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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY EDWARD BARNARD FOR JUDICIAL REVIEW

Between:

CHIEF CONSTABLE, POLICE SERVICE OF NORTHERN IRELAND

Appellant/Respondent;

-and-

EDWARD BARNARD

Respondent/Appellant.

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Before: Morgan LCJ, Stephens LJ and Keegan J

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from an Order made by Treacy J on 27 November 2017 whereby he:-

(i) declared that the failure/refusal on the part of the PSNI Historical Enquiries Team ("the HET") to complete and publish an overarching thematic report regarding the linked Glenanne Gang cases was unlawful and in breach of Article 2 ECHR and further;

(ii) made an Order of Mandamus to compel the appellant to expeditiously honour its enforceable public commitment to provide an overarching report into the Glenanne group of cases and to do so in accordance

with the necessary minimum elements summarised in paragraphs 169-170 of his main judgment.

[2] The notice of appeal lodged by the appellant raises four main issues:-

(i) Whether the respondent is entitled to rely on the Convention Rights, in particular Article 2, introduced into domestic law through the Human Rights Act 1998 since the death with which this case is concerned occurred on 17 March 1976;

(ii) Whether the appellant made clear and repeated promises to the respondent sufficient to ground a substantive legitimate expectation;

(iii) Whether the PSNI Legacy Investigation Branch ("LIB") is sufficiently independent in the manner required by Article 2 ECHR to conduct an investigation in the death of the deceased; and

(iv) Whether it was appropriate to make the Order of Mandamus set out above.

[3] Mr McGleenan QC and Mr McLaughlin appeared for the appellant and Mr Friedman QC and Mr McQuitty for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[4] The respondent is the brother of Patrick Barnard. At 8:20 PM on 17 March 1976 Patrick, who was then 13 years old, was playing on the street outside the Hillcrest Bar, Donaghmore Road, Dungannon when a no warning car bomb planted by the UVF exploded. Patrick sustained severe injuries and was taken to Craigavon hospital for treatment but died the next day. James Francis McCaughey, Andrew Joseph Small and Joseph Kelly were also killed in the attack.

[5] Examination of the scene by Scenes of Crime Officers and members of the Northern Ireland Forensic Science Service determined that a bomb had been planted in a vehicle parked outside the bar. The bomb was believed to have contained 60-80lbs of home home-made explosives. The vehicle had been reported stolen on 9 March 1976. Forensic exhibits recovered from the scene were destroyed in a fire at the Northern Ireland Forensic Centre on 18 September 1976 before a report could be prepared. An inquest into the death of Patrick Barnard and the other victims of the Hillcrest bombing was held on 20 December 1976 and an open verdict was returned.

[6] During 1976 the police received various intelligence reports suggesting the involvement of a number of people. One of those reports in May 1976 identified Garnet James Busby as one of the persons responsible for the bombing. He was not arrested until 7 May 1980 when he was interviewed and released without charge six days later. The records of those interviews are not now available. He was arrested again on 8 December 1980 and on the following day admitted his involvement in the bombing in a series of interviews.

[7] In his statement of admission Busby alleged that he was instructed by a member of the UVF to attend at a car park on the evening of the bombing. There were three UVF members in the car park and he was instructed to follow a car driven by one of them, to drive the car containing the bomb to the Hillcrest Bar and park it outside. Having done so he then got into the lead vehicle and returned to collect his own car.

[8] Busby also admitted placing a car bomb that exploded outside O'Neill's bar in Dungannon on 16 August 1973, placing a car bomb that exploded outside Quinn's public house, Dungannon on 12 November 1973 and the murders of Peter and Jane McKearney at Dungannon on 23 October 1975. He was sentenced to life imprisonment in respect of these offences on 23 October 1981 and was released on life licence on 7 February 1997.

[9] Of the three persons named by Busby as being involved in the Hillcrest bombing the first was interviewed on 22 March 1976 in relation to terrorist offences. There is nothing recorded about the precise nature of the terrorist offences or who carried out the arrest but it seems likely given the timing that the interview included questioning about the Hillcrest bombing. That person was subsequently arrested in 1980 and interviewed in relation to other terrorist offences. In 1981 he was convicted of involvement in a series of UVF murders committed in the 1970s in County Down and County Tyrone.

[10] The second person named was the person who drove the lead car. He was arrested on 11 August 1976 and interviewed about his involvement in a series of terrorist related murders and offences. He admitted his involvement in other murders in County Tyrone and County Armagh and was subsequently convicted and sentenced to life imprisonment. It was not until 1980 that the RUC received reliable intelligence suggesting that this man was involved in the bombing of the Hillcrest bar. By that stage he had been imprisoned for three years serving terms of life imprisonment. There is no record of his being interviewed about the Hillcrest bombing. He was a private in the British (Territorial) Army at the time of the Hillcrest bombing.

