OUTER HOUSE, COURT OF SESSION

[2024] CSOH 82

A152/24

OPINION OF LORD SANDISON

In the cause

SHARON MacFADYEN

Pursuer

against

(FIRST) THE SCOTTISH MINISTERS;
(SECOND) THE LORD ADVOCATE; and
(THIRD) THE CHIEF CONSTABLE OF POLICE SCOTLAND

Defenders

Pursuer: McBrearty KC; Drummond Miller LLP
First Defender: Reid KC, Scullion; Anderson Strathern
Second Defender: James: Scottish Government Legal Directorate
Third Defender: Ledingham Chalmers

21 August 2024

Introduction

[1] The first defenders, the Scottish Ministers, seek by way of motion a 6 month sist of this action raised against them, the Lord Advocate and the Chief Constable of Police Scotland in respect of the death of the pursuer's nephew, Allan Marshall, while in the custody of the Scottish Prison Service on 24 March 2015, or at least such a sist in respect of the action as directed against them. The motion was opposed in both its alternatives by the pursuer. The Lord Advocate, though represented at the motion hearing, adopted a neutral

position in relation to its disposal. The Chief Constable did not appear and was not represented.

Background

[2] Allan Marshall died as a result of a hypoxic-ischaemic brain injury on 28 March 2015, four days after having been restrained by prison officers in the employment of the Scottish Prison Service while a remand prisoner at HMP Edinburgh. The SPS is an Executive Agency of the Scottish Government. The pursuer brings a claim as a victim in terms of section 7(1) of the Human Rights Act 1998 in respect of the defenders' alleged failure to comply with their respective substantive and procedural obligations under the 1998 Act. In broadest outline, it is alleged that the prison officers who restrained Mr Marshall (for whose actions the first defenders are ultimately responsible in law) failed to comply with their obligations under Article 2 of the European Convention on Human Rights by using force against him which was not absolutely necessary nor strictly proportionate to any relevant legitimate aim, and separately by failing to ensure that any risk to his life was minimised, resulting in his preventable death.

[3] In relation to the other defenders, the pursuer claims that the duty to protect life under Article 2 necessitates an official investigation which is effective, independent and expeditious in circumstances where individuals have been killed as a result of the use of force, in order to secure the effective implementation of the domestic law safeguarding the right to life and to ensure accountability for a death occurring involving state agents. It is alleged that in various particularised ways the second and third defenders failed and are continuing to fail to carry out such an investigation and consequentially are in breach of

their obligations under the Article. The pursuer seeks declarators that each of the defenders acted unlawfully, together with awards of damages against them by way of just satisfaction.

[4] A Fatal Accident Enquiry was held by the Sheriff at Edinburgh in respect of Mr Marshall's death. It began in July 2018 and concluded in August 2019 with a determination that his death had been entirely preventable. On 25 May 2015, the Crown renounced any right to prosecute any employee of the SPS for any crime that might be thought to arise out of what had happened on the day of Mr Marshall's restraint. The prison officers involved in the restraint gave evidence at the FAI, and CCTV footage of much of what transpired was also examined.

[5] Since at least March 2023 Police Scotland, at the direction of the second defender, has been investigating the possibility of criminal corporate responsibility by the SPS in respect of Mr Marshall's death. The first defenders understand that that investigation encompasses whether an offence has been committed under the Health and Safety at Work etc Act 1974 as well as whether the crime of corporate homicide may have been committed. They maintain that the action should be sisted prior to their being required to lodge defences, so as to avoid prejudice to the proper administration of justice in any subsequent criminal proceedings.

European Convention on Human Rights

[6] Article 2 of the European Convention on Human Rights is in the following terms:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law.
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> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
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> - in defence of any person from unlawful violence

- in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, and
- in action lawfully taken for the purpose of quelling a riot or insurrection."

First defenders' submissions

[7] Senior counsel for the first defenders submitted that it would be prejudicial to require them to lodge a defence to the claim as that would require them to state a position on criminal charges which might be brought against them or others.

