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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**KING'S BENCH DIVISION**
**(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY HENRY GARGAN AND EDWARD BUTLER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF THE CORONER CONCERNING THE INQUEST TOUCHING THE DEATHS OF JOHN DOUGAL, FATHER NOEL FITZPATRICK, PATRICK BUTLER, DAVID McCAFFERTY AND MARGARET GARGAN**

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**Ms Karen Quinlivan KC with Mr Stuart McTaggart (instructed by O Muirigh Solicitors) on behalf of the Applicants**
**Mr Martin O'Rourke KC with Mr Ronan Daly and Michael McCartan (instructed by the Legacy Inquest Unit) on behalf of the proposed Respondent**

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**COLTON J**

***Introduction***

[1] By these proceedings the applicant seeks leave to challenge the ruling of the coroner, Mr Justice Scoffield, of 27 February 2023 in the inquest into the deaths of Margaret Gargan, Patrick Butler, Father Noel Fitzpatrick, John Dougal and David McCafferty on 9 July 1972 ("the Springhill Inquest").

[2] I am obliged to counsel for their focused written and oral submissions which facilitated an expedited hearing of this application.

[3] The first module of the inquest hearing involving evidence from civilian eyewitnesses has commenced.

[4] The next module is due to commence on 6 November 2023.

[5] The issues that arise in the inquest can be gleaned from sections of the opening of senior counsel to the inquest. Mr O'Rourke KC made the following observations:

> "Most of the civilian witnesses claim that at the time of these fatalities, the shooting in Springhill/Westrock was coming from Corry's Yard (where soldiers were stationed). There is, however, some evidence to the effect that there was at least one gunman firing shots at Corry's Yard. There is also evidence that Corry's Yard was also subjected to gunfire from others although whether this was before, during or sometime after the incidents is a matter the court may have to determine in due course."

[6] He further observed that:

> "The clear implication of the civilian statements is that each of the five deaths were caused as a result of gunfire discharged by the army from Corry's Yard."

[7] Having summarised the evidence in deposition form given to the original inquest into these deaths in 1973 by the ciphered soldiers who were stationed at Corry's Yard, several of whom describe firing at gunmen or seeing other soldiers do so, Mr O'Rourke added that:

> "The narrative of the military is of the legitimate and justified use of force at a time of heightened tension and in response to specific threats.
>
> The contrary narrative to that of the military is that the Springhill deaths resulted from the illegitimate, unjustified and indiscriminate use of force by the army on civilians."

[8] In his ruling Mr Justice Scoffield explains at para [9]:

> "On the other hand, the MOD submissions make reference to the witness statements taken from the seven ciphered soldiers by the Royal Military Police Special Investigations Branch the day following the deaths. In broad terms, the soldiers make the case that there was a prolonged gun attack during the evening of 9 July 1972 by a number of armed civilians on the soldiers who were based in Corry's Wood Yard and that they returned fire. It was suggested that this account is corroborated by the relevant army radio logs. A feature of the early army accounts was that there was a sounding of car horns on Westrock Drive,

> followed by the deployment of armed men from vehicles who began firing at soldiers. Mr Aiken took me to the depositions of Soldier A and Soldier E in this regard. In particular, soldier E describes seeing two civilian vehicles (a light blue Austin and a yellow Triumph Herald) which each contained four men, which parked between 60 and 47 Westrock Drive and blasted their horns, and from which eight armed men deployed.
>
> [10] Mr Aiken also referred to some civilian eyewitness accounts which, in his submission, supported the contention that relevant witnesses or participants in events (such as Martin Dudley) were in or near one or other of these cars; and, perhaps more importantly, supported the narrative that civilians were firing upon the army position in the course of the evening before at least some of the deaths which are the subject of this inquest. He made particular reference to the account given by "Eye Witness 1" in one version of the booklet entitled 'The Springhill Massacre' booklet produced by the Springhill Massacre Committee on behalf of the local community in the wake of the deaths ("the Springhill Massacre booklet"), which pointed to gunmen being in the area of Westrock Drive and both members of the Official IRA and Provisional IRA being in attendance. By reference to certain evidence relating to the fatal injury suffered by John Dougal, and other evidence as to his position at the time of death, Mr Aiken raised the prospect of his having been shot by someone in a lower position shooting upward at Corry's Yard, which would have to be considered in the course of the inquest."

[9] Against this background the coroner was in possession of a statement by a Mr Gerard Heath.

[10] In one of his accounts he places himself at the occupied cars at or about 47/60 Westrock Drive. He places a number of named individuals as being present with him. He refers to members of the IRA who were at the scene and armed. In particular he identifies a Jim Bryson as "spraying" Corry's Wood Yard from a Lewis gun. It is said that Bryson is an acknowledged member of the IRA who was subsequently killed by the army in 1973.

