Neutral Citation No: [2020] NIQB 13 ***Judgment: approved by the Court for handing down*** ***(subject to editorial corrections)****	***Ref:*** **McC11186** ***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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IN THE MATTER OF AN APPLICATION BY PATRICK LAVERY

FOR JUDICIAL REVIEW

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McCLOSKEY LJ

Introduction

[1] In common with the case of Robert Lavery [2019/3163/01] the question of whether the stay of these proceedings should be removed at this juncture arises.

[2] These proceedings, which are now of some vintage, were initiated on 28 March 2017. This is an application for judicial review whereby Patrick Lavery (the Applicant) seeks relief from two public authorities, the Public Record Office of Northern Ireland ("PRO") and the Department for Communities ("DFC"). The Applicant is the son of Martin Lavery deceased who was murdered at the family home in Belfast on 20 December 1992. The Applicant asserts that the murder was perpetrated by the members of a proscribed organisation (the UVF). He further complains that the ensuing police investigation was inadequate. It is this complaint which provides the rational of these proceedings. His quest is to obtain the records of the inquest into the death of his father, with a view to making representations to the Attorney General for Northern Ireland to exercise his statutory power to direct a fresh inquest.

[3] The court has made a total of 16 case management orders. The first of these issued on 5 October 2017. The most recent such order is dated 24 January 2020. During the intervening period, leave to apply for judicial review having been granted, the court conducted an incomplete substantive hearing on 22 February 2018. Mr Hugh Southey QC (with Mr Nicholas Scott of counsel) presented his client's case. At this stage I raised the issue of whether the case should proceed

further pending the hearing and completion of several so-called "legacy" appeals in the Court of Appeal ("COA"). Having considered the parties' respective submissions, I adjourned the hearing and stayed the case generally. It has been the subject of periodic review subsequently. The court's oversight during this period has included a number of attempts to relist the case to complete the substantive hearing. However the sequence of appeal events in both the COA and the UK Supreme Court ("UKSC") has frustrated these endeavours.

[4] It suffices to draw attention to just some of the court's previous orders:

(a) The order dated 22 February 2018 states *inter alia*:

> "*It is ordered that:*
>
> 1. *Completion of this hearing will be deferred until the Court of Appeal has given Judgment in the collection of Legacy Appeals listed for hearing in April that is McQuillan, Barnard & McGuigan,*
> 2. *The Applicant's counsel is permitted to address the court afresh on Human Rights Act issues when this court reconvenes in the wake of the Judgments given in those cases,*
> 3. *The Respondent's counsel shall composite a reply to all grounds of challenge,*
> 4. *The Applicant's counsel shall file a reply in response,*
> 5. *The Applicant shall reduce their skeleton argument to 2x A4 pages on or before close of business on Wednesday 28 February 2018,*
> 6. *Supplementary skeleton arguments on both sides to be exchanged sequentially,*
> 7. *This matter shall be listed for a resumed short hearing at 10.30am on Monday 25 June 2018 before the assigned Judge, and;*
> 8. *Reserve todays costs,*
> 9. *Liberty to apply."*

Further CMD Orders followed.

(b) In due course a hearing date of 23 November 2018 was allocated.

(c) By a communication dated 11 November 2018 the Applicant's solicitor stated that they were "*…… trying to obtain information from the Court of Appeal regarding the judgment in* ***McQuillan*** *and will update the court and the respondent of the outcome of our enquiries*."

(d) In their written submission dated 14 November 2018 counsel for the Applicant proposed *inter alia* that (a) the hearing date of 23 November 2018 be vacated and (b) a new hearing date in February 2019 be allocated. The court acceded to this proposal. Thereafter the parties exchanged further written submissions directed to *inter alia* the impact of the Northern Ireland (Executive Formation and Exercise of Functions) Act 2018.

(e) A further CMD order of the court dated 02 March 2019, recorded *inter alia*:

> "*This application has stood adjourned pending the judgment of the* [COA] *in ……. **McQuillan, Bernard, McKenna and McGuigan**. At a review …….. on 22 February 2019 the Lord Chief Justice indicated that judgment in **McQuillan** would issue within 3 – 4 weeks with the judgments in the related cases to follow shortly thereafter. The* [COA] *fixed a review date of 05 April 2019 for a number of related pending appeals (**McEvoy, Kenny** ……. challenging stay orders) …….*
>
> *The parties are agreed about the relevance of the judgment …. in **McQuillan** and the need to consider any issues arising from the judgment of the* [UKSC] *in **Re Finucane**. The Applicant will, within ten working days of ……. the **McQuillan** judgment provide a written submission …*"

Certain related and ancillary directions were added.

(f) The UKSC decision in ***Re Finucane*** [2019] UKSC 7 was promulgated on 27 February 2019. The COA decision in ***McQuillan*** [2019] NICA 13 was published on 19 March 2019. Further written submissions and *inter-partes* skirmishing followed.