[11] The third person named was interviewed about the Hillcrest bombing on 5 May 1980 while he was in custody for possession of explosives and firearms offences. He was interviewed again on 11 December 1981 while he was in custody for suspected murder and firearms offences. Throughout all of his interviews he denied any involvement in the bombing of the Hillcrest bar. This individual had been involved with UVF bombings and murders in County Tyrone and County Armagh since 1973. In the mid-1970s he served a term of imprisonment for possession of explosives and firearms offences. It is common case that the three persons named by Busby were highly likely to have been part of the bomb gang.

The McKerr group of cases

[12] On 4 May 2001 the European Court of Human Rights ("ECtHR") gave judgment in McKerr v UK and a number of related cases concerning the form of the effective official investigation required by Article 2 of the European Convention on

Human Rights ("the Convention") when individuals have been killed as a result of the use of force. At [111] the court stated that the essential purpose of such an investigation was to secure the effective implementation of the domestic laws which protected the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. The kind of investigation that will achieve those purposes may vary according to the circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention.

[13] Although there had been a criminal trial in which three police officers had been accused of the murder of a passenger in the car driven by Mr McKerr the ECtHR concluded at [137] that there may be circumstances where issues arise that have not, or cannot, be addressed in a criminal trial and that Article 2 may require wider examination. The court referred to evidence of police counterterrorism procedures and the deliberate concealment of evidence and concluded that the aims of reassuring the public and the members of the family as to the lawfulness of the killings had not been adequately met by the criminal trial. The court concluded, therefore, that Article 2 required a procedure whereby those elements could be examined and doubts confirmed, or laid to rest.

[14] The judgment was then transmitted to the Committee of Ministers to supervise its execution. The UK government set in train a package of measures to remedy the identified breaches of the Article 2 procedural obligation which included as part of the obligation of an effective investigation the requirement to secure the independence of the investigators. That led to the establishment in the United Kingdom of investigative units the development of which was set out in detail by Stephens LJ in Re McQuillan [2019] NICA 13 at [22]-[78].

[15] The unit with which this judgment is concerned is the HET which was established in September 2005. As noted at paragraph 31 of McQuillan the three main objectives of the HET were:

> "1. To assist in bringing a measure of resolution to those families of victims whose deaths are attributable to 'the Troubles' between 1968 and the signing of the Belfast Agreement in April 1998;
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> 2. To re-examine all deaths attributable to 'the Troubles' and ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a manner that satisfies the Police Service of Northern Ireland's obligation of an effective investigation as outlined in Article 2, Code of Ethics for PSNI;
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> 3. To do so in a way that commands the confidence of the wider community".

Those objectives were to be delivered through a five phase process comprising collection of information, assessment of the information, review of the opportunities arising, focused re-investigation and resolution.

[16] Initially the HET was set up with two teams, one of which comprised police officers seconded from police forces outside Northern Ireland and the other was staffed by police officers and civilian staff recruited from both the PSNI and externally. The head of the HET was a senior police officer seconded from outside Northern Ireland and he reported to the Chief Constable although he largely had operational independence. Between 2006 and 2007 a third team was established known as the White Team whose function was analytically driven and directed towards examining issues around collusion between terrorism and members of the security forces and police officers. For that purpose the HET had established a substantial Analytical Database.

[17] Collusion, as defined by the HET, was where a member of the security forces commits with any other person an offence that amounts to either:

(i) Murder.

(ii) Serious offence (includes attempted murder, causing an explosion, intimidation, shooting and kidnap.

(iii) Misfeasance in public office.

(iv) Conspiracy to commit acts of terrorism.

[18] These arrangements were the subject of careful review by the Committee of Ministers dealing with the implementation of the McKerr judgment and that supervision was essentially signed off by the Committee of Ministers on 19 March 2009. The UK government represented that the HET would act in as compliant a manner with Article 2 of the Convention as possible. This court accepted in McQuillan that those arrangements secured practical independence in the conduct of these reviews and investigations for the purposes of Article 2 of the Convention.

[19] As part of this process the HET produced a Review Summary Report ("RSR") for each family which engaged with it. The applicant in this case did not engage but the families of the other three deceased, James Francis McCaughey, Andrew Joseph Small and Joseph Kelly did engage and each received an RSR. In some cases amended reports were produced as a result of queries raised by the families. Those reports indicated that there was no evidence of collusion in the case of the Hillcrest bombing which had been detected by the review team but that the HET would continue to assess the Hillcrest case and other cases as part of its ongoing investigations into the "Glenanne Series". That was a reference to a significant number of murders and other serious terrorist crimes committed by the mid-Ulster UVF which were to be the subject of consideration by the White Team through the Analytical Database. Some of these murders were linked whether by personnel or weapons and in some of these cases there was direct evidence of the involvement of

security forces and police personnel. The families were advised that they would be updated of any developments.

