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

Delivered:	23-4-13

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Finucane's (Geraldine) Application [2013] NIQB

AN APPLICATION FOR DISCOVERY IN JUDICIAL REVIEW PROCEEDINGS BROUGHT BY GERALDINE FINUCANE

STEPHENS J

Introduction

[1] This is an application by Geraldine Finucane ("the applicant") for discovery of documents in the course of a judicial review application brought by her in which she challenges the decision of the then Secretary of State for Northern Ireland ("the Secretary of State") to hold "a review into the death of Patrick Finucane (her husband) rather than a public inquiry of the kind recommended by Judge Peter Cory."

[2] The factual background to and the context of the judicial review application is the murder of Patrick Finucane, a practising solicitor, in his home in North Belfast on the evening of Sunday 12 February 1989. The attack was carried out by gunmen from a loyalist paramilitary group. They entered the family home while the applicant and her husband were having Sunday dinner with their three children. Patrick Finucane was shot 14 times and the applicant was injured by a ricochet bullet that struck her in the ankle. The Ulster Freedom Fighters claimed responsibility for his murder. The applicant was convinced from the beginning that servants or agents of the state were involved in the murder of Patrick Finucane. The government has accepted that there was state involvement in the murder of Patrick Finucane and has apologised for it.

[3] The applicant challenges, in the context of amongst other matters, acknowledged state involvement in the murder of a practising solicitor, the decision to hold a review rather than a public inquiry. The gravity of the issues and the

nature of that context can be seen from the report of the Rt Hon Sir Desmond de Silva QC who was appointed by the Secretary of State to carry out the review into the question of state involvement in the murder. He has completed that review and at paragraph 115 - 116 of his report dated 12 December 2012 he gave an overall assessment of the involvement of the State in the murder:

> "115. Overall, I am left in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements of the State. The significance is not so much, as Sir John Stevens concluded in 2003, that the murder could have been prevented, though I entirely concur with this finding. The real importance, in my view, is that a series of positive actions by employees of the State actively furthered and facilitated his murder and that, in the aftermath of the murder, there was a relentless attempt to defeat the ends of justice.
>
> 116. My Review of the evidence relating to Patrick Finucane's case has left me in no doubt that agents of the State were involved in carrying out serious violations of human rights up to and including murder. However, despite the different strands of involvement by elements of the State, I am satisfied that they were not linked to an over-arching State conspiracy to murder Patrick Finucane. Nevertheless, each of the facets of the collusion that were manifest in his case - the passage of information from members of the security forces to the UDA, the failure to act on threat intelligence, the participation of State agents in the murder and the subsequent failure to investigate and arrest key members of the West Belfast UDA - can each be explained by the wider thematic issues which I have examined as part of this review."

[4] The gravity of these findings is self-evident but foreshadowed for instance by Ciaran Martin, a government intelligence and security advisor, in a paper dated 8 July 2011 to the Prime Minister which stated

> "...even by Northern Ireland standards the facts are grisly. Moreover, in terms of allegations of British state "collusion" with loyalist paramilitaries, this is the big one. ...Whilst we know of no evidence of direction or advance knowledge of the murder by

> Ministers, security chiefs or officials, exhaustive previous examinations have laid bare some very uncomfortable truths. Paid state agents were directly involved in the killing, including the only man ever convicted of involvement in it. Lord Stevens's conclusions paint a picture of a system of agent running by the RUC's Special Branch and the Army's Force Research Unit that was out of control, whatever the hugely difficult context of the Troubles. There is plenty of material in the public domain to this effect. Some of the evidence available only internally could be read to suggest that within Government at a high level this systemic problem with loyalist agents was known, but nothing was done about it. It's also potentially the case that credible suspicions of agent involvement in Mr Finucane's murder were made known at senior levels soon after it and that nothing was done; the agents remained in place. These two points essentially aren't public."

[5] There is further evidence from Ciaran Martin as to the gravity of the issues which evidence is contained in an e mail dated 9 July 2011. In that e mail he stated that he had

> "never spoken to PM about in person (sic) but readouts I've had suggest the following approach: he, like virtually everyone else outside MoD shares the view that this was an awful case and as bad as it gets, and far worse than any post 9/11 allegation;"

[6] Mr Macdonald Q.C., S.C. and Ms Fiona Doherty prepared a skeleton argument and appeared on behalf of the applicant on the hearing of the discovery application. Mr Eadie QC and Mr McLaughlin prepared a skeleton argument on behalf of the respondents and Mr McLaughlin appeared on the hearing of the discovery application.