[8] It was accepted that, unless the interests of justice dictated otherwise, civil proceedings should be litigated continuously and without interruption, and that it was for the party seeking a sist to show why that was necessary in the interests of justice. Whether to grant a sist was a discretionary decision. It was competent to sist a cause in part (eg in respect of one defender but not another): *Bee* v *T&N Shelf Twenty Six Ltd* 2002 SLT 1129.

[9] In *Rangers FC Group Ltd* v *Joint Liquidators of RFC 2012 plc* [2017] CSOH 85, liquidators of a company facing a creditor's claim concluded that the agreement founding the claim was part of a fraudulent scheme to which the creditor was a party, and rejected it. There were ongoing criminal proceedings in connection with the same matter. In an appeal to this court against the liquidators' adjudication, parties wished a debate to be fixed, but the Lord Ordinary (Doherty) instead sisted the proceedings, noting:

> "[11] Having considered the terms of the indictment in the criminal proceedings I am satisfied that (i) whether there was a fraudulent scheme involving the noter, and (ii) whether the noter was the recipient of unlawful financial assistance from the Company, are both issues which arise in the proceedings. In those circumstances hearing the appeal before the criminal proceedings have been concluded would trespass upon matters at issue before the High Court of Justiciary, with the risk of prejudice to the administration of justice in those proceedings. The risk can be avoided by sisting the appeal meantime. That will give rise to some delay in the appeal's disposal. Any delay is prejudicial to the interests of creditors (the noter as secured creditor if the noter's claim is a good one, or the body of unsecured creditors

> if it is not). However, in my opinion that disadvantage, and any disadvantages to the respondents arising from the sist, are outweighed by the benefit to the administration of justice in the criminal proceedings.
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> [12] Prohibitions on reporting might reduce, but in my opinion would not remove, the risk of the appeal proceedings impinging upon the criminal trial. Nor do I think it can be said with confidence *ab ante* that any evidence about the appeal would be of no relevance to, and would to be inadmissible in, the criminal proceedings. Even if it was inadmissible, in what may well be the highly charged atmosphere of the trial there can be no guarantee that it would not emerge."

[10] Article 2 complaints such as those advanced in the present case had to be subjected to the most careful scrutiny, taking into account not only the actions of the agents of the state who actually administered the force but also the surrounding circumstances, including matters such as the planning and control of the actions under examination. In *Boukrourou* v *France*, App No 30059/15, 17 November 2017, the Fifth Section of the European Court of Human Rights had observed:

> "[54] The Court reiterates that Article 2 of the Convention, which safeguards the right to life, ranks as one of the most fundamental provisions in the Convention. Together with Article 3 of the Convention, it enshrines one of the basic values of the democratic societies making up the Council of Europe. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, among other authorities, *McCann and Others* v *the United Kingdom*, 27 September 1995, §§ 146-47, Series A no. 324; *Taïs v. France*, no. 39922/03, § 82, 1 June 2006; and *Giuliani and Gaggio* v. *Italy* [GC], no. 23458/02, § 174 and 177, ECHR 2011 (extracts)).
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> [55] In the light of the importance of the protection afforded by Article 2, the Court must subject to the most careful scrutiny complaints about deprivation of life, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination (see, for example, *McCann and Others*, cited above, § 150, and *Scavuzzo-Hager and Others* v. *Switzerland*, no. 41773/98, § 89, 7 February 2006).
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> [56] The Court reiterates that the exceptions delineated in paragraph 2 indicate that Article 2 extends to, but is not concerned exclusively with, intentional killing. The text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an

> unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c) (see *McCann and Others*, cited above, § 148, and *Saoud v. France*, no. 9375/02, 9 October 2007).
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> [57] In assessing evidence, the Court adopts the standard of proof "beyond reasonable doubt". However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of unrebutted presumptions of fact (see *Centre for Legal Resources on behalf of Valentin Câmpeanu* v. *Romania* [GC], no. 47848/08, § 131, ECHR 2014)."