[20] Many of the families, including the respondent, also liaised with the Pat Finucane Centre ("PFC") which carried out a case study of 51 separate murders and serious crimes committed against members of the Catholic community in South Armagh between 1972 and 1978. In May 2004 the PFC published its case study report entitled "A Case to Answer". There were four central allegations within the case study.

> 1. A "pseudo-gang" operating out of a farm in Glenanne, County Armagh comprising of members of the Royal Ulster Constabulary ("RUC") and Ulster Defence Regiment ("UDR") had colluded with loyalist paramilitaries. This loose gang had carried out approximately 18 attacks in the border counties resulting in the deaths of 58 people.
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> 2. The activities of the Glenane group were well known to security and intelligence agencies and had those organisations taken the appropriate action, a number of loyalist paramilitaries would not have gone on to commit other murders.
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> 3. Clear evidence existed of collusion between loyalist paramilitaries and security force personnel, predominantly in south Armagh, in that they were directly involved in attacks or failed to investigate or prosecute those responsible.
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> 4. The true scale of the gang's activities, including a number of convicted RUC officers, was hidden from the public by the deliberate misuse of the justice system.

[21] Following on from this in 2006 the PFC arranged for the conduct of an investigation by Douglass Cassel of the Centre for Civil and Human Rights, Notre Dame Law School, Notre Dame, Indiana. In 2009 there were a series of meetings between the PFC and the Director of the HET. By this stage RSRs had been made available to the three Hillcrest families who had engaged. The applicant had been advised by the PFC of the content of these meetings.

[22] It is common case that at these meetings the HET indicated that it was going to look at each case individually and then do a larger thematic report which would put things in context. At a meeting on 6 October 2009 the Director of the HET indicated that he felt that the Glenanne Report could be started because enough was now known to start doing a rolling report. There was a further meeting on 20 October 2009 when the HET met representatives from the PFC and set out the structure of the HET thematic RSR which was going to be published including consideration of the wider issue of collusion.

[23] At a meeting on 15 June 2011 between the PFC and the HET it was indicated that substantial work had been done on the thematic report and it was believed that it may be possible to complete it by the end of 2011. In the interim, however, two

significant events had occurred. First, a substantial investigation had been handed over to the HET which at that time effectively utilised the vast bulk of its resource. Secondly, the Chief Constable had directed that the HET should no longer carry out investigative work but that it should refer such matters to the PSNI. In practical terms it appears that despite this some investigative work continued to be carried out by the HET.

[24] In the course of these proceedings disclosure was made of a draft unfinished report entitled "South Border Security Situation" ("SBSSR") which introduces itself as the HET overarching report into its reviews of a number of terrorist -related deaths in the south border area of Northern Ireland between 1972 to 1978. The introduction to the report records that "associated with many of the deaths are allegations of collusion in that they were caused by loyalist terrorists, who included among the numbers serving police officers and soldiers of the British Army. A number of security force personnel were convicted of involvement in some of the deaths and that there was collusion in those cases is indisputable. There are also a number of cases where due to weapons links, associations or similar method, collusion is believed to have played a part in the deaths."

[25] The draft report is concerned with 89 incidents comprising 46 murder cases involving a total of 80 deaths, 22 non-fatal bombings, 13 attempted murders, seven non-injury intimidation shootings and one abduction and false imprisonment. The Hillcrest bombing is not included in the list but the explanation for this is that the final RSR in respect of one of the families was still outstanding at the time of this draft report which it is believed was prepared at the end of 2010. Mr Morris, who was the principal author of the report, stated on affidavit that once this had been completed the Hillcrest bombing would undoubtedly have been added to the incidents.

[26] The Hillcrest incident is also linked through the convicted murderer, Busby, to other killings in which he was involved and through the weapon used in another case in which he was involved to further terrorist incidents. The identity of two others highly likely to have been involved in the Hillcrest bombing has been established and their involvement in other terrorist offences has also been documented. This information has been helpfully tabulated in a spreadsheet prepared within the papers.

[27] The HET was subject to an HMIC inspection which reported in July 2013. That report raised issues about the independence of the provision of intelligence to the HET but also dealt with other criticisms relating to the HET approach to military personnel. The Chief Constable decided in September 2013 to suspend any further work by the HET and it was disbanded the following year. Its work has now been transferred to the Legacy Investigations Branch ("LIB") of the PSNI. In McQuillan this court concluded for the reasons there set out that the LIB did not have practical independence in respect of the conduct of legacy investigations for the purposes of Article 2 of the Convention.

The impugned decision

[28] On 11 March 2014 the respondent's solicitors wrote to both the Chief Constable of the PSNI and the HET. In the letter to the HET the solicitors referred to previous correspondence touching upon the need to have a thematically linked investigation with other cases/murders. The solicitors asked the HET to confirm that the Hillcrest investigation had been linked to all other relevant incidents and seeking access to the investigative end product undertaken as a result of analysis of the Historical Enquiries Analytical Database ("HEAD"). The letter to the Chief Constable noted that the thematic report was due to be prepared by the HET but that it had not been produced. The respondent wanted to know who took the decision not to produce the overarching thematic report into all of the Glenanne Gang linked cases.

