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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY RAYMOND McCORD FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE DELAY IN HOLDING AN INVESTIGATION INTO THE DEATH OF RAYMOND McCORD (JNR)

Martin O Rourke KC[1] with Andrew Moriarty (instructed by McIvor Farrell, Solicitors) for the Applicant
Philip Henry KC with Bobbie-Leigh Herdman (instructed by the Departmental Solicitor s Office) for the Proposed Respondents

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SIMPSON J

Introduction

[1] On 9 November 1997 the applicant s son, Raymond McCord (Jnr) (the deceased") was brutally murdered by loyalists. His body was found in Ballyduff quarry, Newtownabbey. He had been beaten to death. To date no inquest has been held into his death. For something of the history of this matter see the judgment of Sir Declan Morgan LCJ in *McCord, Re Application for Judicial Review* [2019] NICA 4. As the law presently stands, no inquest will take place.

[2] The proposed respondents in this challenge are Mr Justice Fowler (Fowler J"), in his capacity as a coroner, and the Coroners' Service for Northern Ireland (CSNI"). The impugned decision was made by Fowler J, so he is the appropriate proposed respondent to this application, and when I refer to the respondent it is a reference to him. Although the Order 53 Statement in this case contains a number of challenges, this judgment deals with a discrete challenge which, I heard on 12 April 2024 and

[1] Mr O'Rourke KC was engaged in another legacy hearing on the day of this challenge, but the applicant was content that the case be presented by junior counsel.

which I will describe later. The application is for leave to apply for judicial review, but it has been agreed that I should treat this as a rolled-up hearing.

Background

[3] On 18 September 2023 the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (the Act") received Royal Assent. The Act is the government s way of dealing with the legacy of Northern Ireland s turbulent years, known as the Troubles, and it brings to an end investigations — by police, by the Police Ombudsman, by civil claim or by inquests — of all Troubles-related incidents. By the provisions of the Act, the sole body responsible for investigation into deaths caused during the Troubles will be the Independent Commission for Reconciliation and Information Recovery (ICRIR").

[4] Although the legislation has been challenged, partially successfully, by way of judicial review — see the magisterial judgment of Colton J in *Dillon & Ors, Re Application for Judicial Review* [2024] NIKB 11 — the court said that it "is satisfied that the provisions of the Act leave sufficient scope for the ICRIR to conduct an effective investigation [into eg Troubles-related deaths] as required under articles 2 and 3 ECHR."

[5] Section 44 of the 2023 Act amends section 16 of the Coroners Act (Northern Ireland) 1959 by inserting sections 16A-C which provide the following:

> **16A Death resulting directly from the Troubles: closure of existing inquest**
>
> (1) This section applies to an inquest into a death that resulted directly from the Troubles that was initiated before 1 May 2024 unless, on that day, the only part of the inquest that remains to be carried out is the coroner or any jury making or giving the final determination, verdict or findings, or something subsequent to that.
>
> (2) On and after that day, a coroner must not progress the conduct of the inquest.
>
> (3) As soon as practicable on or after that day, the coroner responsible for the inquest must close the inquest (including by discharging any jury that has been summoned).
>
> (4) The provision in section 14(1) requiring a coroner to conduct an inquest is subject to this section."

[6] Section 16B also provides that on or after 1 May 2024, the coroner must not decide to hold an inquest into any death that resulted directly from the Troubles. This prohibition applies also to the power of the Attorney General or Advocate General for Northern Ireland to give a direction under section 14 of the Coroners Act (Northern Ireland) 1959 to conduct an inquest into a death resulting directly from the Troubles. Section 16C is an interpretation sub-section. For present purposes only sub-paragraph (4)(a) is material. It provides that an inquest is initiated' — by a coroner deciding to hold an inquest."

[7] In April 2022 Fowler J was appointed as the coroner responsible for conducting an inquest into the death of the deceased. On 4 July 2023 he directed that the inquest be listed to commence in Ballymena courthouse on 19 February 2024. It was scheduled to last for four weeks. However, the effect of the passage of the Act is that, unless by 1 May 2024 the inquest has progressed to the stage where the only outstanding matter is essentially Fowler J s verdict/findings, he is prohibited from progressing the inquest.

