

Neutral Citation No: [2021] NIQB 18

Ref: HUM11423

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 19/02/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**IN THE MATTER OF AN APPLICATION BY CRIS DONEGAN
FOR JUDICIAL REVIEW**

**Fiona Doherty QC and Seamus McIlroy (instructed by Finucane Toner Solicitors) for the
Applicant**

**Tony McGleenan QC and Laura Curran (instructed by the Crown Solicitor's Office) for
the proposed Respondent**

**Andrew McGuinness (instructed by the Police Ombudsman for Northern Ireland) for the
proposed Notice Party**

HUMPHREYS J

Introduction

[1] This is an application for leave to apply for judicial review brought by the applicant whose father, Jim Donegan, was brutally murdered on 4 December 2018 whilst picking up his child from school on the Glen Road in Belfast.

[2] In the days subsequent to the murder, it was explained to the victim's family that the Police Service of Northern Ireland ('PSNI') had been aware of a specific threat to Mr. Donegan's life but this information had not been passed onto him. The family was told that the matter would be investigated by the Police Ombudsman for Northern Ireland ('PONI').

[3] The applicant himself grew frustrated at delays in the investigatory process and consulted a solicitor on 1 June 2020. The solicitor made contact with PONI on 9 June and was advised that the investigation had come about as a result of a 'call-in' by PONI, not a referral by PSNI.

[4] The PONI investigation is ongoing and this application does not seek any relief in respect of this process. The decision under challenge is the failure by the PSNI to refer the matter to PONI under the statutory provisions of the Police (Northern Ireland) Act 1998 ('the 1998 Act'). The court is grateful to all Counsel for the clarity and economy of their oral and written submissions.

The Statutory Framework

[5] Part VII of the 1998 Act established the office of PONI to, *inter alia*, investigate complaints against officers of the PSNI. The jurisdiction of PONI was extended to 'other matters' by section 55 of the 1998 Act which provides:

"(2) The Chief Constable shall refer to the Ombudsman any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person.

(3) Where any matter is referred to the Ombudsman under subsection (1) or (2), he shall formally investigate the matter in accordance with section 56.

(4) The Chief Constable may refer to the Ombudsman any matter which –

(a) appears to the Chief Constable to indicate that a member of the police force may have –

(i) committed a criminal offence; or

(ii) behaved in a manner which would justify disciplinary proceedings; and

(b) is not the subject of a complaint,

if it appears to the Chief Constable that it is desirable in the public interest that the Ombudsman should investigate the matter.

(4A) The Director shall refer to the Ombudsman any matter which –

(a) appears to the Director to indicate that a police officer –

(i) may have committed a criminal offence; or

(ii) may, in the course of a criminal investigation, have behaved in a manner which would justify disciplinary proceedings; and

(b) is not the subject of a complaint,

unless it appears to the Director that the Ombudsman is already aware of the matter.

(4B) *In subsection (4A) “criminal investigation” has the same meaning as in Part 2 of the Criminal Procedure and Investigations Act 1996 (c. 25).*

(5) *Where any matter is referred to the Ombudsman under subsection (4), or (4A), he shall formally investigate the matter in accordance with section 56 if it appears to him that it is desirable in the public interest that he should do so.*

(6) *The Ombudsman may of his own motion formally investigate in accordance with section 56 any matter which –*

(a) *appears to the Ombudsman to indicate that a member of the police force may have –*

(i) *committed a criminal offence; or*

(ii) *behaved in a manner which would justify disciplinary proceedings; and*

(b) *is not the subject of a complaint,*

if it appears to the Ombudsman that it is desirable in the public interest that he should do so.

(7) *The Ombudsman shall notify –*

(b) *the Chief Constable, in the case of a matter referred under subsection (2) or (4),*

of the outcome of any criminal or disciplinary proceedings brought against a member of the police force in respect of, or in connection with, the matter so referred.”

[6] In essence, therefore, the Chief Constable is under a duty under section 55(2) to make a referral to PONI when it appears to him that the conduct of a member of the PSNI may have resulted in the death of an individual. There is also a discretionary power to make a referral under section 55(4) when it appears that a member of the PSNI has either committed a criminal offence or behaved in such a way as to merit disciplinary proceedings and it appears to be in the public interest that PONI should investigate.