[29] That letter was passed to the Crime Operations division within the PSNI. A report was prepared by the then deputy head of the HET, Detective Supt Murphy, on 14 April 2014. It noted that he had been unable to determine who made the decision to commission a thematic report and he had not been able to establish what had been promised and to whom. He had, however, located a copy of the draft report entitled South Border Security Situation. He considered that it was massively incomplete and not fit for publication. He noted that although there had been attempts made to draw together pieces of individual cases no overarching report detailing the chronology of the Glenanne Series had been prepared by the HET. He concluded that producing such a report was a massive undertaking well beyond the current capacity of the HET.

[30] That report was also approved by Detective Chief Supt Hanna who like Detective Supt Murphy was a member of the PSNI and was then the head of the HET. The report was then considered by Deputy Chief Constable Harris who noted in his affidavit that neither he nor the Chief Constable had given any active consideration to the question of whether an overarching report into the Glenanne Series should be completed. He concluded that there would be no investigative benefit to be derived from preparing such an overarching report and that such reports were not used in contemporary policing practice in the United Kingdom in the conduct of murder investigations. He referred extensively to the issue of resources but later in his affidavit stated that resources was not a defining factor and that was confirmed in submissions the appellant made before this court. He replied on 12 June 2014 in those terms and that is the impugned decision. At the time of this correspondence the work of the HET had been suspended by the Chief Constable and was subsequently taken over in January 2015 by the Legacy Investigations Branch ("LIB") of the PSNI. For the reasons set out at [193]-[202] of McQuillan we consider that the LIB is not a practically independent investigatory body for the purposes of Article 2 of the Convention.

Treacy J's decision

[31] Between [130] and [195] Treacy J examined the package of measures put before the Committee of Ministers by the United Kingdom government in order to

address the issues arising from the McKerr group of cases. He noted that the HMIC report of July 2013 had recognised that the measures were intended to address both individual grievances and systemic findings in the previous investigative mechanisms. He recorded the indication in the 2007 Interim Report from the Committee of Ministers which noted that the HET was part of a process aiming to achieve as Article 2 compliant an investigation as possible. In particular the Committee of Ministers was informed by the United Kingdom government that in cases where there were allegations of collusion it was specifically provided that these were handled by the HET's White Team and Complex Enquiry Team. These were both staffed by police officers from outside Northern Ireland. The evolving database prepared for the purposes of these independent teams were noted in the 2007 Interim Report of the CM. It was specifically indicated that these teams would look for evidence of offences which might be characterised as collusion and that they would also examine any links which could be identified between cases.

[32] Despite the assurances which had been received from the United Kingdom government in 2007 the Committee of Ministers continued to review the mechanisms set out in the package of measures. On 19 March 2009 it closed its examination into the investigation of historical cases and noted that the HET had the structure and capacities to finalise its work. The judge then went on to note the change of approach which commenced in 2010 and noted at [190] to [195] that the system which presently exists whereby LIB carry out investigations in respect of legacy matters is inconsistent with the package of measures upon which the United Kingdom government relied upon in order to have the supervision of the Committee of Ministers closed in 2009 and did not meet, in particular, the requisite minimum element of practical independence. This court has had cause to examine those precise issues in McQuillan. It reached the conclusion that the LIB did not have the practical independence necessary to demonstrate the capacity to carry out an Article 2 compliant investigation and there is no reason to depart from that conclusion in this case. The White Team did have that capacity.

[33] The learned trial judge then examined the function of the HET at [197]. He noted in particular that the HET was put forward by the United Kingdom government as part of a process aiming to achieve as Article 2 compliant an investigation as possible. Where it considered cases to be linked it undertook to the Committee of Ministers in 2007 to consider those cases together. There was a particular reference to a developing analytical database in respect of that approach. The White Team was specifically designed to fulfil that analytical role. That was particularly the case in respect of the examination of collusion.

[34] When the Committee of Ministers decided to close its investigation in relation to the investigatory obligations in March 2009 it did so on the basis that the HET would carry out this wider function in an Article 2 compliant manner. The Hillcrest case was linked to others and the learned trial judge concluded at [200] that there was a credible suspicion of collusion in respect of the remaining cases and a revived Article 2 duty arose. The thematic report was a key process by which it may be possible to unearth evidential opportunities that were not capable of discovery by

looking at cases in isolation. The changes in the role of the HET from 2010 onwards frustrated any possibility of the effective investigation to examine the wider issues of State involvement which could fulfil the Article 2 duty.

