafter.

There are some particularly complex inquests which would benefit from on-going active judicial case management. I intend to assign a dedicated member of the judiciary to such cases.

Inquests falling within the second category will be subject to periodic administrative review at the discretion of the Presiding Coroner. While I understand that other investigations are on-going at present, there may come a time when these inquests simply have to be heard. These decisions will be taken in liaison with all interested persons, including the next of kin. This process of review will ensure that, if and when these cases require active case management to be ready for listing, this occurs

in a timely manner. The first administrative reviews will take place in April 2020.

In presenting this plan to you all, I have been greatly assisted by all submissions made. I have had a difficult decision to make. I am confident that the approach I have taken is the best in the circumstances. Once again, I emphasise that there is no hierarchy of inquests and that listing is not a task which I have undertaken lightly. I assure you again that my judicial colleagues and I, supported by the staff in the Legacy Inquest Unit, will do everything we can to ensure that all pending legacy inquests are completed within the five year timeframe. I ask for your patience and forbearance during this process.

I will now adjourn until a case management review to be fixed in January. There are some legal issues on which I may give a decision at a convenient time.

Thank you for coming.

The Hon. Mrs Justice Keegan

20th November 2019

ANNEX

INQUESTS SUBJECT TO ACTIVE JUDICIAL CASE MANAGEMENT

Mid Ulster Inquests:

1. Samuel Marshall
2. Kevin McKearney & John McKearney
3. Charles Fox & Teresa Fox
4. Seamus Dillon
5. Fergal McCusker
6. Richard Jameson[1]

Potential Military Operations Inquests:

7. Patrick Duffy
8. Francis Bradley
9. Loughgall inquest – Hughes, Arthurs, Donnelly, Gormley, Kelly, Kelly, Lynach, McKearney & O'Callaghan
10. Alexander Patterson
11. Coagh incident – Ryan, Doris & McNally
12. Clonoe incident – Vincent, O'Farrell, Clancy & O'Donnell

Other inquests

13 & 14. 2 x inquests of Slane & McDaid

15 - 18. Stalker & Sampson Inquests x 4: Quinn, McCloy & Hamilton; McKerr, Toman & Burns; Michael Tighe; and Carroll & Grew

19. Springhill Inquest: Dougal, Gargan, Fr. Fitzpatrick, Butler & McCaffrey

[1] This inquest is in the active case management category due to its inclusion in the Mid Ulster group but may fall to be dealt with by administrative review.

20. McDonald & McGleenan

21. Gerard Lawlor

22. Joseph Campbell

23. Raymond McCord

24. Liam Thompson

25. Kevin McAlorum

26. John Moran

27. Desmond Healey

28. Hugh Coney

INQUESTS SUBJECT TO ADMINISTRATIVE REVIEW

1. 3 x inquests of Craig McCausland; Mahood & Coulter; and Robert Moffett

2. 2 x inquests of Daniel Rooney & Patrick McVeigh

3. 1 x inquest of Gerard Casey.