**Legacy cases-recent developments**

Three recent cases have implications for those seeking truth and justice for their loved ones.

The cases involve the functioning of the Legacy Investigations Branch of the PSNI, the availability of the Inquest system for historical cases and the chronic underfunding of the Police Ombudsman’s office.

In Mrs McQuillan’s judicial review, she contested the impartial status of the PSNI in respect of a fresh investigation by them into the killing of her sister, Jean Smyth, who was shot dead at Glen Road on 8th June 1972.

On 9th December 1972 an inquest recorded an open verdict into her death.

Subsequent events included a seemingly unconnected trial of a soldier in 1973, a 1975 intelligence report, a Panorama programme in November 2013 and, importantly, the discovery of army records at Kew by Paper Trail.

In the course of the judicial review, further army records were disclosed.

Counsel for Mrs McQuillan criticized the initial RUC investigation but , more importantly, characterized the HET review as inadequate and insufficiently independent from the interests of the security forces, including the MOD.

It was pointed out that the joint Lords/Commons Committee on Human Rights had stated that :

*“as well as having fewer resources at its disposal than its predecessor the Legacy Investigation Branch cannot satisfy the requirements of Article 2 ECHR because of the lack of independence of the Police Service.”*

The court concluded that the original RUC investigation was inadequate, that HET inquiry may have been biased, that the LIB lacked the independence required.

The court declared that the proposed LIB inquiry was not Human Rights compliant. The Chief Constable will now have to request outside assistance for cases such as the killing of Jean Smyth.

It is noteworthy that Paper Trail, which is doing excellent work for families, believes , that as a result of its discoveries in Kew, similar material from the army was removed from the public records.

The second case was a judicial review by Dorothy Johnstone the daughter of Sean Eugene Dalton who was killed by a bomb planted in a flat in Derry on 31st August 1988. The IRA had left the bomb as a trap for security forces. The Police Ombudsman found that the police investigation was flawed and incomplete in several respects, though he did not refer the case to the Public Prosecution Service.

As a result, the deceased’s family wrote to the Attorney General, requesting a fresh inquest.

On 27th March 29 2015 the Attorney declined to order a fresh inquest.

The court refused to interfere with his decision. Here is what it said:

*[37]      In this context one notes several things.  Firstly, the issue of resources is relevant to the decision taken by the State with regard to its Article 2 duty.  This does not, in this particular decision, seem to have figured largely in the decision of the Attorney General but it could have.  It is a matter of public record that the considerable number of new inquests ordered by him has not been matched by an increase in resources to have those inquests held.  The courts seek to deal with these inquests with the resources available but inevitably with very considerable further delays occurring.  Edwards therefore is further authority for the proposition that the Attorney General should consider whether ordering an inquest would impose a disproportionate burden on the authorities.*

*[38]      That leads on to a relevant consideration about this case.  If the death had occurred recently an inquest might disclose a systemic flaw in practice which contributed to the deaths.  But if, as the Ombudsman found, there was a failure here,  it took place 28 years ago at the height of the Troubles.  It is very difficult to see how any practical benefit could now be obtained for the public in going over the procedures then being followed by police officers in Derry at that time, when they say that much of the city was out of bounds to them by terrorist activity.*

*46]      One must take into account not only the financial costs involved as adverted to above but the human cost.  To bring back for a public hearing in an inquest civilian and retired police witnesses to give evidence about these tragic events and the difficult questions around them will inevitably be unwelcome and in many cases positively distressing.  Many may have legitimate health grounds for refusing to attend.*

*[53]      In deference to the grant of leave I would add a few more observations.  While there may be cases where an Article 2 obligation is revived even though it is unlikely to advance the goal of successful prosecution of the immediate perpetrators of the unlawful death, such cases are not likely to be common and are not likely to warrant a renewed inquest.  If they involve the alleged misconduct on the part of the police then the Police Ombudsman would be, as he was here, appropriate to address the issues.*