[35] At [203] the learned trial judge noted the repeated representations to the families of the Hillcrest victims and to the PFC that the Glenanne Series would be separately analysed and that a report would be completed. Those representations reflected the public commitments made by the United Kingdom government to the Committee of Ministers during its investigation. There were specific representations about the analysis of allegations of collusion in linked cases by investigators who were not members of the security forces nor persons who had served as police officers in Northern Ireland and had practical operational independence. These were clear and unambiguous assurances devoid of any relevant qualifications which created a substantive legitimate expectation that a thematic report including the examination of collusion having regard to the linked cases in the Glenanne Series would be provided by the HET.

[36] The learned trial judge concluded that this was a representation to a small and identifiable number of persons. The unfairness was extreme and amounted to an abuse of power. There had been a dismantling of the protections upon which the Committee of Ministers relied when signing off the supervision of the McKerr cases. The judge concluded at [209] "that whether the legitimate expectation is now enforceable or not its frustration is inconsistent with Article 2, the principles underpinning the ECtHR judgments in the McKerr series and with the package of measures."

[37] Treacy J allowed the parties an opportunity to consider the judgment and agree an appropriate form of relief. The parties agreed an order quashing the impugned decision, the terms of a declaration and an order for costs. There was disagreement, however, over whether the court should make an Order of Mandamus. At [4] of the further judgment on remedy the trial judge noted that the ground on which relief was sought included breach of the respondent's common law legitimate expectation that the thematic report would be completed and published as well as Article 2 of the Convention and thereby section 6 of the HRA.

[38] The learned trial judge relied on the observation of Lord Carnwath in United Policyholders Group v AG of Trinidad and Tobago [2016] 1 WLR 3383 at [121] that where a legitimate expectation is established the court will require the promise to be honoured unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. He noted that the Chief Constable failed to appreciate that such a commitment had been generated and there was no evidence before him to discharge the burden of showing good proportionate reasons for resigning from that public commitment. Accordingly he made an Order of Mandamus.

The submissions of the parties

The appellant's case

[39] The submissions of the Chief Constable focus primarily upon the engagement of Article 2 in the circumstances of this case and the arguments relating to the independence of the LIB. We have dealt with the arguments in the latter point in McQuillan and have nothing to add to our findings in that case.

[40] In respect of the Hillcrest case it was noted that there had been a police investigation which was successful in ensuring the prosecution and conviction of Busby in 1981. The HET had reviewed the case in 2007 and produced a number of RSRs which were provided to the McCaughey, Small and Kelly families. Those reports indicated that the HET had not found any evidence or information that would indicate any form of collusion between the security forces and loyalist paramilitary organisations in the murders. It was accepted, however, that the reports indicated that the HET would continue to examine a series of murders and terrorist offences commonly called the "Glenanne Series" and that these murders would be considered as part of that series.

[41] It was noted that the focus of the challenge was the preparation of an overarching thematic report. It was noted that the SBSSR was commenced about May 2010 but had not been completed before the closure of the HET in May 2014. No explanation for the failure to complete the report has been given and it has been criticised by the LIB.

[42] There was no definition of the cases which constituted the Glenanne Series. A 2004 case study by the PFC looked to a series of murders in the border counties between 1972 and 1978 and concluded that the gang was responsible for 18 attacks resulting in 58 deaths. The 2006 study by Notre Dame University looked at 25 cases referred to it by the PFC resulting in 76 deaths. The SBSSR was broader still involving 89 incidents, 46 of which were fatal and included 80 deaths between July 1972 and June 1978 in the Mid-Ulster area.

[43] In nine of those cases the HET considered that collusion was established by reason of the conviction of a member of the security forces or their involvement having been established in some other way. In a further eleven cases there were allegations of collusion as a result of involvement by members of the security forces. The Hillcrest case is not listed in the SBSSR but this was explained by Mr Morris of the HET on the basis that there was an outstanding RSR in respect of one of the Hillcrest families. That had to be completed before Hillcrest could be added.

[44] It was submitted that by virtue of section 22(4) of the Human Rights Act 1998 ("HRA") the Act does not apply to acts taking place before it came into force on 2 October 2000. In Re McKerr [2004] 1 WLR 807 the House of Lords interpreted this provision to mean that the HRA did not give rise to any domestically enforceable obligation to conduct an investigation into deaths which occurred prior to the act coming into force. That decision has not been overruled.

[45] The reasoning for this decision was based on the conclusion that the duty to investigate depended upon the occurrence of the violent death and could not be separated from it. Accordingly if the death occurred before the coming into force of the HRA no duty of investigation under Article 2 arose. That reasoning was undermined by the decisions of the ECtHR in Silih v Slovenia (2009) 49 EHRR 37 and Janowiec v Russia (2013) 58 EHRR 30.