A summary of the grounds of challenge in the substantive judicial review application

[7] In this section of this judgment I summarise briefly some of the grounds upon which the applicant relies in order to challenge the decision to hold a review rather than a public inquiry into the death of Patrick Finucane. I do so in order to determine the relevance of the documents sought on discovery and whether disclosure of those documents or any of them is necessary for the fair disposal of the judicial review application. In summarising some of the grounds I will also refer briefly to parts of the evidence upon which the applicant relies to support those

grounds of challenge and also the nature of some of the issues that will arise in respect of some of the grounds.

[8] The applicant states that she 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, Patrick Finucance. In support of the assertion that she had a substantive legitimate expectation the applicant states:

(a) That following discussions at Weston Park the Irish Government and the United Kingdom 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)

(b) Judge Cory recommended that a public inquiry should be held in five of the six cases he examined including the murder of Patrick Finucane and he outlined the basic requirements for a public inquiry.

(c) 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.

(d) On 1 April 2004 the Secretary of State said the Government stands by the commitment that we made at Weston Park.

[9] A short summary of the legal principles in relation to legitimate expectation in so far as they relate to this case are that:

a) In a claim based on a promise, the applicant must prove the promise and that it was clear and unambiguous and devoid of relevant qualification: see paragraph 37 of *Paponette and Others v Attorney General of Trinidad and Tobago* [2012] 1 AC 1 and *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569.

b) If the applicant in this case discharges that burden then the onus is on the respondent to justify the frustration of the expectation and it is for the court to decide "whether the consequent frustration of the applicant's expectation is so unfair as to be a misuse of the (respondent's) powers": see paragraph 82 of *R v North East Devon Health Authority ex parte Coghlan* [2001] QB 213. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh

the requirements of fairness against that interest. If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence its conduct is so unfair as to amount to an abuse of power, see paragraphs [37] and [38] of *Paponette and Others v Attorney General of Trinidad and Tobago.*

c) In arriving at a decision a fair balance has to be struck between the interests of the general community and the interests of the individual. That is a concept which also underlines the whole of the European Convention see *Brown v Stott* [2003] 1 AC 681 at 704 e-f. Laws LJ at paragraph 68 in *Nadarajah and Another v Secretary of State for the Home Department* [2005] EWCA Civ 1363 stated that:

> "Accordingly a public body's promise or practice as to future conduct may only be denied, ..., in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises will be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances."

d) The burden of proving that an applicant has relied upon a promise to her detriment rests on the applicant. However it is not essential that the applicant has so relied upon the promise, although this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest. Reliance, once proved ... is in principle no more than a factor to be considered in weighing the question whether denial of the expectation is justified ... as a proportionate act or measure.: see *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569 and *Nadarajah and Another v Secretary of State for the Home Department* [2005] EWCA Civ 1363.

[10] The respondent has not conceded that there was a substantive legitimate expectation but contends that if there was then there was detailed consideration of where the public interest lay including consultation. Substantial material has been put before the court in relation to the consideration that was given, by whom it was given, when and during what meetings and in what documents. Material has also been provided for instance as to those who were consulted, by whom and when.

The material relates to both the actions of civil servants, ministers and the Prime Minister. That in event the decision was taken by the Secretary of State that the public interest would be met by a review rather than a public inquiry.

[11] In turn the applicant alleges that the consultation process was a sham. That the respondent had no intention of departing from the Government's previous declared policy of "no more open-ended and costly inquiries into the past." That the decision was not made on the merits of the case or with an open mind but in compliance with that policy and under the influence of those opposed to any further investigation of the role of State agents in the murder.

[12] The applicant also contends that:

a) she had a legitimate expectation that as a matter of procedure she would be consulted in advance about any decision to establish a review or any procedure other than a public inquiry and that this procedural legitimate expectation was frustrated.

b) in refusing to establish a public inquiry the respondent has acted in a manner that is incompatible with the applicant's rights pursuant to Article 2 ECHR.

c) there was a failure to take into account relevant factors and various irrelevant factors were taken into account so that the decision of the Secretary of State was a decision that no reasonable decision maker could have taken. The applicant's arguments on this last ground rely heavily on amongst other matters the nature of her husband's murder.

[13] It is important to appreciate that leave was sought to bring the substantive judicial review application on all these grounds including for instance that the decision making process was not genuine and that the decision was made under the influence of those opposed to any further investigation of the role of State agents in the murder. The leave application was not opposed by the respondent. Furthermore it was not suggested by the respondent during the discovery application, for instance in relation to the genuineness of the decision making process or influence from those opposed to further investigation, that the state of the evidence was such that any aspect of discovery could be termed a fishing expedition. Accordingly, whilst emphasising that this is a preliminary stage, there has been sufficient evidence to grant leave in relation to all of the applicant's grounds of challenge.

Legal principles in relation to discovery of documents in judicial review applications

[14] I seek to apply the principles set out in *Tweed v Parades Commission for Northern Ireland* [2007] 1 AC 650 some of which I summarise as follows:-

(a) Judicial review applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary and that remains the position in those cases.