[11] In this context the MOD made an application to the coroner seeking material held by the PSNI, including intelligence material on, Mr Heath and nine other named individuals.

[12] Importantly for this application the MOD sought further information in relation to particular categories of individuals which it was said may be of direct relevance to the contention that weapons were fired at the army personnel stationed in Corry's Yard after or before the time of the deaths which are the subject matter of the inquest.

[13] In the course of a detailed reasoned written ruling, the coroner granted the application and set out criteria and parameters for those individuals in respect of whom further inquiries should be made.

[14] At issue in this application is his ruling at para [66](c) and (d) which provide:

> "[66] Accordingly, I propose to ask the PSNI to disclose such other information as it may hold in respect of civilian eyewitnesses (in the sense described at para [77] below) or other civilians (including those who are deceased) who were physically present at the events in Springhill/Westrock on the evening of 9 July 1972, who fall within the following categories:
> …
>
> (c) A person whom there is evidence to suggest was an occupant of a car in which there were armed civilians in the area, or who was in the immediately proximate vicinity of such a car at the time when firing by the army occurred; and
>
> (d) A person whom there is evidence to suggest was at or about (viz in the immediately proximate vicinity of) a specifically identified location from where there is evidence that an armed civilian was firing at soldiers in Corry's Yard at or about the time of that person's presence there."

[15] Para [77] provides:

> "[77] In light of the approach adopted by the NOK in relation to this issue, and on a pragmatic basis to move matters forward quickly so as to minimise disruption to the evidence planned to be heard in this first module, I directed that a request should be made of the police to disclose to my office the criminal records of all civilian eyewitnesses (that is to say, witnesses to the events in contention on the ground on the night of 9 July 1972 but excluding, for instance, those who came on the scene afterwards such as ambulance drivers who did not offer

> any evidence relevant to the actual shootings). I emphasised that this ought not to be taken as setting any precedent for future cases; and that I had adopted this approach in the interests of expedition, bearing in mind the (relative) speed with which such requests could be complied with on the part of the police. I also bore in mind that where an individual has been convicted, any such conviction will have arisen after due process. Further, I indicated that, where I consider any of the contents of a criminal record to be potentially relevant and so liable to disclosure, before making any further disclosure to the PIPs the relevant individual would be informed and given an opportunity to make representations. I am conscious of the 'chill factor' which the obtaining and potential disclosure of a witness's criminal record may have on their cooperation with a coroner's inquiry; so I emphasise again that the expansive approach I have adopted to this request should not be taken as viewed as a standard in any way."

[16] The coroner went on to set out the parameters of any further search and for the purposes of this challenge the relevant ones are set out in para [71](i)-(iv) which provide:

> "[71] As to the parameters of the request for information the police should seek to find, assimilate and disclose when they are undertaking a search in respect of an individual falling within one of the categories identified in para [66] above, I intend to limit this both in terms of subject matter and timeframe. As to subject matter, the potentially relevant information which police should seek to find and disclose is as follows (drawing on the analysis helpfully provided in the BSI ruling discussed above):
>
> (i) Information relating specifically to the events in Springhill/Westrock on 9 July 1972, including any plans or activities of the individual or a proscribed organisation in which they may have been involved on that day. (It is to be hoped that the vast majority, if not all, of any such information will already have been disclosed to my office in the PSNI's sensitive material as a result of its obligations under section 8 of the Coroners Act (Northern Ireland) 1959, although Mr Coll KC was reluctant to give any guarantee that this would prove to be so).

(ii) Information within such researches which identifies other persons who are not presently identified as witnesses in this inquest but who might reasonably be supposed to be likely to have, or be able to provide, information about any planning of proscribed organisations for activity in the Springhill/Westrock area 9 July 1972 or about the actual events of the day.

(iii) Information suggesting that the individual was involved in the commission of firearms offences; terrorism or terrorist-related offences; or offences of violence against police or security forces.

(iv) Information suggesting that the individual was a member of a proscribed organisation."

[17] In the course of the hearing I was told that the PSNI had provided confirmation that the product of the checks requested by the coroner has been available for viewing since the end of August 2023. Should that material be deemed potentially relevant and require to be included in the PII application in respect of other PSNI sensitive material, the task can be completed within the current PII timetable. It would therefore appear that the ruling of the coroner will have no impact on the schedule for the hearing of the inquest, which is an important factor for the court's consideration.

***The applicant's challenge***

[18] In her admirably focussed oral submissions Ms Quinlivan argues that the ruling is disproportionate in breadth and accordingly disproportionate as to the requirement of establishing (how) the deceased came to meet their deaths.