[11] Given the inherently vulnerable position of persons in custody, the state had a duty to protect them. Accordingly, where a person was in good health when he went into custody but was found to be injured on release, it was incumbent upon the state to provide an explanation of how such injuries were caused. That obligation was particularly stringent where the individual had died. In essence, the burden of proof rested on the state to provide a satisfactory and convincing explanation. In *Salman v Turkey* (2002) 34 EHRR 17 the ECtHR had observed:

> "[99] In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused. [See, amongst other authorities, *Selmouni* v. *France*: (2000) 29 E.H.R.R. 403, para. 87.] The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies.
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> [100] In assessing evidence, the general principle applied in cases has been to apply the standard of proof "beyond reasonable doubt". [See *Ireland* v. *United Kingdom* (N25): (1979-80) 2 E.H.R.R. 25, para. 161.] However, such proof may follow from the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death occurring during that detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation."

[12] Where the state had employed properly trained staff and taken all the relevant general precautions, but a prisoner nonetheless died as a result of the negligence of a member of the prison staff, the prison authorities would be liable for that negligence but there would be no violation of Article 2 – *Savage* v *South Essex NHS Trust* [2009] 1 AC 681, [2009] 2 WLR 115 per Lord Rodger of Earlsferry at [31]:

> "If the authorities failed to put in place appropriate general measures to prevent suicides among the prisoners in a particular prison and, as a result, a prisoner was able to commit suicide, there would be a breach of article 2. If, on the other hand, the authorities had employed properly trained staff and taken all the relevant general precautions, but a prisoner none the less succeeded in committing suicide because of the casual negligence of a member of the prison staff, the prison authorities would be vicariously liable for that negligence, but there would be no violation of article 2."

[13] Proceedings in which it was claimed that a public authority had acted unlawfully in terms of the 1998 Act had to be brought within one year of when the act complained of took place or such longer period as the court considered equitable: section 7(5) of the 1998 Act. This action had been brought in May 2024, meaning that the issue of equitable extension of the limitation period would be a live one. When asked to extend the limitation period, the court was bound to have regard to the strength of the underlying case when having regard to the equities of such an extension: *Rabone* v *Pennine Care NHS Foundation Trust* [2012] UKSC 2, [2012] 2 AC 72, [2012] 2 WLR 381 at [79].

[14] In respect of the offence of corporate homicide, that was a statutory offence created by the Corporate Manslaughter and Corporate Homicide Act 2007. It was committed where the way in which an organisation managed or organised its activities (i) caused a person's death; and (ii) that amounted to a gross breach of a relevant duty of care owed by the organisation to the deceased and the way in which its activities were organised or managed by its senior management was a substantial element of the breach of duty: section 1 of the 2007 Act. A "relevant duty of care" was, read short, a duty of care under the law of

negligence: section 2. The offence could only be indicted in the High Court: section 1(7); and no prosecution in respect of the offence had yet been brought in Scotland. In the present circumstances, any prosecution under the 2007 Act could only be brought against the first defenders as the legal entity responsible for the SPS.

[15] There was a clear privilege against self-incrimination: "It is a sacred and inviolable principle of the criminal jurisprudence of Scotland, that no man is bound to criminate himself": *Livingston* v *Murrays* (1830) 9 S 161 at 162 per Lord Gillies. A corporate entity enjoyed the same privilege against self-incrimination as a natural person: *Triplex Safety Glass Company Limited* v *Lancegaye Safety Glass (1934) Limited* [1939] 2 KB 395.

[16] An FAI was held before a Sheriff for the purpose of establishing the circumstances of a death and considering what steps, if any, might be taken to prevent other deaths in similar circumstances: section 1 of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. An FAI was mandatory where a person died whilst in legal custody: section 2. It was not the purpose of an FAI to establish civil or criminal liability, and it did not do so: section 1(4). An FAI determination was not admissible evidence and might not be founded upon in any judicial proceedings of any nature: section 26(6).