[46] In Silih the court found that the procedural obligation to carry out an effective investigation under Article 2 had evolved into a separate and autonomous duty. In determining the jurisdiction of the court in respect of a death which occurred before the ratification of the Convention there had to be a genuine connection between the death and the coming into force of the Convention. That had two components. The lapse of time between the death and the entry into force of the Convention had to be reasonably short and a significant portion of the steps which would normally be required to discharge the investigative duty should take place after ratification. Further specification in relation to those matters was given in Janowiec. It was recognised that there might be extraordinary situations in which the genuine connection test was not satisfied but that the need to protect Convention values would constitute a sufficient basis for recognising the existence of a connection.

[47] The appellant also noted that in Brecknell v UK [2008] 46 EHRR 42 the court recognised that even where the Article 2 investigative obligation had been discharged it might be revived by fresh information or allegations in the circumstances there set out. It was submitted that this depended upon new material that was credible, relevant to the identification/prosecution of the perpetrator and capable of opening up new investigative opportunities or undermining previous conclusions. It was further submitted that the temporal limitations applied also in Brecknell cases.

[48] The appellant accepted that the Supreme Court in Re McCaughey recognised the separation of the investigative duty from the duties arising in relation to the cause of death in an Article 2 case but submitted that this did not avail the respondent in this case. The death in this case occurred 24 years before the HRA was commenced. In any event there had been a review by the HET which found that there was no collusion in this case. There was no new factor which justified the imposition of a further Article 2 investigative duty.

[49] The appellant submitted that it was not clear from the main judgment whether the trial judge upheld the respondent's legitimate expectation case. At the end of [209] of the main judgment the learned trial judge said:

> "I consider that whether the legitimate expectation is now enforceable or not its frustration is inconsistent with Article 2, the principles underpinning the ECtHR judgment in the Medicare series and with the package of measures."

In the remedies judgment, however, he noted that the relief sought included breach of the respondent's common law legitimate expectation as well as Article 2 ECHR.

At [13] of the remedies judgment he then went on to identify the relevant case law in respect of legitimate expectation as indicated at [35] above. At [14] of the remedies judgment he based the decision to make an Order of Mandamus on the legitimate expectation argument.

[50] In respect of the submission that the respondent had a legitimate expectation of a thematic report dealing with collusion it was submitted that any representation was neither clear nor unambiguous. There was no definition of the content of the Glenanne Series. The structure of the proposed analysis was unclear. There was no timescale within which the report was to be delivered and no clarity as to its function.

[51] Finally it was submitted that in any event the absence of definition of the Glenanne Series made it inappropriate to make an Order of Mandamus since it would be impossible for the court to define the standard of clarity to enable compliance. The Order is also contradictory in that it compels the respondent to prepare the report while indicating that he is not sufficiently independent to undertake the task.

The respondent's case

[52] The respondent sought to uphold the conclusions of the learned trial judge for the reasons given by him. His conclusions are matters of fact and should not be impugned at appellate level (DB v PSNI [2017] UKSC 7). It was submitted that the trial judge found that there were clear, unequivocal, repeated promises made to a category of persons of which the respondent was a member.

[53] The precise contours of the Glenanne Series is a matter to be independently evaluated by the HET itself. The SBSSR indicates the conclusion of the HET that collusion has been established in some cases and is suspected in others. It was submitted that this was sufficient to establish a State practice of killing. The Hillcrest case was associated with a number of other cases by reason of personnel and weapons and the evidence clearly indicates that it was part of the Glenanne Series.

[54] Although a statement supporting allegations of collusion was made by a retired police officer, John Weir, in 1999 subsequent investigations by the Barron Inquiry into the Dublin and Monaghan bombings suggested that Weir was credible. Weir provided further assistance in 2008. The HET and SBSSR identified named suspects who were involved in other related cases.

[55] The withdrawal of the promise ignored the fact that there was a promise at all. That suggests a failure to establish all the relevant facts before making the decision. The court was correct to conclude that this was a promise made to a small and identifiable number of persons giving rise to legitimate expectation. The learned trial judge also correctly identified the unfairness in this case as extreme. This was a case in which the common law provided a commitment to accountability and transparency on behalf of these bereaved families.

[56] It was submitted that there was no temporal bar in international law to the pursuit of a remedy under Article 2 ECHR. This was a Brecknell case where fresh evidence had come into the public domain. The temporal threshold established in Silih and Janowiec had no basis in domestic law.

[57] By the time of the impugned decision the White Team was no longer functioning and the HET was headed by members of the PSNI in preparation for its transformation into the LIB in January 2015. None of this is in dispute. Neither the HET as so constituted nor the LIB had the requisite independence to deliver the promise.

Consideration

Legitimate expectation

[58] The law on legitimate expectation has recently been reviewed by both the Privy Council and the Supreme Court. In United Policyholders Group and Others v Attorney General of Trinidad and Tobago [2016] 1 WLR 3383 the appeal concerned promises by the government to pay all sums due under the policies of an insurance company which was in substantial deficit. The principles relating to the law of legitimate expectation were set out by Lord Neuberger at [37] and [38].