*[55]      While the existence of civil proceedings brought by the family will not, indeed, necessarily cure a duty of compliance with Article 2, nevertheless it is relevant as giving a further opportunity to seek documents and call witnesses.  It is true that the power to subpoena witnesses in a civil action will not lead to a right of the plaintiff to cross-examine the witness under subpoena.  In an inquest situation such a witness might be compelled.  But the chances of a witness, even a police officer guilty of an error of judgment or negligence or conceivably something worse, let alone a perpetrator, making a concession because he is being cross-examined rather than examined in chief is a very slight one which the State is entitled to conclude does not justify the financial and human cost of a further inquest.*

The third case was a judicial review brought by Patricia Bell, on behalf of he father, Patrick Joseph Murphy, who was shot dead on 16 November 1982. The judgment was given on 25 March 2017 but I was not given a copy by the Court Service until 25 April. Initially they said that I was not entitled to a copy at all, then when challenged , consented. There then followed another delay and I was not given a copy until I threatened to make a complaint.

It may be that the State is uneasy with Maguire J’s findings.

Here is what he said:

*[4] The outcome has been that it can be said that in this application there is no significant dispute about a range of sub-issues. These include:*

*(i) The fact that there remains a continuing problem in the form of the PO and his office being underfunded.*

*(ii) The absence of any significant argument on the part of the DOJ that the PO’s concession vis a vis the applicant has not been properly made.*

*(iii) Apart from the submission by the DOJ that it is a matter for the PO to determine how he should spend his budget, the absence of any suggestion by the DOJ that there is fault in respect of the manner in which the PO runs his office.*

*(iv) The acceptance by the DOJ that there have, since the Martin case, been in operation a now prolonged period in which, to a greater or lesser extent, there have been cuts in funding for the PO imposed as a result of -*

*(a) the Department’s own budgetary allocation and*

*(b) the DOJ’s need to itself allocate its budget across the range of its responsibilities.*

*(v) The general acceptance that attempts to deal with historic cases requiring investigation – such as the Martin and now the present case – through a process of more general reform, initially in the guise of the Stormont House agreement, have by the date of this judgment stalled or otherwise been withdrawn.*

The court set out a helpful and depressing chronology:

*[19] In chronological order the highlights of the affidavit evidence may be summarised as follows:*

*March 2012 The PO’s business case in respect of the projected operation of the History Directorate was accepted by DOJ. This offered hope of increased funding.*

*January 2013 The PO rescinded his suspension of historical investigations. However, at the same time, there emerged an escalation in the number of complaints relating to historic matters being received. As Mr McAllister put it in his affidavit “there were even more historic cases to be dealt with than had been anticipated”.*

*January 2014 PO submitted to DOJ a still further business case for additional resources but this was put “on hold” by DOJ pending ongoing discussions among Executive Ministers about proposed arrangements for dealing with historic cases.*

*May 2014 On the basis of indications received funding had increased to a budget of £2.08M for 2014/2015 for historic investigations. In addition £400,000 (with further resources in subsequent years) to support historical investigations was to be made available. This, it was believed by the deponent would have supported some 40 staff within the History Directorate.*

*June 2014 A revised business case was submitted by PO to DOJ under which it was proposed that annual funding would be increased to £3.2M per annum in order to support 55 staff in the completion of investigations relating to a revised historic caseload of 358 matters by 31 March 2019. However neither the funding sought in the June 2014 business case nor the additional £400,000 in fact were provided. Instead there was a reduction in funding with a consequent loss within History Directorate of 25% of staff bringing the number of staff to 30.*

*October 2014 Slippage in the timing of investigations due to the budgetary position alongside delays experienced in obtaining materials from PSNI. These latter delays eventually resolved in September 2014. Paul Holmes* *at this time wrote the letter quoted earlier in this judgment [see paragraph [15] supra] indicating that historical investigations may not be completed to 2025. Budget for historical investigations finalised at £1.98M supporting 26 staff.*

*2015/2016 Budget allocation of £1.98M. The deponent avers that “this is simply not sufficient to undertake the required workload” within the original plan of a 6 year period. A build-up of funding pressures was also said to be affecting other work of the PO in its Current Directorate. This impact was being especially felt in relation to the Significant Cases Team (“SCT”). The SCT, according to the deponent, was struggling over a significant period of time to cope with the weight of cases in what were, the deponent says, critical investigations for the office.*

Having set out the history, Maguire J moved on to consider the DOJ’s failings.