[8] In a ruling dated 2 February 2024 Fowler J described in some detail attempts which he had made to ensure that disclosure by various agencies was perfected in time for the inquest to commence. For the purposes of this judgment, it is unnecessary for me to rehearse all those attempts which, sadly, proved unfruitful. Where relevant to an understanding of the background, he said in the ruling:

> [31] As regards the viability of the February 2024 listing date, the PSNI and PONI informed me that they did not think it would be possible to complete disclosure within a timeframe that would allow the inquest to start on that date.
> …
> [33] … The PSNI submitted [at a review hearing in November 2023] that even if further resources were devoted to this inquest at the expense of others, it would still not be possible to conclude the inquest before 1/5/24. They went on to explain that it was not only a question of funding, but also the type of resource required. … PONI were asked to provide details of the volume of sensitive material held by them in digital format which had not yet been made available to my Counsel in a reviewable format. I was told that the digital material was estimated to amount to in the region of 100,000 pages.
> …
> [35] As for PONI, their considered position was, like the PSNI, that it would not be possible to complete the necessary preparatory work of disclosure for the inquest to conclude before 1/5/24.
> …

> [39] in order to hold an inquest into the death of the deceased, and in particular an inquest that is Article 2 compliant, I must have relevant disclosure…
> …
> [41] My team have not yet been provided with access to all the further material that has to be reviewed for potential relevance. Moreover, the material which has been reviewed has to be cross-checked … (PSNI have to review PONI s material and vice versa before the unresolved redaction issues can be addressed). Even on the most optimistic view, these tasks are months from conclusion.
> …
> [43] On any reasonable assessment of the circumstances, I am impelled to conclude that this inquest will not be ready to start, still less finish, prior to 1/5/24.
> …
> [47] I should not start an inquest if I do not have a reasonable expectation that it will reach its conclusion on or before 1/5/24. In my view, it would be wrong to do so.
>
> [48] Further, continuing with an inquest which does not have a reasonable prospect of concluding before 1/5/24 would have the adverse effect of drawing resources away from other legacy inquests which do enjoy a reasonable prospect of concluding before 1/5/24."

[9] At paragraph [55] he concluded that the inquest into the death of Raymond McCord junior will not be able to start and finish before 1/5/24" and at [57] that I should not prejudice other inquests which do have a reasonable prospect of concluding within that compressed timeframe by drawing away resources from them."

The applicant s challenge

[10] The decision not to hold the inquest into the death of the deceased is not challenged in this discrete aspect of the applicant s judicial review proceedings. Indeed, in an affidavit sworn in the *Dillon & Ors* challenge the applicant had accepted that it would be virtually impossible for the inquest to conclude by 1 May 2024. What is challenged is the decision of Fowler J not to continue with preparatory work up to the 1 May cut-off date. Preparatory work, properly understood, is the carrying out of investigations by or on behalf of the coroner prior to holding the inquest, and when I use the expression 'preparatory work' in this judgment, that is what I mean by it. In this case the particular preparatory work identified is that relating to disclosure of documentary material from PSNI/PONI.

[11] The applicant s challenge is squarely founded on the provisions of Rule 3 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963. Rule 3 provides:

> On being notified of any death the coroner shall, without delay, make such inquiries and take all such steps as may be required to enable him to decide whether or not an inquest is necessary, and every inquest shall be held as soon as is practicable after the coroner has been notified of the death." [emphasis added]

[12] Since a decision had been made that an inquest was necessary, the only part of Rule 3 relevant to this challenge is the emphasised words.

[13] The relief sought by the applicant in this discrete part of the challenge is:

> 1. A declaration that the coroner … [has] acted in breach of Rule 3 … by reason of the decisions to make no further directions for the future progress of the inquest and to cease all preparatory work for the hearing of the inquest"; and
>
> 2. An order of Mandamus compelling case management of this case and that all necessary steps to conduct the case promptly and with reasonable expedition be taken, including the provision of disclosure to the applicant."

[14] Because of the rapidly approaching 1 May 2024 deadline I heard this case as a matter of urgency on 12 April 2024.