[7] PONI’s power to instigate an investigation of its own motion under section 55(6) mirrors the Chief Constable’s discretionary power in section 55(4). The court was told that there is in place a PSNI policy entitled “Public Complaints and the Role of the Police Ombudsman” (Service Instruction SI0517). This document includes details of the matters to be notified by PSNI to PONI in order that it may consider whether to open an investigation under section 55(6). It states:

“Where the Chief Constable does not believe the criteria for a Chief Constable’s referral has been met, he will nonetheless notify PONI of certain matters. This will enable PONI to consider

whether he wishes to call himself in under section 55(6) of the Police (NI) Act 1998...Matters to be notified to PONI are as follows:

- (a) Any matter resulting in serious injury to a person as a result of police action;*
- (b) Cases where police have discharged a firearm;*
- (c) Use of AEP or TASER stun guns;*
- (d) Use of CS Incapacitant Spray on a person under 18 years old;*
- (e) Any sexual offence alleged to have been committed on duty; or*
- (f) Any allegation which may cause widespread public concern or attract media attention."*

The Decision Under Challenge

[8] On 7 December 2018, Temporary Deputy Chief Constable Stephen Martin, to whom responsibility had been delegated by the Chief Constable, determined that the legislative requirements for a referral under either section 55(2) or section 55(4) were not met, but he did consider it appropriate to make a notification to PONI under the extra-statutory policy set out above.

[9] On 10 January 2019 PSNI was informed that PONI had determined that it would carry out an investigation pursuant to its power under section 55(6). This investigation is ongoing. There is no assertion by the applicant that the extant investigation is different in quality or substance from one which would have been instigated by a Chief Constable referral under section 55(2) or section 55(4).

The Grounds for Judicial Review

[10] In a commendably succinct Order 53 statement, the applicant claims that the impugned decision was made in breach of statutory duty, both in respect of section 55(2) and section 55(4), was contrary to Article 2 ECHR and was irrational in the *Wednesbury* sense.

[11] The proposed respondent contends that the applicant does not enjoy an arguable case on the merits, but also that the application is out of time and the matter is academic in the *Salem* sense. I propose to deal with the merits of the application before considering the other issues. In doing so, I remind myself of the relatively modest threshold which the applicant must overcome in order to be granted leave to apply for judicial review. He must establish that he has an arguable case, i.e. one with a realistic prospect of success.

[12] Section 55(2) imposes a mandatory duty on the Chief Constable to make a referral to PONI. Any failure to comply with such an obligation would render the decision unlawful. However, as the proposed respondent points out, the duty is not engaged until the Chief Constable has carried out an evaluative exercise and determined that the conduct of the officer may have resulted in the death. The wording of the statutory provision “*may have resulted in*” is different from the more familiar “*may have caused or contributed to*” and part of the task of the court is to consider whether these terms are, in fact, synonymous or represent a different test. It could be argued, for instance, that the terminology of “*resulted in*” limits the statutory duty to cases where a police officer has used lethal force. If this were the case, the Chief Constable would not be obliged to refer cases which fall within the broad spectrum of ‘collusion’ under section 55(2) although would have a power to do so under section 55(4). Where would this leave potential sins of omission, such as the failure to pass on specific intelligence information to those whose lives are under threat? I have concluded that it is arguable, as a point of statutory interpretation and in light of the State’s obligations under Article 2 of ECHR, that the section 55(2) obligation is triggered in such circumstances. There is at least an arguable case that the Chief Constable acted in breach of his section 55(2) duty by failing to refer the matter under consideration to PONI. Whether leave should be granted to apply for judicial review will, however, be determined by the outcome of the other issues dealt with later in this judgment.

[13] Section 55(4) is couched not in mandatory but in discretionary terms. Nonetheless, the applicant asserts that the proposed respondent has acted in breach of statutory duty by failing to make a referral to PONI pursuant to this provision. It is not suggested that any PSNI officer committed a criminal offence in the instant case but it is alleged that a member may have behaved in a manner justifying disciplinary proceedings and it would be desirable in the public interest that PONI should investigate the matter. To an extent, this position is supported by PONI’s decision to ‘call-in’ the investigation under section 55(6).