[17] Against that background, the Court should exercise its discretion to sist the cause. The parties being investigated (by the third defender at the direction of the second defender) included the first defenders themselves. Only the first defenders could be prosecuted under the 2007 Act. They could not be prosecuted under the 1974 Act: section 48(1). They did not know who was being investigated with a view to possible prosecution under that Act. There was a near total overlap between the grounds relied upon in the present action and what would have to feature in any prosecution, either under the 1974 Act or in respect of corporate homicide. In practical terms, a defence to the present claim would require the first

defenders to plead a position on (i) the incident itself; (ii) the use of force and the reasonableness of the response by the prison officers; (iii) the systems of work; and (iv) the training given to officers. Each of those matters would, should there be a prosecution under the 2007 Act in particular, be matters on which the Crown would require to lead evidence in order to discharge its burden of proof. The present claim could not be answered by the first defenders simply opting to put the pursuer to proof (i.e. by advancing no positive position). Leaving aside the fact that the Court had deplored such an approach – *Urquhart* v *Sweeney* 2006 SC 591, 2005 SLT 422 at [44] – a burden rested on the first defenders in a claim of this nature: *Salman*. In substance, the first defenders would have to plead and run their defence to any likely criminal charge in these proceedings. The risk of prejudice was exacerbated by the identity of the co-defenders: respectively the very body investigating, and the person who would prosecute. Other measures (such as reporting restrictions) could provide no mitigation given that any defences would require to be intimated to those other defenders. Undertaking to co-operate with a criminal investigation, as the first defenders had done, did not require disclosure of the defence to a charge which was under consideration. Separately, whilst the first defenders had committed to co-operate, it did not follow that any individual involved would co-operate, and could not be compelled to do so. The risk of prejudice was further increased by the fact that the FAI had already taken place and there had been considerable media coverage following on from it. Further media attention, seemingly at the behest of the pursuer, had already been generated by the present proceedings. Proceeding with this action, with the media attention that could be anticipated, created a further risk of prejudicing the proper administration of justice should criminal proceedings be brought.

[18] The claim advanced, and the police investigation that was ongoing, were novel. There had never been a prosecution under 2007 Act in Scotland. Nor, so far as the first defenders were aware, had an Article 2 claim of this nature been previously raised in Scotland. If the Court was going to be asked to consider and determine an important and novel issue, it was in the interests of justice that the first defenders could respond to that case uninhibited. Given that any prosecution under the 2007 Act would be novel, it was particularly important that care was taken to ensure any criminal proceedings were not prejudiced by anything done in or arising from these civil proceedings. In short, the issues that led to the sist in *Rangers FC Group Ltd* caused at least as much concern in this case. Finally, should the current investigation result in a prosecution and ultimately a conviction, the pursuer would have the benefit of the presumption in section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968. Should these proceedings go first, however, the pursuer would need to lead evidence to prove all of her averments, and she could not found on the FAI determination to do so.

[19] In summary, the matters for determination in these civil proceedings and the matters currently under investigation by the third defender, at the direction of the second defender, were all but identical and they might be the subject of a prosecution. In such circumstances, the first defenders submitted that there was a real risk of prejudice to the proper administration of justice should this action proceed while the criminal investigation continued. Accordingly, the court was invited to sist the action for 6 months, and thereafter to review the situation as it then appeared.

[20] In the event that the court was not persuaded to sist the action as a whole, it was invited to sist it so far as it concerned the first defenders. The cases directed against the first defenders on the one hand and the Lord Advocate and the Chief Constable on the other

were distinct. The case against the first defenders concerned a concluded act. The cases against the Lord Advocate and the Chief Constable concerned the (continuing) investigation into that concluded act. Different issues arose in the two cases. The interests of individuals who might be subject to prosecution were not engaged by the case against the Lord Advocate and Chief Constable. The issue which had prompted the first defenders to seek a sist, being the risk of prejudice to the proper administration of justice in the context of a possible criminal prosecution, did not arise in respect of either the second or third defenders.