[15] Mr Moriarty s submission, as articulated in the skeleton argument, is that by deciding to cease preparatory work on the inquest, the coroner is acting in breach of Rule 3" (paragraph 13). Para 14 of the skeleton argument asserts:

> From the mandatory statutory requirement to hold an inquest *as soon as is practicable*" after notification of death, it is possible to discern the manifest urgency in the statutory duty, whether read alone or in an article 2 ECHR compliant manner. The duty is without caveat — this is what a coroner must do, and it logically comprehends all preparatory work that is necessary to actually hold the inquest." (emphasis in the original)

[16] He submits that the court should adopt a purposive approach to the interpretation of Rule 3 and aim to give effect to the legislative purpose (see *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th edition, at paragraph 12.2).

Mr Moriarty says that the fact that the words in Rule 3 do not refer to preparatory work does not alter the duty. He relies on a passage from *R(Quintavalle) v Secretary of State for Health* [2003] UKHL where Lord Bingham of Cornhill said, para [8]:

> **The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed**. But that is not to say that attention should be confined, and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. **Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose**. So, the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment." [emphasis added in the skeleton argument]

[17] I note also what Lord Steyn said in para [21] of the same case:

> "… nowadays the shift towards purposive interpretation is not in doubt."

[18] At paragraphs 18 and 19 of the skeleton argument the applicant submits:

> [18] In this instance the Court is of course dealing with a statutory rule, but applying the principles mutatis mutandis, it is respectfully submitted that the statutory duty to hold an inquest and, with that, the obligation to carry out what preparatory work is required, remain inviolate and cannot be dispensed with by a coroner.
>
> [19] The imperative for the coroner to hold an inquest as soon as possible is well established by judicial authorities. It should be presumed that the principles around this were known to the legislature upon the drafting and

> implementation of [the Act], section 44 of which provides for the cessation and discontinuance of legacy inquests after 1 May 2024. The natural presumption is that the legislature intended that until that date legacy inquests would proceed as normal. It is submitted that the order of the coroner to cease all preparatory work and thereby stay the inquest is contrary to the intentions of Parliament was discernible from the 2023 Act. In effect the decision of the coroner brings forward the operative date … to February 2024… This is contrary to the clear wording of [the Act] and the natural legislative inferences which arise regarding what is to occur before 1 May 2024."

[19] The applicant prays in aid a decision by McAlinden J, in the Loughgall inquest, and a decision by O Hara J in the Stalker/Sampson series of inquests — both of whom permitted preparatory work to continue notwithstanding the fact that neither inquest would reach the appropriate stage by 1 May 2024. I was told that neither McAlinden J nor O Hara J received any submissions on the effect of Rule 3, and the written ruling made by McAlinden J and provided to me makes no reference whatsoever to Rule 3. In exchanges with me when dealing with the ruling of McAlinden J Mr Moriarty rejected any suggestion that McAlinden J was exercising any discretion; he was, says Mr Moriarty, recognising the duty in Rule 3 and acting in accordance with it. In support of his submissions, he further refers to the ruling of Kinney J in relation to the death of Sean Brown.

[20] The applicant also relies (paragraph 22 of the skeleton argument) on the following passage from a statement from the then Presiding Coroner, Humphreys J, made in November 2023 and relating to legacy inquests:

> "… I am aware of the nature and extent of the challenges which have been brought against the Legacy Act, including the provisions relating to inquests. The new sections 16A and 16B of the Coroner s Act are not yet in force and their future remains uncertain. It would not be appropriate for me to take a final view in relation to the future conduct of the unallocated inquests. I have determined that the best course of action to take is for a further review to take place once the judgment of the High Court has been handed down. At that stage the implications can be considered."

[21] The applicant says that in the ruling by McAlinden J and the statement by Humphreys J, both were looking down the track" ie to potential future developments. Essentially, says the applicant, Fowler J should have done the same, but did not, and wrongly brought forward the 1 May 2024 date to February 2024, the date on which he made the impugned decision.

The respondent s submissions

[22] Mr Henry KC s principal submission is that the applicant s approach to Rule 3 is incorrect in law and would require the court to read into the words of the Rule an implied legal duty to continue preparatory work after a decision had been made not to hold the inquest. Once the decision has been made not to hold the inquest, he submits that Rule 3 has no further force.

[23] Adopting the purposive approach, he submits that if the purpose of Rule 3 is that the coroner should hold an inquest (as soon as is practicable) there can be no legal duty to continue preparatory work when the decision has been taken not to hold the inquest.

