IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GERALDINE FINUCANE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF THE RESPONDENTS' REFUSAL TO ESTABLISH A PUBLIC INQUIRY INTO THE MURDER OF PATRICK FINUCANE COMMUNICATED TO HER ON 11 OCTOBER 2011

ORDER 53 STATEMENT

1. The applicant is Geraldine Finucane, c/o Madden & Finucane, Solicitors, 88 Castle Street, Belfast BT1 1HE.

2. The applicant seeks the following relief:

   a) An order of certiorari quashing the decision to hold "a review into the death of Patrick Finucane";
   b) A declaration that the decision to establish the said "review" is incompatible with the applicant's rights pursuant to Article 2 ECHR and therefore in breach of section 6 of the Human Rights Act 1998;
   c) An order of mandamus compelling the immediate establishment of a public inquiry into the murder of Patrick Finucane of the kind recommended by Judge Peter Cory;
   d) Such further and other relief as the court may deem appropriate;
   e) By way of interim relief an order halting the work of the "review" pending the determination of this application;
   f) A protective costs order (i.e. an order providing that, whatever the outcome of these proceedings, an order for costs will not be made against the applicant.)

3. The grounds upon which the said relief is sought are:

a) The applicant had a substantive legitimate expectation that a public inquiry of the kind recommended by Judge Peter Cory would be established to examine the murder of her husband for the following reasons:

i. Following the discussions at Weston Park the Irish government and the UK government jointly appointed Judge Peter Cory to examine, *inter alia*, the murder of Patrick Finucane with a view to recommending whether a public inquiry should be held. Both governments agreed that "In the event that a Public Inquiry is recommended in any case, the relevant Government **will** implement that recommendation." (emphasis added);

ii. Judge Cory recommended that a public inquiry should be held in 5 of the 6 cases he examined, including the murder of Patrick Finucane;

iii. Judge Cory outlined the "basic requirements for a public inquiry" (at para 1.294);

iv. In each of the cases where Judge Cory recommended an inquiry should be held an inquiry was established, save for the case of Patrick Finucane;

v. Public inquiries were established by the UK Government into the deaths of Rosemary Nelson, Billy Wright and Robert Hamill and by the Irish Government into the deaths of Chief Superintendent Breen and Superintendent Buchanan;

vi. On 1 April 2004 the Secretary of State said "the Government stands by the commitment that we made at Weston Park" (Hansard Col 1756; Col 1761);

vii. The UK Permanent Representative to the Council of Europe's comments in a letter to the Directorate General of Human Rights on 5 July 2005 that "...we are committed to an inquiry which will be tasked with uncovering the full facts of what happened and which will, in accordance with Judge Cory's recommendations, be both independent and, to the extent possible, held in public."

viii. The comments in the same letter that "...we are clear that the Finucane inquiry should and will have statutory powers to compel the attendance of witnesses and disclosure of evidence."

ix. On 20 February 2006 the Secretary of State said "...I am committed to establishing an independent, statutory inquiry, with full powers to require the production of all the relevant documents and, most importantly, to compel witnesses to attend. That inquiry must also, as Judge Cory recommended, be "public to the extent possible." (letter 20 February 2006);

x. On 22 March 2006 the Secretary of State said "...we are taking forward arrangements to establish an inquiry into the death." (letter 22 March 2006);

xi. The Secretary of State's comments in a letter dated 10 April 2006 that he considered the following "key features ... **essential to the Inquiry's ability to get at the full facts and expose any wrongdoing**..." (emphasis added)

- Independent chair who sees all the evidence;
- Full statutory powers to compel any evidence that could be compelled by a court;
- The inquiry should be "public to the extent possible"; and
- Its conclusions will be made public.

xii. Prior to the announcement of the impugned decision, Government officials engaged in discussions with the applicant's representatives about the type of public inquiry that would be acceptable to her and her family: the sole object of both parties during this exercise was to find a mutually acceptable means of holding an inquiry under the Inquiries Act 2005, the discussions eventually focussed on the possibility of establishing a "Baha Mousa style" inquiry, the applicant's representatives indicated a willingness to accept such an inquiry and the discussions concluded with the officials undertaking to consult with ministers about the issue.