[19] She contends that such an unduly broad and disproportionate ruling will have a chilling effect. It may discourage witnesses coming forward in circumstances were doing so is likely to result in a search by the PSNI of "all such information as it may hold" being conducted and thereafter potentially disclosed and deployed. It is argued that such a chilling effect on the receipt of evidence from affected persons unduly impinges on the ability of the coroner to fulfil the statutory function to ascertain how the deceased met their deaths.

[20] The second primary focus of her challenge is based on the argument that the ruling is disproportionate in that it unfairly affects only civilian witnesses and that there is no similar direction as regards military witnesses.

[21] Finally, it is argued that by withholding the names of the persons against whom searches will be conducted (save for the 10 identified by name), the coroner has prevented the PIPs, including the next of kin, from being able to properly understand

the scope of the ruling and from having an opportunity to make any representations as to the proper application of the ruling in a given case.

***The test for judicial review in the context of the coroner's procedural rulings***

[22] The general test for leave for judicial review is that approved by the Court of Appeal in the case *Ni Chuinneagain* [2022] NICA 56. The threshold is that of an arguable case having a realistic prospect of success.

[23] In the context of procedural rulings from a coroner it is discussed by the Court of Appeal in *Re Officer C & Ors* [2012] NICA 47. At para [8] the court stated:

> "Unless it is apparent that a procedural ruling should not have been made the High Court exercising its supervisory jurisdiction should not intervene. It is not the function of the High Court to micromanage an inquest or to act as a forum for a de facto appeal on the merits against a coroner's procedural ruling. A coroner will have only acted unlawfully if he has exceeded the generous width of the discretion vested in him to regulate the inquest in the interest of what he considers to be a full, fair and fearless inquiry. The coroner will have much greater awareness of the issues involved and the evidence likely to emerge in the course of the inquest. He must, accordingly, be accorded a wide margin of appreciation and the High Court must recognise that aggrieved parties alleging procedural unfairness will have an ultimate remedy at the end of the inquest if there is a case that the verdict should be quashed because the inquest has fallen short of proper standards to such an extent as to call into question the lawfulness of the resultant verdict."

[24] The court continued at para [15] as follows:

> "… The applicant must establish that the conduct of the inquest following the procedural ruling will deprive him of an opportunity to properly participate in the inquest and that, unless restrained, the coroner will be proceeding to carry out an inquest that is in breach of article 2. In considering the question the court must take into account the following matters:
>
> (a) the next-of-kin is entitled to be involved in the inquest proceedings to the extent necessary to safeguard his legitimate interest;

(b) in an inquisitorial inquest no party has a right to demand that evidence be presented in a particular way. It is for the coroner to ensure that the inquest as a whole ensures a proper inquisition into the issues arising and that the evidence is presented in such a way as to enable the coroner and the jury after a searching inquiry to reach fair and balanced conclusions to which the verdict gives effect;

(c) the coroner's rulings on anonymity and screening are subject to review and alteration in the course of the inquest and must be kept under review;

(d) the adequacy of the inquest process and its overall compliance with the requirements of article 2 can only fairly be assessed at the conclusion of the inquest. It is not possible to make an assessment of any real or apparent prejudice suffered by the next- of- kin until the inquest is underway and it can be seen what the real issues are, how they are developing and the way in which the next-of-kin are affected or prejudiced in their ability to deal with the evidence and the witnesses."

[25] Ms Quinlivan on behalf of the applicants accepts the applicability of these principles save for her submission that in light of the provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 in practice an aggrieved participant in an inquest will not have the opportunity to have the benefit of a new inquest should an original verdict be quashed.

[26] However, what is beyond dispute is that a person challenging a procedural ruling such as the one impugned here faces a high bar in seeking leave.

***The coroner's ruling***

[27] In relation to the purported breadth and disproportionality of the ruling which is impugned I observe as follows.

[28] The purpose of the ruling was clearly to elicit potentially relevant material which may assist in addressing the contention, which is central to the military narrative of what occurred, that civilians were armed and fired at the military personnel in Corry's Yard. Such a ruling is clearly within the generous width of the coroner's discretion and in furtherance of the overall objective of conducting a full, fair and fearless inquest.

[29] In terms of the actual breadth of the searches which may be conducted, in my view both the basis for and the parameters of the search have been carefully and

clearly set out in the coroner's detailed ruling. It is a focused ruling directed to particular categories of individuals identifiable by material which may place the individuals within one or more of the categories stipulated in para [66] of the ruling. Furthermore, temporal parameters are set out in paras [71] and [72].

[30] In any event the fears expressed in relation to the breadth of the ruling and the potential chilling effect have not been borne out in practice. The searches have now been conducted. All the information sought is available for viewing. An assessment of its relevance can be completed within the current schedule for the inquest.