(g) This court's general legacy cases CMD order was issued on 30 June 2019, identifying the present case as one of those the subject of an extant stay. This order noted *inter alia* that the judgments of the COA were still awaited in ***Jordan (Damages), Bernard and McKenna and McGuigan*** and, further, that an application for leave to apply to the UKSC in ***McQuillan*** remained unresolved. The order made provision for the procedure to be followed in any case seeking removal of a stay.

(h) On 30 September 2019 the Applicant's legal representatives applied for removal of the stay.

[5] On 15 October 2019 this court made the following CMD order (No 14):

> *"1. The Court has received an application on behalf of the Applicant, dated 30 September 2019, for an Order removing the stay of proceedings imposed by the Court's Order dated 22 February 2018. The effect of that Order was to adjourn the proceedings, following a limited hearing, pending the decisions of the Northern Ireland Court of Appeal in McQuillan and other linked cases.*
>
> *2. This court, in an effort to minimise delay, relisted to this case for hearing on 23 November 2018. By a written submission dated 14 November 2018 Counsel for the Applicants proposed that of the rescheduled hearing date be vacated. The Court acceded to this application. A further written submission from Counsel dated 5 December 2018 makes clear that the Applicant's position was unchanged.*
>
> *3. This Court has continued to issue case management Orders periodically.*
>
> *4. There is an extant undetermined application to amend the Applicant's Order 53 pleading.*
>
> *5. Furthermore the Court has identified this case has [sic] one in which there is an extant undetermined interlocutory application: see the general ruling and the directions of 20 June 2019.*
>
> *6. On 27 February 2019 UKSC gave judgment in the Finucane case. On 19 March 2019 Northern Ireland Court of Appeal gave judgment in the McQuillan case. On 12 April 2019 all three Respondents. In [sic] McQuillan applied to Northern Ireland Court of Appeal for leave to appeal to UKSC. This application remains undetermined.*
>
> *7. Since March 2019 the parties have traded submissions on the issue of the further transaction of these proceedings in the light of the Finucane and McQuillan decisions.*
>
> ***DIRECTIONS***
>
> *8. The Applicant's representatives shall, by 25 October 2019, amalgamate all of their separate written submissions of 2019 into a single document, shall update this in any way considered appropriate and shall set forth their agenda for a proposed review listing before the court (six pages maximum).*
>
> *9. Making allowance for the mid - term vacation, the Respondents' legal representatives will reply in writing, with the same strictures (i.e. amalgamation etc) by 16 November 2019.*

10. *The Applicant's solicitors shall further, by 21 October 2019 at the latest –*

i. *[i] notify the Judicial Review Office of an agreed listing before this Court, time allocation 45 minutes, on a date between 18 November and 5 December 2019 when the assigned judge is available;*

ii. *[ii] write to the Court of Appeal Office in appropriate terms, to be agreed by all parties, drawing attention to [6] above and the impact thereof on both the instant case and other cases, to be identified by name & Court number 'cc' the Judicial Review Office and all interested legal representatives.*

11. *The parties shall have liberty to apply and;*

12. *The costs of this application shall be reserved until the conclusion of the Judicial Review proceedings. "*

[6] On 21 January 2020 the Applicant's solicitors filed an application to amend the Order 53 Statement. On 24 January the court considered submissions from the parties.

Order 53 Statement

[7] In common with the case of ***Robert Lavery*** there have been several incarnations of this. Since the uncompleted hearing in February 2018 the court has not granted permission for any amendments. The latest amended incarnation (the sixth by the court's calculation) is the product of alterations more accurately described as mutilation than modification. It appears to have been precipitated by the re-establishment of the Northern Ireland Assembly on 04 January 2020. This event has also precipitated certain *inter-partes* correspondence.

[8] The Applicant's case, at this distant remove from its initial configuration, is, in a nutshell, that there is a continuing failure to provide him with the relevant inquest papers giving rise to continuing unlawful delay. The legal characterisation of this illegality is found in Articles 2 and 10 ECHR, the common law and the Court Files Privileged Access Rules (Northern Ireland) 2016 (SRNI 2016/123) objectives. The period of delay in this case measures some five years and four months. The subject death occurred 18 years ago, some eight years prior to the effective date of HRA 1998.

The Impact of the McQuillan Case

[9] 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.

[10] By order dated 21 November 2019 the COA granted leave to appeal to UKSC in the case of ***McQuillan*** 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.

[11] 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.

[12] 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.

[13] 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 in [3] above. <u>At this juncture the court confines itself to urging the parties to explore a sensible, reasonable and practicable consensual mechanism for disposing of these proceedings. The court considers that this would best further the overriding objective and would simultaneously promote the public interest. The court will lend such assistance to this exercise as may be reasonably possible</u>.

Conclusion and Order

[14] The situation to which this case belongs at this point in time appears to mirror that applying in the case of ***Robert Lavery*** with the exception that this court has received no details regarding ministerial submissions or kindred matters.

[15] In all of the circumstances outlined above I consider that the course most apt to further the overriding objective is to direct that the proposed Respondent's solicitor provide a timetable for the outstanding decision making **<u>by 21 February 2020</u>**. No further direction is appropriate and, with the exception of this step, none of the parties should take any cost incurring steps until further order. The stay likewise continues until further order.