[14] The proposed respondent says that there is no duty imposed by section 55(4) in any event and therefore the applicant’s contentions in this regard are flawed. However, it has been held in recent authorities in this jurisdiction – see, for example *Re Turley’s Application* [2020] NIQB 57 & [2021] NICA 10 that, in certain circumstances, an apparent discretionary power may import a positive duty. In the context of the Victims’ Payments Regulations 2020, Morgan LCJ concluded:

“The apparently permissive wording of Regulation 9(1)(b) does not prevent the imposition of a duty to pay”

[15] I would emphasise that in the instant case I have not had the benefit of any evidence from the proposed respondent as to his interpretation of the relevant statutory provisions or his decision making process. Nor have the parties made

detailed submissions on the question of statutory interpretation. I have concluded, however, at this stage that there is at least an arguable case that, in certain circumstances, section 55(4) could import a duty on the Chief Constable. If, for instance, the court were to determine that the section 55(2) duty was limited in scope to cases where the police officer had used lethal force, it could be the case that section 55(4) would operate more widely in the context of cases where a death has occurred. It is difficult to foresee circumstances in which the Chief Constable could determine that an officer may have committed a disciplinary offence, and it was in the public interest for PONI to investigate, yet exercise his discretion to refuse to refer the matter.

[16] The applicant also alleges that the decision in question was unlawful as being in breach of the duty owed by the proposed respondent under article 2 of the European Convention on Human Rights and section 6 of the Human Rights Act 1998. Article 2 enshrines the protection of the right to life and, as interpreted in *Osman -v- UK* [1998] 29 EHRR 245, this includes an obligation on the State to take appropriate steps to safeguard the lives of those in the jurisdiction. Such preventative operational measures can include an obligation to protect an individual whose life is under threat from a non-state actor. The applicant in this case no doubts contends that the State failed in this duty since the PSNI did not warn his father of the specific threat to his life.

[17] However, that issue goes to the heart of the investigation currently being carried out by PONI; it does not speak to the mechanism by which that investigation was triggered. As matters stand, there is no criticism of the PONI investigation nor does this court have any role to play in determining whether the deceased's Article 2 rights were breached in the manner alleged. For this reason, the claim in respect of breach of Article 2 is not arguable and I refuse leave on this ground.

[18] The challenge grounded on irrationality adds nothing to the case. It is hard to conceive of a basis upon which the proposed respondent could have made a lawful decision within section 55 yet be found to have acted irrationally. I therefore refuse leave on this ground also.

Is the Challenge Academic?

[19] The proposed respondent contends that, in light of the fact that a section 55(6) investigation is underway, which is for all intents and purposes the same as a section 55(2) or section 55(4) investigation, this challenge is purely academic.

[20] In *R v Secretary of State for the Home Office ex parte Salem* [1999] 1 AC 450, the House of Lords held that there was a discretion to hear a public law dispute, even where the issue is academic between the parties, where there is a good reason in the public interest to do so. The examples given in that case included a discrete point of

statutory construction or where there are a large number of cases in existence awaiting the outcome of the issue.

[21] There is no evidence in this case that there are any other cases in which the section 55 issue arises. However, the applicant argues that this is a discrete point of statutory construction and one which gives rise to important matters of public concern. Reliance is placed upon the judgment of Kerr J in *Re E's Application* [2003] NIQB 39 wherein he stated:

"It appears to me that one must conclude that the issue of whether police action in relation to the Holy Cross dispute is amenable to judicial review is one which, even if it is academic, should be decided by the courts. This is not because of the wide coverage that the episode received in the media or because of the intense controversy that it generated but because the reviewability of police actions in these circumstances and the propriety of such actions are matters in which the public has a legitimate interest."

[22] It is recognised that the proposed respondent made a notification to PONI under the published policy which resulted in the decision being made under section 55(6) to instigate the investigation. However, there must nonetheless be a legitimate public interest in the application of the statutory duties and powers created by section 55 of the 1998 Act and how they interact with the handling of intelligence information by the PSNI. Public confidence in policing requires accountability both in terms of substance and procedure.