(b) Judicial review involving human rights decisions under the Convention tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts. Disclosure of documents may be necessary in such cases.

(c) However even in such cases orders for disclosure of documents should not be automatic. The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly. Lord Carswell stated that "The proportionality issue forms part of the context in which the court has to consider whether it is necessary for fairly disposing of the case to order disclosure of such documents. It does not give rise automatically to the need for disclosure of all the documents." He also stated that "Even in cases involving issues of proportionality disclosure should be carefully limited to the issues which require it in the interests of justice."

(d) In considering any application for disclosure in a case involving proportionality that concept and the concept of margin of discretion must be taken into account by the court together with the obligation resting on a public authority to make candid disclosure to the court of its decision-making process, laying before it the relevant facts and the reasoning behind the decision challenged and the undesirability of allowing "fishing expeditions", where an applicant for judicial review may not have a positive case to make against an administrative decision and wishes to obtain disclosure of documents in the hope of turning up something out of which to fashion a possible challenge.

(e) A party's whose affidavits contain a reference to documents should exhibit them in the absence of a sufficient reason (which may include the length or volume of the documents, confidentiality or public interest immunity). Any summary, however conscientiously and skilfully made, may distort. It is not always possible to obtain the full flavour of the content of documents from a summary, however carefully and faithfully compiled, and there may be nuances of meaning or nuggets of information or expressions of opinion which do not fully emerge in a summary.

[15] *Tweed v Parades Commission for Northern Ireland* was a case that related to discovery in respect of convention rights giving rise to a very fact-specific enquiry in

relation to the concept of proportionality under those convention rights. The principles in *Tweed v Parades Commission for Northern Ireland* apply equally to a case involving proportionality arising as a result of a substantive legitimate expectation as opposed to under a convention right. In this case if a legitimate expectation is established by the applicant then the issue becomes whether the denial of the expectation is in the circumstances proportionate to a legitimate aim pursued.

[16] The crucial factor for the application of the principles in *Tweed v Parades Commission for Northern Ireland* is whether the resolution of the matters contained in the judicial review application depends to a high degree on the specific facts. In this case there is an allegation that the decision making process was not genuine and that it was under the influence of those opposed to any further investigation of the role of State agents in the murder. The leave application in respect of those grounds was not opposed and no suggestion was made of a fishing expedition. I consider that the outcome of the judicial review will be very fact specific in relation to those grounds of challenge and that the principles enunciated in *Tweed v Parades Commission for Northern Ireland* also apply to them.

[17] In their skeleton argument in response to the discovery application the respondents' state that:-

> "In relation to the challenge founded upon alleged substantive legitimate expectations ... it is ... to be noted that if the court were to accept that a substantive legitimate expectation could arise, recent authority suggests that the burden of justifying departure from the relevant commitment then shifts to the respondent. This includes a burden of placing the relevant information before the court. *The necessity of disclosing sufficient materials is therefore a matter for the respondent, not the applicant.*" (emphasis added)

The recent authority to which reference is made is the case of *Paponette and Others v Attorney General of Trinidad and Tobago*. That was a case in which no evidence was put before the court which is entirely different from this case in which there is substantial material before the court which may be incomplete in significant ways.

[18] It is correct that the burden of justifying departure from the relevant commitment shifts to the respondent. However if discovery is necessary to resolve the matter fairly and justly then it matters not whether the burden of proof is on one or other party. A lack of evidence in order to discharge the burden of proof is not a substitute for public, reasoned, and informed adversarial submissions from both parties. Furthermore one party to litigation should not be deprived of the ability to make reasoned and informed submissions. For its part the court should not be deprived of the ability to make a careful and accurate evaluation of the facts. I do

not accept that the necessity of disclosing sufficient materials where there is a burden of proof on the respondent is a matter for the respondent, not the applicant. The test is and remains whether disclosure is necessary to resolve the matter fairly and justly. It matters not whether the burden is on one or other party.

[19] The respondent, whilst accepting that this is a case with a high level of factual enquiry, also submitted that very substantial materials are already before the court which explain in detail the background to the proceedings and impugned decision-making process so that the decision-making process has already been described in a comprehensive and transparent fashion. They contend that discovery in such circumstances is not necessary. I consider that the fact that there are already substantial "materials" including source documents before the court does not mean that "documents" necessary in order to resolve the matter fairly and justly should not be disclosed. The test is and remains whether in the given case the documents which are sought by the applicant are necessary to resolve the matter fairly and justly. Discovery can be necessary to seek to establish, as the applicant seeks to do, that the decision-making process has in fact not been described in a comprehensive or transparent fashion but rather that it was a sham.