> "37 In the broadest of terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. Some points are plain. First, in order to found a claim based on the principle, it is clear that the statement in question must be "clear, unambiguous and devoid of relevant qualification", according to Bingham LJ in *R v Inland Revenue Comrs, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545*, 1569, cited with approval by Lord Hoffmann in R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2) [2009] AC 453, para 60.
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> 38 Secondly, the principle cannot be invoked if, or to the extent that, it would interfere with the public body's statutory duty: see eg *Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629*, 636, per Lord Fraser of Tullybelton. Thirdly, however much a person is entitled to say that a statement by a public body gave rise to a legitimate expectation on his part, circumstances may arise where it becomes inappropriate to permit that person to invoke the principle to enforce the public body to comply with the statement."

[59] In his concurring opinion Lord Carnwath relied upon the observations of Lord Fraser in AG of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629 where the expectation arose in the context of procedural fairness:

> "The justification for it is primarily that, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation *does not interfere with its statutory duty*. The principle is also justified by the further consideration that, when the promise was made, the authority must have considered that it would be *assisted in discharging its duty* fairly by any representations from interested parties and as a general rule that is correct."

[60] He then went on to contrast the position in relation to substantive legitimate expectation and at [121] proposed a relatively narrow approach to the circumstances in which such an expectation could arise:

> "Where a promise or representation, which is "clear, unambiguous and devoid of relevant qualification", has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it."

In the course of that discussion he also referred to an earlier Privy Council decision in Paponette v AG of Trinidad and Tobago [2012] 1 AC 1 also dealing with substantive legitimate expectation.

[61] The approach where the legitimate expectation is procedural was considered by the Supreme Court in Re Geraldine Finucane [2019] UKSC 7. The earlier case law was reviewed by Lord Kerr from [55] on and he concluded at [62]:

> "From these authorities it can be deduced that where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown fair to do so. The court is the arbiter of fairness in this context. "

[62] The first question, therefore, is to determine whether there is a clear and unambiguous undertaking devoid of relevant qualification. In Paponette Lord Dyson said that the question was how on a fair reading of the promise it would have been reasonably understood by those to whom it was made. On the basis of the

findings by the learned trial judge the promise made in this case amounted to the following:

(i) An independent police team comprising officers who had not served in Northern Ireland or been members of the security forces and having the practical independence equivalent to that required under Article 2 of the Convention would analyse the cases referred to as the Glenanne Series through the HEAD.

(ii) The precise identification of the composition of the Glenanne Series was for that independent police team to establish having regard to the purpose of the analysis but in any event it included the Hillcrest bombing.

(iii) The purpose of the analysis was to consider whether the review of the cases as a whole suggested that there were wider issues of collusion beyond those already established in the individual cases.

(iv) The outcome of the analysis was to be published.

(v) The commitment to carry out the analysis on this basis was communicated to the Committee of Ministers in its review of the McKerr cases as part of the fulfilment of the commitment by the United Kingdom government to carry out a review and investigatory process that was as Article 2 compliant as possible.

[63] The representation was, of course, made in a number of different circumstances. Its public form was to the Committee of Ministers in order to demonstrate an investigation as close as possible to the requirements of Article 2 of the Convention. It was also made to the individual families who received RSRs. It was made to the PFC with whom this applicant liaised and indeed was referred to by the Director of the HET before the Barron Enquiry. In light of his relationship with his deceased brother the respondent clearly had standing to enforce the promise.

[64] We are satisfied that the learned trial judge was correct to conclude that the representation was clear and unambiguous without any relevant qualification. We recognise that there was a degree of uncertainty around the precise contours of the Glenanne Series and the precise process of the analysis but we are satisfied that there was clarity as to the function. Some uncertainty of this nature did not undermine the effect of the representation as noted by Lord Dyson in Paponette at [30].

[65] The first argument advanced to demonstrate that it was fair to disappoint the expectation was that the investigation into the Hillcrest incident on its own had not found any evidence of collusion. That misses the point, however, that the proposed analysis was on a wider scale involving linked cases and designed to assess whether there were additional strands of collusion.

[66] The second argument was based on the conclusion of the relevant PSNI officers that no purpose was to be served by pursuing this approach. The first

difficulty in that argument is that there is nothing to indicate that those who came to the conclusion had any access to the HEAD and none of those officers purported to have carried out any form of evaluation based on the analytical database. Secondly, it was critical to the representation that the officers carrying out the analysis of collusion were independent in the sense that they had not served with the police in Northern Ireland and had not been members of the security forces. In those circumstances the conclusions reached by officers of the PSNI in the absence of any evaluation of the relevant materials leading to the defeat of the expectation contradicted the underlying purpose of the original commitment. There was never any suggestion that the underlying purpose should be defeated in that way and no explanation was offered to explain why the need for independence was no longer appropriate.