[23] The content and application of the agreed policy are also matters of public interest. The only basis upon which the Chief Constable could have notified PONI under the terms of that policy was that there was an *"allegation which may cause widespread public concern or attract media attention"*. In fact, there was no allegation in existence at the time of the notification since the victim's family were unaware of the intelligence information. It may be, therefore, that the fact of the existence of a section 55(6) investigation is entirely fortuitous.

[24] Whilst I accept therefore that the challenge may be academic in terms of the legal rights and obligations of the parties, I have nonetheless determined that there is in play here a discrete point of construction of section 55 of the 1998 Act, and there is legitimate public interest in the court proceeding to hear the matter.

Delay

[25] The applicant seeks an extension of time under Order 53 rule 4(1) of the Rules of the Court of Judicature (Northern Ireland) 1980 in order to pursue this application. The Court needs to be satisfied that there is a 'good reason' to extend time. The

leading case in this jurisdiction on the question of delay and the extension of time is *Re Laverty's Application* [2015] NICA 75. The Court of Appeal stated at paragraph [21]:

"The Court may extend time for good reason. Although not stated in legislation in this jurisdiction, consideration of good reason would include consideration of the likelihood of substantial hardship to, or substantial prejudice to the rights of, any person and detriment to good administration. Also included would be whether there was a public interest in the matter proceeding."

[26] The applicant in this case was not aware of the decision which had been made on 7 December 2018 until 9 June 2020. The judicial review proceedings were not commenced until 29 September 2020. The reasons put forward for the delay are, essentially, threefold:

- (i) The applicant's solicitors were engaged in pre-action correspondence;
- (ii) The applicant was himself out of the jurisdiction for a period of time in July and August; and
- (iii) There were delays associated with the obtaining of legal aid.

[27] The response to the pre action protocol letter was received on 8 July 2020. This was followed by a further letter from the applicant's solicitor raising a "*wider point of public importance*" which related to the frequency of the exercise of the section 55 powers. This was not responded to until 7 August 2020.

[28] The application for legal aid was made on 6 August but refused on 13 August. This was successfully appealed to an Appeal Panel on 24 September, with the proceedings launched 5 days later.

[29] In *Re Watterson's Application* [2021] NIQB 16 I recently cautioned:

"Practitioners ought to be aware that delays caused by the processing of legal aid applications and appeals will not automatically be accepted as good reasons for the extension of time under Order 53 rule 4(1). In R (on the application of Kigen) v Secretary of State for the Home Department [2015] EWCA Civ 1286 the Court of Appeal in England & Wales considered whether delay awaiting a decision of the Legal Aid Agency provided a good reason for failure to adhere to time limits. Moore-Bick LJ stated:

"Delay of any kind in proceedings for judicial review is to be avoided as far as possible... The explanation

provided, namely, that the appellants were awaiting the outcome of their application for legal aid, is not one that I think can be regarded as satisfactory in the circumstances of this case. The appellants' solicitors were alive to the time limit, but appear to have taken no steps to ensure that the relevant form was lodged or to advise the appellants that they should lodge it themselves in order to preserve the position."

[30] Each case, and the consideration of the question of good reason, turns on the particular circumstances. Delay in obtaining legal aid can be a factor as the Court of Appeal confirmed in *Re Laverty* [supra] at paragraph 26. In this case, I have already considered the question of the public interest in the determination of this dispute in the context of the academic nature of the challenge. This, together with the reasons put forward in the applicant's affidavit in relation to the delay, have led me to conclude that there is good reason to extend the time for the bringing of this application.

Conclusion

[31] Accordingly I grant leave to apply for judicial review on the grounds set out at paragraph [5](i)(a) of the Order 53 Statement, namely that the proposed respondent breached the statutory duties imposed by section 55(2) and section 55(4) of the 1998 Act. I refuse leave in respect of the other grounds.

[32] I will reserve the issue of costs and hear the parties as to proposed directions for the hearing of the application.