[20] Another issue that arises is as to the relevance of and the necessity for disclosure of drafts of minutes. Drafts always require careful assessment. They have written at the top of them, either expressly or by implication, "draft." Of course that has to be and will be taken into account. That is so whether the proceedings are judicial review applications or for instance ordinary commercial actions. On occasions first drafts can mislead and it is the final approved draft that is the most accurate record of what occurred. Indeed approval by those who are at a subsequent meeting of the final draft is a factor to be taken account. On other occasions first drafts may contain a more accurate reflection of either the tone or content of a meeting. Indeed it may transpire that the decision makers or not all the decision makers at the meeting saw or approved the final minute particularly if that minute is contained in a letter essentially between civil servants. All these matters require careful consideration. However absent the documents the consideration is limited. Ordinarily in commercial actions drafts are disclosed as a matter of course. Crucial to the outcome of this case is a determination as to what did or did not occur at various meetings and drafts of the minutes of those meetings or exchanges between officials particularly if they were present at the meetings are likely to be both relevant and necessary for the fair disposal of this application.

[21] There is reference in opposition to the discovery application to an official who made some "private notes" during the course of a meeting. The implication that could have been taken from the word private was that in some sense the notes were not authorised or legitimate or were under the control sole control of the official in her private capacity. That accordingly they should not be disclosed. However during the course of submissions on behalf of the respondent definition was brought to what was meant by the word "private" or specifically what was not meant by that word. Accordingly it was accepted by the respondent that the notes were made by

the official in the course of her employment, that she was authorised to make those notes during the course of the meeting, that the notes were official notes and that the notes were available to and under the control of her employer. It was also accepted that the notes were made openly during the course of the meeting in full view of those who were attending the meeting. The word private was being used in the sense that these were not approved or formal minutes of the meeting but it was accepted that they were notes made by an official at the time of and during the course of the meeting.

[22] The respondent objects that at meetings differing views could have been expressed and that the confidentiality of those differing views should be maintained. The expression of conflicting opinions is a part of any decision-making process. Individuals can be persuaded to change their opinions. Just because an opinion is expressed or is expressed trenchantly does not mean to say that it is determinative in subsequent proceedings or binding for the future. An instance of a document which has already been disclosed by the respondent illustrates the articulation of a clearly expressed view. In an e-mail dated 9 July 2011 the Cabinet Secretary wrote:-

> "Does the PM seriously think that is right to renege on the previous Govt's clear commitment to hold a fully judicial inquiry?
>
> This was a dark moment in the country's history - far worse than anything that was alleged in Iraq/Afghan. I cannot really think of any argument to defend not having a proper inquiry.
>
> What am I missing?
> All the legal risks are there or even greater if we try to avoid a judicial inquiry."

[23] The respondent also contends that documents tending to show the different views of cabinet ministers are confidential and would undermine the concept of collective cabinet responsibility. That it is important that cabinet ministers should be able to express their views openly and frankly without the apprehension that those views may become public. There is no public interest immunity certificate in this case and accordingly that argument is put forward on the basis of confidentiality. I agree that such documents are confidential, see *Attorney General v Jonathan Cape Ltd and others; Attorney General v Times Newspapers Ltd* [1975] 3 All ER 484. To identify the ministers who voted one way or another is objectionable because it undermines the doctrine of joint responsibility. However the fact that a document is confidential does not make it immune from disclosure. There are precautions, such as redaction, that can be taken to protect confidentiality whilst at the same time disclosing the document. There are degrees of confidential information. There is a balance to be struck between the public interest in maintaining confidentiality and competing

public interests for instance in the administration of justice. Restrictions on disclosure should not be imposed beyond the strict requirement of public interest and the court would have to be satisfied that disclosure would inhibit free and open discussion in cabinet in future in relation to this issue.

[24] Resolving any case fairly and justly includes not only justice as between the parties but also a public interest that justice is done and seen to be done.

[25] I consider that this is a highly fact sensitive case requiring the most careful and accurate evaluation of the facts. That it will involve a painstaking analysis of a whole series of meetings tracing the whole decision making process from inception to conclusion identifying those who were involved in it and the roles that each played during the process. That enquiry is not restricted to the actual decision maker but also to those involved in the decision making process including civil servants who were advising the decision maker. That a document was not seen by the actual decision maker does not mean that it is immune from disclosure. For instance if seen by the decision maker it could have properly informed the decision making process or alternatively it may not have been summarised appropriately to the decision maker by the civil servant.

The remaining documents the subject matter of the discovery application

[26] Definition has been brought to the remaining documents the subject matter of the discovery application by a letter from the Crown Solicitor's Office on behalf of the respondent dated 16 May 2012 in response to the summons for discovery. I set out the various remaining documents the subject of this discovery application and my decision in relation to those documents.