Second defender's submissions

[21] On behalf of the second defender, counsel confirmed the nature and extent of the immunity from prosecution granted to individuals employed by the SPS, and that the focus of the current police investigation was on the potential impact of the 2007 Act, but otherwise maintained a neutral position.

Pursuer's submissions

[22] On behalf of the pursuer, senior counsel opposed the motion in both its alternatives. Legal issues arising out of Mr Marshall's death had been ongoing for over 9 years without satisfactory resolution. A decision to grant immunity to individuals employed by the SPS in respect of the events of the fateful day had been taken by the Crown as long ago as May 2015, and although it was now accepted by the Crown that the subsequent emergence of certain expert evidence concerning the nature of the restraint techniques deployed rendered that decision an incorrect one, it could not be revoked. There was no rule of law that civil actions should be sisted so as to accord priority to related criminal proceedings; rather, that

was a matter for the court's discretion. In the present circumstances there was no real risk of prejudicing any criminal proceedings which might be brought. The issues raised in the action were peripheral only to those which might feature in any criminal prosecution; there was no real overlap between the two. The only parties truly at risk of prosecution were the first defenders, as responsible for the SPS, in the context of their systems of work judged by the criteria set out in the 2007 Act, and given their status as a public authority they should be providing willing and candid cooperation in both civil and criminal matters.

[23] There was no indication of when the current investigations might be concluded and thus as to when any actual prosecution might commence. Any trial which might eventually take place was, in all probability, years away. In effect, the first defenders were asking for an indefinite sist renewable on a six-monthly cycle. There was a strong public interest in the orderly and expeditious progression of a case such as the present. Any delay which had occurred in the raising of the current action was not the fault of the pursuer. The facts of the events of 24 March 2015 had already been thoroughly canvassed in the context of the FAI, where twelve prison officers had given evidence under immunity from potential prosecution. Although the Sheriff's determination in the FAI could not be adduced in evidence in these proceedings, the evidence given at it could be.

[24] *Rangers FC Group Ltd* was the only Scottish case bearing any relation to the circumstances facing the court, and it contained no statement of principle, but rather was decided purely on its own facts.

[25] In *Mote* v *Secretary of State for Work and Pensions* [2007] EWCA Civ 1324, [2008] HLR 27, Richards LJ (with whom Lloyd LJ and Sir Peter Gibson agreed) noted:

> "[30] In his submissions, Mr Lofthouse made clear that he was not arguing for a rule of law that a criminal trial must always take precedence over related civil proceedings. He submitted, however, that a change of approach was required by the

> coming into force of the Human Rights Act 1998. Formerly the civil court or tribunal had a discretion to adjourn if there was a real risk of prejudice to the defendant in concurrent criminal proceedings; but it did not have to adjourn, and might conclude that policy factors came down in favour of a speedy determination of the civil case. Now, however, the civil court or tribunal has a duty to safeguard the defendant's rights in the criminal proceedings and must not proceed with the civil case if to do so would be in breach of those rights.
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> [31] I do not accept that the Human Rights Act 1998 requires any material change of approach in this area. In my judgment the court still enjoys a real discretion whether or not to adjourn. The authorities make clear that a relevant consideration is whether the continuation of the civil proceedings will give rise to a real risk of prejudice to the defendant in the criminal proceedings. If there is a risk of prejudice, then I would expect it to weigh heavily in favour of an adjournment pending the conclusion of the criminal proceedings, but it will not necessarily be decisive. I accept, of course, that the court must not act in breach of the defendant's Convention rights; but it is difficult to see how the continuation of the civil proceedings could give rise in itself to a breach of those rights. As the tribunal chairman held in the present case, the civil proceedings can be conducted in such a way as to respect them. An additional and important safeguard lies in the powers of the judge in the criminal proceedings to stay those proceedings for abuse of process or to limit the evidence admitted at the trial if, in the circumstances then prevailing, it is necessary to do so in order to prevent a breach of Convention rights or to ensure a fair trial. The civil court or tribunal can take into account the existence of those powers when considering the exercise of its own discretion whether to adjourn."