[24] The respondent, he says, had a discretion, as had McAlinden J, once he decided that the inquest could not proceed, to decide whether or not preparatory work should continue, and in the proper exercise of that discretion the respondent decided that it should not. He noted that no challenge is made to the exercise of the respondent s discretion; rather the challenge is that the respondent s decision was unlawful, ie in breach of the asserted duty.

[25] He submitted that the statement from Humphreys J was of no relevance to this inquest, dealing as it did with unallocated inquests, and making no reference to Rule 3. The court should not look down the track" but should apply the law as it is at the date of judgment. He drew my attention to another document issued by Humphreys J, entitled Legacy Inquest Update" and dated 19 September 2023. Paras [8] and [9] stated:

> [8] It will be evident that many of these inquests have no prospect of reaching a conclusion by 1 May 2024. It is a matter for each coroner, exercising independent judgment, to determine this issue, but it seems clear that the resources of the Coroners Service and the state agencies ought to be focused on the inquests which have a realistic prospect of reaching the stage of findings by the guillotine date.
>
> [9] Representations have been made by representatives of PSNI and MOD, and those working within Coroners Service, to the effect that the resources simply do not exist to enable all the existing inquests to be properly managed. The worst of all worlds would be to press on with too many inquests and then find that only a few can be completed by 1 May 2024."

[26] Mr Henry also submitted that the utility of any declaratory relief or order of mandamus should be considered. The hearing was on 12 April; during submissions

I indicated that I would give judgment on 19 April; so, he asks, what utility would there be in compelling the respondent to direct that preparatory work should continue for effectively only 11 days?

Discussion

[27] I am obliged to apply the law as it is at the date of this judgment. The facts, as were canvassed before me, that the decision of Colton J is under appeal and that a general election is inevitable in the near future which may result in a change of government, and therefore a change of approach to the Act, are neither here nor there. The outcome of the appeal (or any further appeal), like the outcome of a general election or the approach to the Act of an incoming government of whatever political stripe, is pure speculation. It would be entirely wrong of me to look down the track."

[28] In support of his submissions that Rule 3 imposed a duty such as he contended for, Mr Moriarty placed significant reliance on the ruling of McAlinden J in the Loughgall inquest. Some time was spent in the hearing analysing the transcript of the ruling of McAlinden J dated 27 October 2023. Mr Moriarty asserted that McAlinden J could only have been acting under the duty imposed by Rule 3 and that Fowler J was wrong not to do the same. The transcript contained in the trial bundle runs from page 525 to page 562. The principal passages relied upon by Mr Moriarty are on pages 558, 559 and 560, where McAlinden J discusses duty and requirement.

[29] It is acknowledged by Mr Moriarty that McAlinden J s ruling was not binding on Fowler J. However, for a number of reasons I do not consider that McAlinden J was referring to or purporting to act under any Rule 3 duty. The most obvious reason is that nowhere in the pages of the transcript is there any reference, either by the judge (in his capacity as coroner) or by any of the five counsel appearing, to Rule 3. McAlinden J, both at the Bar and on the Bench, has significant experience of coronial matters. If he considered that he was acting pursuant to the duty in Rule 3, I would have expected him to refer to it.

[30] Further in support of the consideration of what McAlinden J was considering and doing, it is necessary to look at some of the preceding pages to establish the context in order to identify the duty being discussed. I consider it to be clear that the relevant discussion relates to the procedural obligation under article 2 of the European Convention on Human Rights. So, at pages 548-550 there is a discussion of article 2. Article 2 is again specifically mentioned on pages 554, 556, 557 and 558.

[31] At page 559 McAlinden J says this:

> The situation is that the court has a responsibility to investigate the deaths arising out of the shooting … at Loughgall. … At present, that duty is ongoing and the court, at present, must comply with its duty to ensure that the investigation continues until such times as … the court

> is mandated or prevented from continuing with that investigation."

[32] I am satisfied that in using the expression responsibility to investigate the deaths arising out of the shooting … at Loughgall" McAlinden J was referring to the procedural obligation under article 2 of the Convention, and that he continues to do so when he variously refers to duty or requirement.' No other explanation is supportable or logical. I reject emphatically Mr Moriarty s submission that, notwithstanding what was discussed in the preceding pages and notwithstanding that there was no reference whatsoever to Rule 3, McAlinden J could only have been referring to and recognising his duty under Rule 3.