(a) An email exchange between officials following a meeting on 5 May 2011 of the Secretary of State and the Prime Minister.

[27] In her Discovery Summons the applicant sought the original notes and/or minutes and/or original recordings and/or transcripts of recordings of a meeting held on 5 (May) 2011 of the Secretary of State, his Minister of State and the Prime Minister. In response the Crown Solicitor's letter of 16 May 2012 stated that:

> "The record of this meeting is contained in a letter from Simon King dated 6 May 2011, exhibited at Tab 8 to the affidavit of Simon King. No other formal notes or minutes of the meeting are in existence. In the event that any private notes were made by officials, these have not been retained. There was an email exchange between officials after the meeting relating to the preparation of the formal note, contained in Simon King's letter of 6 May 2011. Disclosure of this email exchange is not considered to

> be necessary for the fair disposal of these proceedings."

The applicant, whilst accepting that there are no other documents in relation to this meeting seeks discovery of the email exchange between officials that occurred after the meeting took place.

[28] The meeting on 5 May 2011 is described by Mark Larmour, Deputy Director of the Northern Ireland Office, he states that:-

> "In the afternoon of 5 May 2011, the Secretary of State and his Minister of State met the Prime Minister and provided him with an update on the Finucane case based upon the consideration he had been giving it during recent months. A letter was subsequently received by the NIO from the Prime Minister's Office advising on the outcome of the meeting. ... (A copy of the letter which is dated 6 May 2011 is exhibited.) As appears from that letter the Prime Minister was mindful of the complexities of this case and also the pressure for a public inquiry. He asked the Secretary of State to give further consideration to the option of an independent review of the case which stopped short of a full public inquiry along with an acknowledgement and apology for actions which were thought to be wrong."

[29] It was acknowledged by the respondent during submissions that the e mail exchange was relevant and the meeting was an important meeting in the decision making process. It was also acknowledged that the officials who exchanged e mails after the meeting were present at the meeting and that accordingly that they would have had personal knowledge of what took place. However the objection to disclosure was maintained on the basis that there was sufficient information in the letter dated 6 May 2011. I consider that evidence as to the tone and content of the meeting may well be contained in this e mail exchange between officials, after the meeting relating to the preparation of a more formal note. The formal record of the meeting which is contained in the letter may or may not be accurate. The e mail exchange may or may not be an accurate record of the meeting. There are numerous variations on those themes. The failure to disclose raises the question as to whether there is a conflict or a variation between the e mail exchange and the letter of the 6 May 2011. I consider that sufficient necessity has been established by the applicant in relation to the disclosure of the exchange of e-mails so as to require the respondent to make the e mails available to the court for inspection. Accordingly in order to give further consideration to the question of disclosure in the interests of fair disposal of the case I direct that I should receive and inspect the e mails, so that I may decide whether disclosure would give sufficient extra assistance to the

applicant's case, over and above the material that has already been furnished. If I do so decide, then the question of redaction may have to be considered, about which I would wish to invite further submissions to the court.

(b) The earlier draft of a model of a possible review as opposed to a public inquiry into the death of Patrick Finucane prepared in advance of a meeting on 16 May 2011 of officials from the Northern Ireland Office, the Cabinet Office and the Prime Minister's Office.

[30] In her discovery summons the applicant sought the original notes and/or minutes and/or original recordings and/or transcripts of recordings of the meeting of 16 May 2011. The letter of 16 May 2012 from the Crown Solicitor's Office stated that:

> "No formal minutes of this meeting between officials were prepared. In advance of the meeting a draft agenda/briefing paper was prepared for the benefit of Simon King, who chaired the meeting. A copy is enclosed. Exhibited at Tab 22 of the affidavit of Mark Larmour is a draft of a possible review model which was prepared after the meeting and was later provided to the Secretary of State. An earlier draft of that paper was prepared in advance of the meeting. It is not considered that disclosure of the prior draft is necessary for the fair disposal of these proceedings."

It is apparent that one of the matters to which consideration was being given at the meeting was a review into the death of Patrick Finucane rather than a public inquiry. In the event the ultimate decision was that a review would be undertaken rather than a public inquiry. The applicant seeks discovery of the first model of the review.

[31] The content of a draft may inform as to the thinking and aims of the person who prepares the draft. This in turn may inform as to the nature of the instructions either given to or understood by the person or persons who prepared the draft. The alterations to the draft may also inform as to the reasons why the changes were made. Information as to what was being said or thought both before and after the draft may therefore be evidenced by that draft in particular when considered in conjunction with later drafts and the final document. The drafting sequence is a part of the factual matrix and I consider that sufficient necessity has been established by the applicant in relation to the disclosure of the earlier draft so as to require the respondent to make the documents available to the court for inspection. Accordingly in order to give further consideration to the question of disclosure in the interests of fair disposal of the case I direct that I should receive and inspect the earlier draft, so that I may decide whether disclosure would give sufficient extra assistance to the applicant's case, over and above the material that has already been furnished. If I do so decide, then issues might arise about which I would wish to invite further submissions to the court.