[26] In *V* v *C* [2001] EWCA Civ 1509, [2002] CP Rep 8, the Court of Appeal (Brooke and Waller LJJ and Longmore J) affirmed the proposition that it was a discretionary matter in any given case whether there should be a stay, adjournment or postponement and cited with approval what had been said by Megaw LJ (Brandon LJ concurring) in *Jefferson Ltd* v *Bhetcha* [1979] 1 WLR 898 at 904D – 905B, 905D – H:

> "As I understand it, the judge based his decision on the view that there is an established principle of law that, if criminal proceedings are pending against a defendant in respect of the same subject matter, he, the defendant, is entitled to be excused from taking in the civil action any procedural step, which step would, in the ordinary way, be necessary or desirable for him to take in furtherance of his defence in the civil action, if that step would, or might, have the result of disclosing, in whole or in part, what his defence is, or is likely to be, in the criminal proceedings.
> Mr Owen in this court submitted that that is the general rule which ought to be followed. He did not, as I understand it, submit that it was an invariable or inflexible rule which would deprive the court of any discretion if the matters which I have mentioned were established. With the view, if it were put forward, that this is an

established principle of law, I would respectfully but firmly disagree. There is no such principle of law. There is no authority which begins to support it, other than, to a limited extent, *Wonder Heat Pty. Ltd.* v. *Bishop* [1960] V.R. 489 which, with great respect, I should not be prepared to follow, if indeed it does purport to lay down such a principle. I do not think that it does. I should be prepared to accept that the court which is competent to control the proceedings in the civil action, whether it be a master, a judge, or this court, would have a discretion, under section 41 of the Supreme Court of Judicature (Consolidation) Act 1925, to stay the proceedings, if it appeared to the court that justice – the balancing of justice between the parties – so required, having regard to the concurrent criminal proceedings, and taking into account the principle, which applies in the criminal proceeding itself, of what is sometimes referred to as the "right of silence" and the reason why that right, under the law as it stands, is a right of a defendant in criminal proceedings. But in the civil court it would be a matter of discretion, and not of right. There is, I say again, in my judgment, no principle of law that a plaintiff in a civil action is to be debarred from pursuing that action in accordance with the normal rules for the conduct of civil actions merely because so to do would, or might, result in the defendant, if he wished to defend the action, having to disclose, by an affidavit under Order 14, or in the pleading of his defence, or by way of discovery or otherwise, what his defence is or may be, in whole or in part, with the result that he might be giving an indication of what his defence was likely to be in the contemporaneous criminal proceedings. The protection which is at present given to one facing a criminal charge – the so-called "right of silence" – does not extend to give the defendant as a matter of right the same protection in contemporaneous civil proceedings.

…

Of course, one factor to be taken into account, and it may well be a very important factor, is whether there is a real danger of the causing of injustice in the criminal proceedings. There may be cases – no doubt there are – where that discretion should be exercised. In my view it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors. By way of example, a relevant factor telling in favour of a defendant might well be the fact that the civil action, or some step in it, would be likely to obtain such publicity as might sensibly be expected to reach, and to influence, persons who would or might be jurors in criminal proceedings. It may be that, if the criminal proceedings were likely to be heard in a very short time (such as was the fact in the *Wonder Heat* case in the Victoria Supreme Court) it would be fair and sensible to postpone the hearing of the civil action. It might be that it could be shown, or inferred, that there was some real – not merely notional – danger that the disclosure of the defence in the civil action would, or might, lead to a' potential miscarriage of justice in the criminal proceedings, by, for example, enabling prosecution witnesses to prepare a fabrication of evidence or by leading to interference with witnesses or in some other way. Accepting the existence of a discretion, I have come to the conclusion that there is nothing which has been put forward in this case – presented, as it has been, with great thoroughness and diligence by counsel for the defendant – which leads to the conclusion that it is either just or convenient, bearing in mind fully the defendant's "right to silence" in the

> criminal proceedings, and the reasons for that right, that the civil action should be stayed, or that the Order 14 proceedings should be adjourned, for what that might be worth, without the action being stayed."