xiii. At no stage either during or after these discussions (before the announcement of the impugned decision) was there any suggestion or indication that the Government was considering a "review" or any process other than a public inquiry.

xiv. The Applicant and her family were invited to a meeting with the Prime Minister and Secretary of State for Northern Ireland at 10 Downing Street

on 11 October 2011: the indication in advance of the meeting was that the Prime Minister would inform them personally of the Government's decision and he expected the family to be satisfied with the announcement.

xv. The indication to the Irish Government in advance of the meeting on 11 October 2011 that the Finucane family would be happy with what was on offer.

xvi. There is no basis upon which the Prime Minister could ever have believed that the Applicant or her family would be happy or satisfied with anything other than a public inquiry, so that the indications to the Applicant and to the Irish Government were capable only of meaning that a public inquiry would be established.

b) By reason of the matters specified in paragraph 3(a) above, the applicant had a legitimate expectation that she would be consulted in advance about any decision to establish a "review" or any procedure other than a public inquiry:

c) In ordering the said review the respondent has acted in a manner that is incompatible with the applicant's rights pursuant to Article 2 ECHR and therefore in breach of section 6 of the Human Rights Act 1998 for the following reasons:

i. It will not be effective;

ii. It will not be public;

iii. It will not safeguard the interests of the applicant and her family or allow their participation to the requisite standard.

d) In deciding to establish a "review" rather than a public inquiry the Secretary of State took into account an irrelevant consideration and acted on a mistake of fact in concluding that Judge Cory had reached a "clear conclusion" that there had been collusion in the murder of Patrick Finucane. In fact, Judge Cory's task had not been to "make final determinations of fact or attributions of responsibility"; and his findings were "provisional only" and could not be taken to be "final determinations of any matter" (Foreword).

e) In deciding to establish a "review" rather than a public inquiry the Secretary of State failed to take into account or give any or adequate weight to the following relevant considerations:

i. The fact that the commitment to hold a public inquiry was made as a result of extensive political negotiations, formed part of an agreement with another sovereign state and that a corresponding commitment was made and honoured by the Government of Ireland;

ii. The nature of the case at issue and the public concern it has created all over the world;

iii. The nature and extent of previous attempts to frustrate the investigation of Mr Finucane's murder and allegations of collusion in the case by servants or agents of the state (Stevens 3 *Overview and Recommendations* Chapter 3);

iv. The previous late disclosure of material to both Lord Stevens (Overview and Recommendations, para 1.11) and Judge Cory (paras 1.306-1.307);

v. The Secretary of State's comments in a letter dated 10 April 2006 that he considered the following "key features ... **essential to the Inquiry's ability to get at the full facts and expose any wrongdoing**..." (emphasis added)

- Independent chair who sees all the evidence;
- Full statutory powers to compel any evidence that could be compelled by a court;
- The inquiry should be "public to the extent possible"; and
- Its conclusions will be made public.

vi. That Judge Cory performed a "preliminary role of assessing whether there is a case to be answered as to possible collusion in a wide sense" (Foreward);

vii. That Judge Cory's task had not been to "make final determinations of fact or attributions of responsibility"; and his findings were "provisional only"

and could not be taken to be "final determinations of any matter" (Foreward);

viii. Judge Cory's view that "before any final findings of fact or determinations of responsibility could be made, it would be necessary for individuals to have an opportunity of answering any potential criticisms which might be made of them" (Foreward);

ix. The fact that, for these reasons, the Government did not "take a view" on Judge Cory's provisional findings (Hansard 1 April 2004 Col 1756)

x. Judge Cory's view that "the documentary evidence indicates that there are matters of concern which would warrant further **and more detailed** inquiry" (Foreward, emphasis added);

xi. Judge Cory's view that "The weight to be attached to Nelson's statement can only be determined at a hearing where the evidence of Nelson and the contrary evidence of his handlers could be tested by examination and cross-examination in a public forum" (para 1.125);

xii. Judge Cory's view that "Nelson asserted that one of his handlers had gone through his "intelligence dump", "weeding out" any material that was out of date. Whether or not this occurred can only be determined at a hearing." (para 1.154);

xiii. Judge Cory's view that "The evidence given at Nelson's trial by the former CO of FRU....reflects a pattern of conduct and an attitude that is consistent with acts of collusion taking place. Whether or not acts of collusion did take place can only be determined at a public inquiry." (para 1.171)