(c) Three documents pertaining to a meeting on 11 July 2011.

[32] In her discovery summons the applicant sought original notes and/or minutes and/or original recordings and/or transcripts of recordings of the meeting of Ministers on 11 July 2011. The letter from the Crown Solicitor's office of 16 May 2012 states:

> "The record of this meeting is the letter dated 14 July 2011 from Simon King to the Secretary of State's Private Secretary which is already exhibited at Tab 28 to the affidavit of Mark Larmour. No other formal records of the meeting exist, however, the following documents which relate to the content of the meeting exist."

The letter then set out 3 documents as follows:

> "(i) One official who attended the meeting did make some private notes.
>
> (ii) Following the meeting, one of the officials who attended, sent an email to the official who prepared the formal note, identifying some of the points discussed and which should be recorded.
>
> (iii) A first draft of the formal note was prepared and sent by email to Simon King for his approval."

The application for discovery relates to those 3 documents.

[33] For the reasons that I have already articulated I consider that sufficient necessity has been established by the applicant in relation to the disclosure of the these 3 documents so as to require the respondent to make the documents available to the court for inspection. Accordingly in order to give further consideration to the question of disclosure in the interests of fair disposal of the case I direct that I should receive and inspect the 3 documents, so that I may decide whether disclosure would give sufficient extra assistance to the applicant's case, over and above the material that has already been furnished. If I do so decide, then the question of redaction may have to be considered, about which I would wish to invite further submissions to the court.

(d) The Cabinet Secretary's minutes of the Cabinet meeting of 11 October 2011.

[34] The affidavit of Simon King, Private Secretary to the Prime Minister, sets out that at the meeting of the Cabinet on the morning of 11 October 2011

> "the Finucane case was discussed during a meeting of the full Cabinet when Cabinet members were informed of the decision which had been taken (to hold a review rather than a public inquiry) and the meeting later that day with the Finucane family."

In her discovery summons the applicant sought the original notes and/or minutes and/or original recordings and/or transcripts of recordings of the Cabinet meeting on the morning of 11 October 2011.

[35] The letter dated 16 May 2012 from the Crown Solicitor's office states:

> "The affidavit of Simon King at paragraph 22 sets out that at that meeting Cabinet members were informed of the decision taken in relation to the Finucane case and of the meeting later that day with the Finucane family. This is considered to be a sufficient disclosure. A minute of Cabinet meetings is kept by the Cabinet Secretary. Disclosure of this portion of the minutes of the Cabinet meeting is considered to be unnecessary for the fair disposal of these proceedings. In addition, the respondents object to disclosure of the part of the minutes on the ground that it is not in the public interest to do so. (On the ground that they may indicate the individual views expressed by Ministers during the course of the meeting. Disclosure is not in the public interest on the ground that the decision is one made on behalf of Her Majesty's Government for which all Ministers are responsible and is therefore within the principal of collective responsibility described in Section 2 of the Ministerial Code.)

[36] The person who informed the cabinet could give reasons for making the decision and those reasons may bear on the factual enquiry in this case in relation to the grounds of challenge. What an individual says about a decision after it has been made and how he responds to the discussion that ensues either in support of or in defence of the decision may well inform as to the decision making process. I consider that sufficient necessity has been established by the applicant in relation to the disclosure of those parts of the Cabinet Secretary's minutes of the Cabinet meeting of 11 October 2011 that relate to the Finucane case so as to require the

respondent to make that part of the document available to the court for inspection. Accordingly in order to give further consideration to the question of disclosure in the interests of fair disposal of the case I direct that I should receive and inspect the that part of the Cabinet Secretary's minutes of the Cabinet meeting of 11 October 2011 that relates to the Finucane case, so that I may decide whether disclosure would give sufficient extra assistance to the applicant's case, over and above the material that has already been furnished. If I do so decide, then issues might arise about which I would wish to invite further submissions to the court.

[37] I would add that during the course of submissions I was informed that counsel instructed in this case on behalf of the respondent had not seen the cabinet minutes and I assume that was also the position in relation to the author of the letter from the Crown Solicitor's Office dated 16 May 2012. It is not possible for either solicitor or counsel to make an informed decision as to whether a document should or should not be disclosed without seeing the document itself.

(e) The report authored by Anthony Langdon in 1999.