[67] We accept that the representation in this case amounted to a procedural legitimate expectation. We do not consider that the appellant has shown that it was fair to disappoint the expectation and accordingly we agree that the learned trial judge was entitled to conclude that the respondent was entitled to rely upon it.

Article 2

[68] The Convention Rights became enforceable in domestic law as a result of the passage of the HRA. The death in this case occurred on 17 March 1976 some 24 years prior to the coming into force of the HRA. The temporal jurisdiction of the separate obligation to carry out an effective investigation by virtue of Article 2 of the Convention was considered by the ECtHR in Silih where the court concluded that there had to be a genuine connection between the investigation and the death. The nature of the genuine connection was further examined by the court in Janowiec where the Grand Chamber identified three limitations on the jurisdiction to examine pre-ratification claims. The first was that the duty arose only in relation to procedural acts which were capable of discharging the investigative duty. The second was that the genuine connection between the death and the critical date was primarily a temporal one and should not exceed 10 years. The third was that in exceptional circumstances it may be justified to extend the time limit further into the past on condition that the requirements of the Convention values test have been met.

[69] Despite the submissions of the respondent it is clear from the judgment of Lord Kerr in Finucane at [111] that these tests apply also to any proceedings seeking to enforce the investigatory duty in respect of a death which occurred prior to the commencement of the HRA. There is no exception for Brecknell cases, reflecting the jurisprudence of the Grand Chamber in Janowiec at [144]. At [108] of Finucane Lord Kerr recognised that in certain circumstances the significance of the time lapse diminishes.

> "A period of ten years or less between the triggering event (the murder of Mr Finucane) and the critical date (the coming into force of the HRA) is not an immutable requirement. The time which elapsed between the two dates is a factor of importance but,

> when taken into account with the circumstance that the vast bulk of noteworthy inquiry into his death has taken place since the HRA came into force…the significance of the time lapse diminishes."

[70] The difficulty in this case is that the learned trial judge did not deal with the temporal aspect of this case despite the fact that extensive supplementary submissions on this issue were made by both parties. A substantial part of the investigation clearly occurred between 1976 and 1981 as a result of which Busby was convicted. This is not a case in which it could be said that the vast bulk of noteworthy inquiry into the death had taken place since the HRA came into force. The exercise conducted by the HET largely consisted of the rehearsing of materials that were already available and exposing the probable involvement of others on the basis of intelligence which has been known to the police authorities for many years. It examined the materials for any evidence of collusion and found none. All of the relevant investigative leads in connection with the event were followed up at the time. The promise in this case relates to an analysis of the material which had been generated as a result of the investigation of the other cases rather than some fresh investigative material. That analysis may indicate a basis for the conclusion that collusion in the Glenanne Series may have been wider than so far established.

[71] Finucane makes it clear that the time which elapsed between the two dates is a factor of importance. The principle is that the temporal connection is important in that it enables the subsequent investigation to be placed in its context having regard to the earlier steps taken in respect of the death. In our view in light of the extensive investigations which occurred in the period between 1976 and 1981 it is difficult to see any proper basis upon which the genuine connection test could be established in relation to this death which occurred more than 24 years prior to the commencement of the HRA. It was submitted that the Convention values test was engaged in this case. At [150] of Janowiec the ECtHR indicated that the Convention values test was engaged where the triggering event amounted to the negation of the very foundations of the Convention. The examples were serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments. We do not consider that the Convention values test is met and the examples are far removed from this case.

[72] Accordingly we conclude that there is no enforceable Article 2 duty in domestic law in this case.

Remedy

[73] It must follow from our finding on Article 2 that the terms of the declaration must change. We will make a declaration in the following terms:

> "It is declared that the impugned decision breached Mr Barnard's legitimate expectation that independent police officers would analyse the Historical Enquiries Analytical Database to assess whether the analysis pointed to wider collusion between terrorists and the security forces in the Glenanne Series than that identified in the examination of the individual cases."

[74] We have found that the legitimate expectation generated was procedural. That will require a fresh approach by independent officers determining the appropriate response to the expectation generated. It is not the function of this court to direct how those independent officers should proceed. The Chief Constable's task is to appoint independent officers who should then determine how to respond to the expectation. We do not consider that this is an appropriate case for an Order of Mandamus since we can give very limited meaningful direction to the independent team so appointed. If, however, the Chief Constable unduly delays in appointing independent officers he would be at risk of further proceedings challenging such a failure.

Conclusion

[75] We conclude:

(i) The respondent cannot rely on Article 2 of the Convention because of the passage of time.

(ii) We accept that the respondent had a procedural legitimate expectation that an analytical report on collusion would be carried out by an independent police team.

(iii) The LIB is not sufficiently independent for the purpose of carrying out such a report

(iv) We do not consider that an Order of Mandamus is appropriate.