[33] Further still, in my view it is clear that in passages from about line 5 on page 559 onto page 560 McAlinden J discusses matters which can only inform a discretion — which he clearly considers that he has. If he was acting pursuant to a duty imposed by Rule 3 there would, in my view, be no room for discussing discretionary matters. I do not accept, as submitted by Mr Moriarty, that he was merely identifying matters which had formed the basis of submissions to him. The whole tenor of his remarks point to his considering matters informing the exercise of a discretion.

[34] Accordingly, I do not consider that the ruling made by McAlinden J provides any support for the applicant in this case.

[35] No material was placed before me dealing with the decision of O Hara J in the Stalker/Sampson series of inquests dealing with or articulating the basis for his decision, so I have nothing to assist me in reaching my decision in the present challenge based on Rule 3.

[36] At paragraph 28 of the skeleton argument the applicant refers to the decision of Kinney J in *In the Matter of an Inquest Touching the Death of Sean Brown* [2024] NICoroner 18. This is described as an Open Ruling in the Claim for Public Interest Immunity." At paras [35] and [36] Kinney J concludes that:

> I cannot investigate or make a proper analysis of material which is the subject of the PII certificates. … In these circumstances, and with considerable regret, I have concluded that I cannot continue with this inquest. To do so would inevitably result in an inquest that would be incomplete, inadequate and misleading."

At para [40] he says:

> It is my intention to write to the Secretary of State for Northern Ireland requesting that a public inquiry be established into the death of Sean Brown. Such an inquiry

> would allow evidence to be heard in closed session if required."

[37] There is no discussion of Rule 3 and I find in Kinney J s ruling no support for Mr Moriarty s submissions.

[38] In my view Rule 3 imposes two separate duties of promptitude on a coroner. In *Re Jordan's Applications* [2014] NIQB 11 Stephens J describes Rule 3 as containing an "express requirement of promptness in conducting an inquest" (para [122] — emphasis added). The first duty is "without delay" to do all that is required to enable a coroner to decide whether an inquest is necessary. Secondly, when the decision has been made that an inquest is necessary, a duty as soon as is practicable" to hold an inquest.

[39] The words "as soon as is practicable" clearly comprehend investigations to be carried out by or on behalf of the coroner to ensure that the inquest, when it is held, is in possession of, and can be informed by, the materials identified and gathered during those investigations. As Stephens J says, in para [125(c)] of *Jordan*: "There is no standard period within which an inquest should be completed. Each case depends on the character of the investigation required by the circumstances of the case." The carrying out of any preparatory work (the investigation), however, is clearly predicated on the fact that an inquest will be held. It is precisely for the purposes of holding an inquest, and for no other, that the preparatory work is done. If no inquest is to be held, there cannot be any duty to continue with work the carrying out of which is predicated only on an inquest being held. Judicial interpretation of a statute should avoid absurdity. In my view if the court was to conclude that Rule 3 imposed on a coroner a duty to continue work which was preparatory to the holding of an inquest in circumstances where a decision has been made that no inquest would be held, such a conclusion would be absurd.

[40] Whether one adopts a literal interpretation of the words or, as is now urged by senior courts, a purposive interpretation, there is nothing which suggests that if an inquest is not to be held, there is a duty on the coroner to continue preparatory work. In my judgment, therefore, Rule 3 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 does not impose on a coroner a duty to direct that preparatory work continue where a decision has been made not to hold an inquest.

Remedy — utility

[41] In relation to the applicant's claim for declaratory relief, in *Re JR47* [2013] NIQB 7, McCloskey J identified utility" to be the primary factor in considering whether a court should make a declaration in proceedings which were otherwise academic. He said, at para [85]:

> "… I remind myself that declaratory relief is not granted for the asking. Rather, a declaration is a discretionary

> public law remedy. … In reflecting on the propriety of granting any of the declaratory relief now sought, I consider the main criterion in the present context to be that of utility. Where the grant of declaratory relief would serve an important practical purpose, this will clearly count as a positive indicator; see The Declaratory Judgment (Zamir & Woolf, 4th Edition) paragraph 4-99 and following. I refer particularly to the following passage:
>
> > If … the grant of declaratory relief will be likely to achieve a useful objective, the court will be favourably disposed to grant a relief … [Conversely] a declaration which would serve no useful purpose whatsoever can be readily treated as being academic or theoretical and dismissed on that basis.'"