[38] Mark Larmour, the Deputy Director in the Northern Ireland Office, exhibited to his affidavit a lengthy 86 page briefing document dated 1 April 2011. At paragraph 25 of the briefing document reference was made to previous reviews or investigations into the death of Patrick Finucane by Anthony Langdon in 1999, Judge Cory in 2002-4 and Lord Stevens (specifically in the Stevens' III Investigation, 1999-2003). It stated that:

> "Broadly speaking, it could be argued that the conclusions of each of these investigations put forward sufficiently serious findings in relation to alleged collusion to warrant a public inquiry."

The briefing document also referred to the Langdon Report at paragraph 5 stating that a report produced by the British/Irish Rights Watch prompted the then Secretary of State, Mo Mowlam, to commission a Home Office civil servant, Anthony Langdon, to produce an internal report of the Finucane case. This was delivered to the then Secretary of State in 1999 though no details of this review (or the fact that it had been commissioned) have ever been released publicly.

[39] The existence of the Langdon Report was not known to the applicant prior to the receipt of the affidavit of Mark Larmour. She seeks discovery of that report.

[40] The letter dated 16 May 2012 from the Crown Solicitor's Office opposed disclosure on the basis that

> "... the full report was not provided to the Secretary of State. Rather, he was provided with a description of its conclusions which are contained in paragraphs 5

> & 25 (of a briefing document) and also with an additional summary contained at Annex C of the (briefing) document. Similarly, the full report was not provided to the Prime Minister or the meeting of Ministers which took place on 11 July 2011. It is also clear from the briefing document that the conclusions within that report are in line with those contained in the Cory Report and the Overview and Recommendations prepared by Lord Stevens following the Stevens III investigation. The latter two documents are in the public domain ... . Since the gist of the report has already been provided and the extent of its consideration by Ministers fully disclosed, it is not considered that disclosure of the entire report is necessary for the fair disposal of these proceedings. ..."

[41] In relation to the issue of proportionality of the decision of the Secretary of State the existence and conclusion of the report was a matter which it is accepted should have been and was taken into account by the decision maker. The full report was seen by the Civil Servants advising the Secretary of State and it is implicitly accepted by the respondent that it was necessary for the Civil Servants to summarise the conclusions of the report to the Secretary of State. In the context of this case the question as to whether it was correctly summarised is an appropriate consideration for the court in deciding whether the decision was proportionate and within the appropriate margin of appreciation.

[42] The challenge to the decision of the Secretary of State is also on the basis of rationality. The summary of the Langdon report in the briefing document to an extent equivocates by the qualifying words "broadly speaking" but also suggests that, it could be argued that the conclusions of (Langdon) investigation puts forward sufficiently serious findings in relation to alleged collusion "*to warrant a public inquiry*" (emphasis added). There is a difference between "to warrant" and "to require" but despite that distinction such a report could be supportive of the applicant's case that a decision not to hold a public enquiry was irrational.

[43] Whether the decision of the Secretary of State was made under the influence of those opposed to any further investigation of the role of State agents in the murder could also be evidenced by the contents of the report.

[44] The genuine nature of the decision making process could be evidenced by the decision of civil servants to leave out of their briefing papers the full report and this in turn would depend on a number of factors such as the content, quality and nature of the report.

[45] The impact of the report on the factual matrix, if any, cannot be assessed without disclosure of the report as opposed to the present summary. I consider that sufficient necessity has been established by the applicant in relation to the disclosure of the report authored by Anthony Langdon so as to require the respondent to make the documents available to the court for inspection. Accordingly in order to give further consideration to the question of disclosure in the interests of fair disposal of the case I direct that I should receive and inspect the report authored by Anthony Langdon, so that I may decide whether disclosure would give sufficient extra assistance to the applicant's case, over and above the material that has already been furnished. If I do so decide, then issues might arise about which I would wish to invite further submissions to the court.

[46] I would add that during the course of submissions I was informed that counsel instructed in this case on behalf of the respondent and also I assume the solicitor had not seen the Langdon report and could not say what it contained.

(f) Two letters from the Security Service (MI5) to the Northern Ireland Office dated 4 February 2011 and 1 March 2011.

[47] A letter dated 3 May 2011 from the Security Service (MI5) to the Home Secretary was exhibited to the affidavit of Simon King. That letter sets out various matters but also states that:

> "Your officials will also have seen my letter of 4 February and 1 March to the NIO in which we set out our views on the possible enquiry."

The letter of 16 May 2012 from the Crown Solicitor's Office states:

> "Disclosure of these letters are not considered to be necessary for the fair disposal of the proceedings. These representations form part of the consultation process undertaken by the Secretary of State and were received in confidence as part of that process. The representations made by the Security Service to the Home Secretary and which were provided to the Prime Minister have been disclosed and are contained at Tab 7 of the exhibit to the affidavit of Simon King.