[27] The observations in *Savage* to which the first defenders had drawn attention were case-specific and not intended to be of general application. It had been a case concerning casual and negligent omissions to act, whereas the present case was primarily one of commission in the form of the deployment of deliberate force. The relevant law in relation to Article 2 for present purposes had been set out in *Ramsahai* v *Netherlands* (2008) 46 EHRR 43:

> "[286] The Court reiterates that the exceptions delineated in para.2 of art.2 of the Convention indicate that this provision extends to, but is not concerned exclusively with, intentional killing. The text of art.2, read as a whole, demonstrates that para.2 does not primarily define instances where it is permitted to kill an individual intentionally, but describes the situations where it is permitted to 'use force' which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than 'absolutely necessary' for the achievement of one of the purposes set out in sub-paras (a), (b) or (c) (see *Oğur* v *Turkey* (2001) 31 EHRR 40 at [78]).
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> [287] In this respect the use of the term 'absolutely necessary' in art.2(2) indicates that a stricter and more compelling test of necessity must be employed than that normally applicable when determining whether State action is 'necessary in a democratic society' under the second paragraph of arts 8–11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paras 2(a), (b) and (c) of art.2 (ibid.)."

[28] Those issues bore no real relation to those which would arise in the event of a prosecution under the 2007 Act, and so no proper basis for the assertion of any real risk of prejudice to the interests of the first defenders or anyone else.

Decision

[29] The parties who took an active part in the argument of this motion were in agreement that the burden lay on the first defenders, as the litigants seeking to have paused

the ordinary timetable upon which the action would otherwise proceed, to show sufficient cause why such a course of action should be adopted. They were also agreed that the court had a discretion to grant or refuse a motion of this kind; what divided them were the questions of the identification of the principles upon which that discretion should be exercised, and of the application of those principles to the facts of the present case. The only recent Scottish authority touching on these matters which the diligence of counsel had been able to discover was *Rangers FC Group Ltd*. In that case the Lord Ordinary had before him for consideration extant criminal proceedings turning on an indictment which was susceptible to analysis and which justified the conclusion that the continuation meantime of active procedure in the civil litigation would pose a risk of prejudice to the administration of justice in the criminal proceedings to an extent which outweighed the private interests of those concerned with the civil matter. No question of principle was (at least expressly) dealt with.

[30] Against that background, and given that applications for sists of civil actions pending the resolution of what are said to be related criminal proceedings are by no means rare, it may be helpful to commence with a statement of what I understand to be the nature of the relevant principles requiring consideration in this context, particularly since not all of the observations in the relevant English cases read over very clearly to the Scottish procedural situation.

[31] I conceive those principles to be the following:

1. There is no general rule of law, not even a presumption, that the existence of live criminal proceedings ought to result in the sist of related civil litigation.

2. The onus lies on the party seeking a sist in such circumstances to show (on tangible rather than merely theoretical grounds) that the continuation of the civil

litigation poses a specific and real risk of prejudice to the effective prosecution and conclusion of the criminal proceedings. That will require a careful analysis of the respective proceedings and the issues which do, or are likely to, arise in each.

3. A conclusion that there is such a real risk does not in itself justify the sist of the civil proceedings, but rather is a threshold, the surpassing of which then calls for a weighing of the public interest in the proper administration of criminal justice against the same interest in the orderly maintenance of the processes of civil justice, in each case with reference to the particular processes in question rather than as a matter of abstraction. This will include, but not be limited to, the degree of the risk actually posed to the criminal proceedings by the continuation of the civil.