[42] The declaration sought by the applicant is that the coroner … [has] acted in breach of Rule 3 … by reason of the decisions to make no further directions for the future progress of the inquest and to cease all preparatory work for the hearing of the inquest." Such a declaration would serve no useful purpose as there would be less than a two-week period between the making of the declaration and the guillotine falling on 1 May 2024. Nothing of any import could be done in the intervening period. Further, in view of the fact that, at the date of this judgment, the deadline day is only days away, such a declaration is not likely to inform any other coroner in any legacy inquest in the intervening period. It would, in my view, be entirely academic. In the circumstances of this case, I am not prepared to exercise my discretion to grant a declaration.

[43] The applicant also seeks an order of mandamus compelling case management of this case and that all necessary steps to conduct the case promptly and with reasonable expedition be taken, including the provision of disclosure to the applicant." Equally, there could be no utility whatsoever in this. By the time any further order was made, only a handful of days would remain before the 1 May 2024 deadline. Nothing could usefully be done in such short compass.

[44] In relation to utility I also have in mind the powers which are available to the ICRIR to compel disclosure of documents and other material in the course of any of its reviews. The parties provided me with various sections of the Act, but helpfully drew my attention to paras [42] and [43] of the judgment of Colton J in *Dillon & Ors* in which he summarised those powers. He referred again to those powers in paras [306] to [308]. For the purposes of this judgment, it is only necessary to set out what he said at the first of those references, thus:

> [42] To assist with the primary function of conducting reviews section 5 confers, upon the ICRIR, a broad power

> to require disclosure, by any relevant authority, of such information, documents and other material as the CfI [Commissioner for Investigations] may reasonably require for the purposes of, or in connection with, the exercise of the review function … According to section 60, a relevant authority means, the Chief Constable of the PSNI; the Chief Officer of a Police Force in Great Britain; the Police Ombudsman for Northern Ireland; the Director General of the Independent Office for Police Conduct; the Police Investigations and Review Commissioner; any Minister of the Crown (which has the same meaning as in the Ministers of the Crown Act 1975 — see section 8 of that Act); the Security Service; the Secret Intelligence Service; GCHQ; any other department of the United Kingdom government (including a non-ministerial department); a Northern Ireland department; the Scottish Ministers; any of His Majesty's forces. Section 5(8) states that it is not a breach of any obligation of confidence owed by a relevant authority, or any other restriction on the disclosure of information, for a relevant authority to make such information available to the ICRIR.
>
> [43] Section 14 is an important provision in the exercise of the ICRIR's review function as it gives the CfI powers to require persons by notice to provide information or produce documents in the person's custody for the purposes of inspection, examination, or testing."

[45] As Mr Henry pointed out in his analysis of the relevant legislative provisions, some of the powers provided to the ICRIR are equivalent to those possessed by coroners and some are greater. This is borne out by what Colton J said at para [319] of the judgment in *Dillon & Ors* — "Having considered the disclosure powers of the Commission and the obligations of the state, in particular, it seems to me this is article 2/3 compliant and, an improvement on the situation in relation to inquests. Indeed, it has been limitations in terms of disclosure issues which have been the primary reason for delays in the conduct of inquests."

[46] It is clear, therefore, that if the death of the applicant s son is subsequently to be referred to the ICRIR, the applicant will not be disadvantaged in relation to disclosure of information.

Conclusion

[47] This is a rolled-up hearing, so the applicant still requires leave to apply for judicial review in the discrete challenge. The issue at the leave stage is whether the applicant has crossed the threshold of an arguable case having a realistic prospect of

success" — see McCloskey LJ in *Ni Chuinneagain s Application for Judicial Review* [2022] NICA 56, para [42].

[48] I consider that this discrete challenge is very much a borderline case, but in deference to Mr Moriarty s sterling submissions I will grant leave to apply for judicial review, but I dismiss the application for judicial review of Fowler J s decision.

[49] I will hear counsel on the issue of costs, and also as to timetabling for hearing the remaining matters in the Order 53 Statement.