[48] The two letters were part of the consultation process undertaken by the Secretary of State. They were taken into account in the decision making process. The respondent states that because they were part of the decision making process is not sufficient to render it necessary for the letters to be disclosed for the purpose of fairly disposing of the application. In the context of this case proportionality depends on a consideration of all the consultation responses. I also consider that where, as here, there are issues as to the genuine nature of the decision making

process and as to inappropriate influence I consider that sufficient necessity has been established by the applicant in relation to the disclosure of the two letters from the Security Service (MI5) to the Northern Ireland Office dated 4 February 2011 and 1 March 2011 so as to require the respondent to make those documents available to the court for inspection. Accordingly in order to give further consideration to the question of disclosure in the interests of fair disposal of the case I direct that I should receive and inspect the two letters from the Security Service (MI5) to the Northern Ireland Office dated 4 February 2011 and 1 March 2011, so that I may decide whether disclosure would give sufficient extra assistance to the applicant's case, over and above the material that has already been furnished. If I do so decide, then issues might arise about which I would wish to invite further submissions to the court.

(g) The representations received by the Secretary of State for the Northern Ireland Office as part of the consultation process as to whether it was in the public interest that a public inquiry should be established into the death of Patrick Finucane.

[49] On 11 November 2010 the Secretary of State made a statement to the House of Commons:

> "The House will be aware that one of my predecessors as Secretary of State for Northern Ireland, the Right Honourable Member for Torfaen (Paul Murphy), announced in the House on 23 September 2004 that he would take steps to establish a public inquiry into the death of Patrick Finucane in 1989. To date no such inquiry has been established.
>
> I believe it is right that I should determine the way forward in this case and that consequently I should set out a clear decision making process both to the House and to Finucane family. I met the family on 8 November to listen to their views and I have written to them formally inviting their representations as to whether it is in the public interest that I should establish a public inquiry into the death of Patrick Finucane. I will consider those representations carefully and in detail, *along with any other relevant representations that I receive over the next two months, before deciding this question.*" (Emphasis added.)

[50] The consultation period was extended from two months to four months and ended on 11 March 2011.

[51] The briefing document dated 1 April 2011 under the heading "Finucane – Representations Received" stated:

"Representations have been received from 12 groups or individuals within the allocated four month period, which ended on Friday 11 March. All of the representations on the issue are attached in full."

It can be seen that the briefing document had all of the representations attached in full but the exhibit to the affidavit of Mark Larmour does not include the representations. The briefing document goes on to identify all those who had made representations as follows:

"Representations were received from:

1. The Finucane family and their legal team (two written representations and summaries of two meetings with officials).

Government or Agencies

2. Secretary of State for Defence.
3. Home Secretary.
4. Security Service (two letters).
5. Home Office.

Statutory Bodies

6. PSNI.
7. Northern Ireland Human Rights Commission.

Non-Government

8. Mr Henry Gordon.
9. Mr Jeffrey Dudgeon.
10. Dr Austen Morgan.
11. Brehon Law Society.
12. Action by Christians against Torture (ACAT)."

[52] For the reasons which I have already given I consider that disclosure is necessary for the fair disposal of the matter. In addition the applicant has made the case expressly that the decision making process was not genuine so that whilst representations were invited it is the applicant's case that in reality no or no genuine consideration was given to the responses. The nature and content of the responses bears on whether any consideration was given to them.

[53] The respondent asserts that the consultation requests were confidential. The consultation process was announced orally and it is not suggested by the respondent that anything was said that would have suggested to a potential consultee that their consultation response would be confidential. It is not suggested that the consultees marked their responses as confidential. This was a public consultation process. None of the statutory bodies or non-government bodies has been asked by the

respondent as to whether they object to their consultation responses being disclosed or whether they consider that their response was confidential. I find it difficult to conceive that for instance the Northern Ireland Human Rights Commission would wish to suggest that their response should not be disclosed. I am not persuaded that the respondent has established that the consultation responses are confidential.

[54] If I am incorrect in that conclusion and the responses are confidential then the fact that they are confidential does not make them immune from disclosure.

[55] I consider that sufficient necessity has been established by the applicant in relation to the disclosure of the representations received by the Secretary of State for the Northern Ireland Office as part of the consultation process so as to require the respondent to make those documents available to the court for inspection. Accordingly in order to give further consideration to the question of disclosure in the interests of fair disposal of the case I direct that I should receive and inspect the representations received by the Secretary of State for the Northern Ireland Office as part of the consultation process, so that I may decide whether disclosure would give sufficient extra assistance to the applicant's case, over and above the material that has already been furnished. If I do so decide, then issues might arise about which I would wish to invite further submissions to the court.

Conclusion

[56] For the reasons that I have given I direct that I should receive and inspect the outstanding documents, so that I may decide whether disclosure would give sufficient extra assistance to the applicant's case, over and above the material that has already been furnished.