4. Account should also be taken in reaching a final conclusion as to where the balance lies of any reasonably-practicable measures which may properly be taken in either set of proceedings to mitigate or, it may be, eliminate the identified risk.

[32] In the present case, as matters stand, no person has been charged with any offence and there is no indictment available for analysis. There may be cases where the prospect of criminal proceedings is so clear, and their likely nature so obvious, that the absence of charge, complaint or indictment will not present an insurmountable hurdle to the conclusion that existing civil proceedings should be sisted on the application of the principles just noted. In this case, however, it remains entirely unclear whether the current investigation will reveal a sufficiency of evidence to support a prosecution in respect of any particular offence or, if it does, whether the second defender will consider it in the public interest for any such prosecution to be undertaken. It is unknown when matters might be clarified in these regards; for now, the police investigation continues at a somewhat stately pace.

[33] In these circumstances, any analysis of the issues which are likely to arise in future criminal proceedings could be no more than speculative in nature. Speculation is not an adequate ground upon which to reach any conclusion that adherence to the normal timetable in these proceedings poses any real and specific and risk of prejudice to the effective prosecution of any crime which may or may not have been committed. The first defenders accordingly fail to overcome the threshold requirement for consideration of whether a sist might otherwise have been appropriate.

[34] Had such consideration required to be given, a particular factor in the weighing of the balance which would then have had to be struck would have been the nature of this litigation. As observed by the ECtHR in *Boukrourou* at [54], Article 2 represents one of the most fundamental provisions of the European Convention on Human Rights. It is far from clear that the public interest in the proper prosecution of criminality would outweigh the need for the provision of a timely and effective remedy by the civil courts in respect of a case of breach of Article 2 advanced on apparently substantial grounds. Put another way, it would surpass irony for the resolution of a case complaining, *inter alia*, of inordinate delay in the investigation and prosecution of alleged unlawful killing itself to be further delayed in consequence of an eventual investigation and possible prosecution of the subject-matter of the same complaint. Even had the threshold test been met in this case, the first defenders would in any event have faced formidable difficulties in demonstrating that the balance of the public interests engaged fell to be struck in their favour.

[35] The identity and attributes of the party seeking the sist would also have required to be taken into account. While I accept that the privilege against self-incrimination (however so far that may extend) is enjoyed by a state entity just as much as by a private individual or corporation, that does not entail that such an entity is in quite the same position as other

litigants when it comes to the question of assessment of where the public interest lies in determining whether or not to sist civil litigation because of related criminal proceedings. A public authority would be expected, at least in circumstances where only its own interests as such an authority were engaged, to be by default co-operative and frank in any engagement with either civil or criminal processes, and so an application for a sist in the circumstances presently under discussion would be likely to require more cogent justification than might otherwise be the case. The fact that all employees of the SPS have been given a blanket immunity from prosecution in respect of the events of 24 March 2015 greatly reduces, if not indeed eliminates, any weight which might in other circumstances have been accorded to their private interests. In the event, however, the fact that the threshold test has not been satisfied in this case obviates the need for any closer examination of such considerations.

[36] I do not consider that any of the other matters identified in the arguments of parties has any particular significance for the disposal of the motion. I agree that the onus lies on the first defenders to explain the events of 24 March, and the relevant background circumstances thereto, in a manner consistent with due observation of the requirements of Article 2, but do not accept that that feature of the case places it in any special category for present purposes. It seems that a question will arise, probably as a preliminary matter, about the equitable extension of the presumptive one-year time bar, but that simply underlines, rather than detracts from, the need for early and specific pleading of the first defenders' position so that the case may proceed in an orderly manner. I finally accept that the scope for mitigatory measures to be taken in respect of any real risk to the administration of justice is substantially less in the present case than might pertain in other circumstances, for the reasons identified by the first defenders, but since it has not been

demonstrated that any relevant such risk arises in the first place, that is a matter of no moment.

[37] As the first defenders have, for the foregoing reasons, failed to make out a case for a sist of these proceedings to any extent, I shall refuse their motion in both its branches.