*[44] Moving to the applicant’s case against the DOJ, as already acknowledged in this judgment, the fact of underfunding of the PO is accepted and cannot be denied. There is no evidence of substance that unreasonable delay has been the result of other factors, though the court can accept that there is some, though limited, evidence, which suggests that some periods of delay may have been brought about by events other than the resources issue. However, read as a whole, the court has no difficulty in concluding that, on the balance of probability, the source of the problem besetting the PO’s office lies with the failure of government, most directly the DOJ, to provide adequate resources to the PO. The court can also set aside and dismiss from the case the issue of the systemic reform process, exemplified by the Stormont House Agreement, which has to date clearly failed to provide any sure way forward or otherwise offered a cure for the problem.*

*The issue in this case then becomes whether the level of funding being provided to the PO in this case offends against that standard – which is one, the court acknowledges, which offers substantial leeway to the decision maker, here the Department. In evaluating this, the court has to take into account that it would be unlikely that Parliament would have intended the funding authority to act in a way which would result in the PO being unable to perform its lawful duties with the consequence that it is put into the position of acting unlawfully. It would surely have been expected that sufficient funding would at the very least be provided to ensure that the core statutory duties of the PO may lawfully be performed.*

*[52] While it may be that a failure to reach the standard of carrying out an investigation into a complaint within a reasonable time in an isolated case would not call into the question the legality of the funder’s budgetary allocation, that is not the present case. Rather the present case is one of systemic and persistent underfunding which is disabling the PO, not in one but in a range of cases, and not in one lone period but over a period now of years, from being unable to meet a not particularly demanding standard viz that of carrying out its investigation into a public complaint against the police within a reasonable time.*

*[54] The Wednesbury principle, which it is accepted applies in this case, in the court’s opinion, has been breached on the facts as disclosed in this judicial review, as the court fails to see how a rational funder could underfund a statutory body performing key public obligations to the extent of requiring it to act unlawfully without forfeiting his, her or its ability to be viewed as acting reasonably.*

**Conclusion**

*[58] It is unnecessary for the court to make any order as between the applicant and the PO, save for the declaration that the parties have presented to the court and which the court has approved. As regards the applicant and the DOJ the court will declare that the latter has acted unlawfully by failing to provide a sufficient level of funding to the PO to enable the PO to carry out its statutory obligation to investigate the applicant’s complaint within a reasonable period of time.*

**Lessons to be taken from the cases**

1. The Legacy Investigation Branch is not sufficiently independent to investigate certain cases.
2. Families who allege that there is a state involvement in the killing of their relative should demand that the PSNI appoint another force to investigate the killing and should refuse to allow the LIB to investigate.
3. Paper Trail and similar organisations can play a significant role in finding relevant documents.
4. It may be difficult or impossible to get a fresh inquest into a death which occurred many years ago , where the courts think that no practical benefit would be obtained for the public in going over old procedures.
5. Courts may take into account the likely financial cost of a new inquiry. The Attorney General would not be criticized by a court if he took cost into account.
6. The new inquests ordered by the Attorney have not been matched by the state’s investment in resources.
7. The Court in *Johnstone’s* application took into account the human cost of bringing back to a public hearing, retired police witnesses who “may have legitimate health grounds for refusing to attend”.

8. The Patricia Bell case sets a new standard. It is rare for courts to interfere with the wide discretion given to government departments in how they manage their affairs or set budgets. In Bell, the court had had enough. Consider these words from Maguire J : *Rather the present case is one of systemic and persistent underfunding which is disabling the PO, not in one but in a range of cases, and not in one lone period but over a period now of years, from being unable to meet a not particularly demanding standard viz that of carrying out its investigation into a public complaint against the police within a reasonable time.*

9. Those who have had a promise of an original or a new inquiry by the Police Ombudsman and who have been told that the date for it is many years in the future should now write again , not only to the Ombudsman but also to the Department of Justice. The judgment in Bell should be quoted and the State should be asked what it is they propose to do to remedy the situation.

10 . Both the Ombudsman and the Department of justice are in breach of their statutory duties. At some point the issue of damages will arise. Meanwhile families should pile on the pressure.