[31] The decision to seek the material in question is a classic example of a matter which is best assessed by the coroner charged with conducting the inquest.

[32] I can find no fault with either the basis for or the extent of the search directed by the coroner.

[33] As to participation rights by the NOK or other PIPs they will all have the opportunity to make submissions on the relevance of any material which the coroner does deem to be relevant and the proprietary of its being deployed in the course of the inquest.

[34] In relation to the fact that the NOK are not aware of the names of any of the people who have been identified as a result of the search Mr O'Rourke points out that neither the original ruling nor the submissions made at the time address the provision of a list of names. It is argued that the appropriate way for dealing with this would be for the NOK to make a formal application for this material, on notice to the other PIPs.

[35] In any event, if as a result of the searches relevant material is disclosed there will be an opportunity for all PIPs to consider such evidence and make submissions about its relevance or admissibility. This would, of course, include issues relating to the identity of the persons concerned.

[36] In the event that the Article 8 rights of any person identified as a result of the search are impacted this is something which can be dealt with by the coroner. This would inevitably include notification to the persons potentially affected and the opportunity by them to make representations.

[37] Indeed, provision to the applicants of the names and/or number of persons affected by the ruling at this stage could amount to a disproportionate interference with the Article 8 rights of the persons potentially affected.

[38] I turn now to the argument based on the contrasting approach to civilian witnesses compared to military witnesses.

[39] Mr O'Rourke points out that no formal application has been made by the applicants for a similar order against the military witnesses. It is, however, clear from the coroner's ruling that in opposing the MOD's application Ms Quinlivan submitted that if such material was sought and obtained in respect of civilians, as a matter of fairness similar such material (including complaints and the contents of individual complaints against soldiers) would have to be obtained in respect of military witnesses. He expressly refers to what he describes as her pithy submission that "what is sauce for the goose is sauce for the gander."

[40] In my view the coroner has dealt with this issue fairly and comprehensively in his ruling. He distinguishes between the military witnesses and the civilian witnesses for the purposes of the MOD's application at para [61] in the following way:

> "I do not accept that it necessarily follows that, simply because I will direct the police to provide some information (should it exist) relevant to the MOD's request, the same approach will necessarily be appropriate in respect of military witnesses. As I observed in the course of exchanges during the hearing of this application, there is an obvious distinction to be drawn between soldiers on the ground, whom we know were openly armed, and civilians who (on the soldiers' case) were operating covertly in plain clothes and likely under the auspices of a proscribed organisation. This is not, however, an issue which needs to be determined at this stage. I will hear further argument on it in due course, if necessary. As set out below, I do intend to seek criminal records in respect of military personnel who were on the ground in Springhill/Westrock during the period of the contentious events in the same manner as I have done for civilian witnesses."

[41] He also makes it plain that the outcome of the ruling will be kept under review as the evidence develops.

[42] In my view this is a complete answer to the argument in relation to any alleged disparity of treatment.

[43] As the coroner said at para [58] of his ruling the differences in the material sought are "simply a product of the different circumstances and different contentions which arise in these proceedings."

[44] In summary I conclude:

(i) There is a clear rational basis for the ruling made by the coroner.

(ii) The ruling is not disproportionate. It is a focused ruling with clearly set out parameters.

(iii) It has not resulted in any delay in the scheduled timetable for the hearing of the inquest. The relevant material has been identified and the matter has been considered in the staged approach set out in the ruling.

(iv) Importantly, the effect of the ruling is to seek material which is clearly potentially relevant to this inquiry. Plainly it comes within the coroner's remit in conducting a full, fair and fearless inquest.

(v) It does not impact on the ability of the next of kin to participate in the inquest. At this stage the coroner is gathering potentially relevant material. Should such material be deemed relevant, all PIPs including the applicants will be afforded an opportunity to make representations regarding the relevance, admissibility and the deployment of such material in the course of the inquest.

(vi) In relation to any alleged unfairness arising from different treatment of civilian and military witnesses the coroner has clearly set out the basis for the ruling he has made. He has set out the potential difference between civilian witnesses and military witnesses, which on no account could be said to be irrational in the context of his inquiry. Importantly he has made it clear that he will keep this matter under review.

(vii) It cannot be argued that the coroner "has exceeded the generous width of the discretion vested in him to regulate the inquest in the interests of what he considers to be a full, fair and fearless inquiry."

***Conclusion***

[45] In light of the above I have concluded that the applicant does not meet the test for leave. The court has the benefit of a detailed reasoned ruling which sets out the reasoning behind the ruling and the coroner's approach. Nothing unlawful or irrational is disclosed in the ruling. The threshold for leave has not been met.

[46] Leave is therefore refused.