xiv. Judge Cory's finding of evidence of an attitude within RUC SB and FRU that "they were not bound by the law and were above and beyond its reach." (para 1.270);

xv. Judge Cory's finding that RUC SB and FRU were "prepared to participate jointly in collusive acts in order to protect their perceived interests." (para 1.270);

xvi. Judge Cory's view that the failure to hold a public inquiry in this case "could be seen as a cynical breach of faith which could have unfortunate consequences for the peace accord" (para 1.296);

xvii. Judge Cory's view that "In this case only a public inquiry will suffice. Without public scrutiny doubts based solely on myth and suspicion will

linger long, fester and spread their malignant infection throughout the Northern Ireland community" (para 1.297);

xviii. Judge Cory's view that, whatever the costs and time involved, "If public confidence is to be restored in public institutions then in some circumstances such as those presented in this case a public inquiry is the only means of achieving that goal" (para 1.302(1));

xix. Judge Cory's view that "The original agreement contemplated that a public inquiry would be held if the requisite conditions had been met. That there is evidence which could constitute collusion has been established in this inquiry. Thus, in this case, the requisite condition has been met" (para 1.302(3));

xx. Judge Cory's view that "time and costs can be reasonably controlled" (para 1.302(3));

xxi. The provisions for controlling costs outlined in the Inquiry Rules 2006.

f) The respondent has erred in concluding that the proposed review will be the "most effective way of getting to the truth" of the nature and extent of collusion in the murder of Patrick Finucane (statement to Parliament 12 October 2011) for the following reasons:

i. The review cannot hear evidence;

ii. The review cannot test the documentary evidence provided to it in any or any meaningful way;

iii. The review has no powers of compulsion in respect of documents or witnesses;

iv. Many key witnesses were never employed by the state and many may no longer be employed by the state therefore state guarantees of state co-operation are of no effect;

v. The review has no power to hold oral hearings;

vi. The applicant and her family will not be permitted to play any or any meaningful role in the review;

vii. They will not have sight of documents;

viii. They will not be permitted to question witnesses;

ix. This in circumstances where allegations of the most serious kind have been made about the applicant's husband Patrick Finucane;

x. The review will not be able to fulfil its task properly without the input of the applicant and her family;

xi. Other interested parties, including those suspected of criminal acts, will not be permitted to play any or any meaningful role in the review;

xii. Individuals will be permitted to rely on the privilege against self-incrimination to refuse to assist the review and answer any questions put to them;

xiii. The review will be held in private.

g) The respondent had decided to establish a "Baha Mousa style" public inquiry but reversed that decision and instead commissioned the said "review". That the decision to establish a public inquiry had been taken is evidenced by:

i. The content of the discussions between Finucane family representatives and government officials;

ii. The invitation to the Finucane family to travel to meet the Prime Minister and the Secretary of State at 10 Downing Street on 11 October 2011;

iii. The statement made by an NIO adviser on 7 October 2011 that the Prime Minister had "a solution which he is convinced will reveal the truth which satisfies the family"; and

iv. The assurances given to the Irish government and/or its representatives that the Finucane family would be happy with what would be offered;

v. The fact that the applicant and her family had made it perfectly clear that only an independent public inquiry established on a statutory basis would be acceptable.

h) The stated reasons for refusing to establish a public inquiry are not the true reasons. In the course of the meeting at 10 Downing Street on 11 October 2011

the Prime Minister stated **"It is true that the previous administration could not deliver a public inquiry and neither can we. <u>There are people in buildings all around here who won't let it happen</u>."** (emphasis added)

i) The only inference that can properly be drawn from the facts set out above is that the Respondents came to a decision to establish a "Baha Mousa style" public inquiry into the murder of Patrick Finucane but were then improperly prevailed upon to reverse that decision in order to protect the interests of those liable to be exposed by such an inquiry or for other reasons too discreditable to disclose. In the premises, the Respondents have taken into account irrelevant and improper considerations, have been actuated or influenced by improper purposes and have therefore acted in bad faith.

j) In all the circumstances the failure to establish a public inquiry was unfair, unreasonable and unlawful.

Dated this day of November 2011

Signed _____

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