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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**29/05/2025**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY SOLDIERS A AND C FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE ATTORNEY GENERAL FOR NORTHERN IRELAND DATED 18 APRIL 2024

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Joseph Aiken KC & Helen Law (instructed by McCartan Turkington Breen) for the Applicants
Tony McGleenan KC & Nick Compton (instructed by AGNI) for the Proposed Respondent
Fiona Doherty KC & Malachy McGowan (instructed by KRW Law) for the Notice Party

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HUMPHREYS J

Introduction

[1] Joseph McCann was shot dead on 15 April 1972 on Joy Street, Belfast by members of the Parachute Regiment of the British Army. Three soldiers, ciphered as soldiers A, B & C, opened fire on Mr McCann as he ran away.

[2] An inquest was held on 1 March and 8 June 1973 before the coroner, Mr Elliott, and a jury which returned an open verdict.

[3] On 18 April 2024, the proposed respondent, the Attorney General for Northern Ireland ('AGNI'), made a direction, pursuant to section 14(1) of the Coroners Act (Northern Ireland) 1959 ('the 1959 Act'), directing the Presiding Coroner to hold a fresh inquest into the death of Mr McCann. It is this decision which is under challenge in these proceedings.

[4] The next of kin of the deceased was a notice party to this application and made submissions in support of the impugned decision.

The investigations and prosecutions

[5] The evidence of the applicants sought to summarise the lengthy history of investigations into the death of Mr McCann. On the day of the incident, statements were taken from soldiers A, B & C by an officer of the Royal Military Police Special Investigations Branch ('RMP SIB'). Witness statements were also taken from police officers and a number of civilian eye witnesses. On 11 September 1972 the Director of Public Prosecutions ('DPP') directed that no criminal proceedings be instigated against any of the soldiers concerned.

[6] At the inquest, a deposition was taken from Warrant Officer John Wood, of the RMP SIB and he produced copies of the statements taken from each of the soldiers as exhibits. At the relevant time, any person suspected of causing the death could not be compelled to give evidence at an inquest but the practice was to admit written statements in evidence – see the decision of the ECtHR in *Jordan v UK* [2003] 37 EHRR 553. This decision precipitated a change in the law whereby such witnesses are compellable but may invoke the privilege against self-incrimination.

[7] The soldiers' statements reveal that soldier A fired one shot, soldier B six shots and soldier C one shot. Mr McCann died as a result of one gunshot to the abdomen but it was not possible to establish which of the soldiers fired the fatal shot. Soldier B died some years after the incident.

[8] The Historical Enquiries Team ('HET') conducted a review into the circumstances surrounding the death in 2009 and 2010. As part of that review process, HET officers contacted soldiers A and C asking them to participate in the investigation and they each agreed to be interviewed in March 2010.

[9] In 2013 the next of kin of Mr McCann wrote to the AGNI seeking a direction for a fresh inquest under section 14 of the 1959 Act. The AGNI declined to make such a direction but in April 2013 wrote to the DPP asking him to review the original decision not to prosecute the soldiers in relation to the death of Mr McCann.

[10] On 16 December 2016 the DPP confirmed that a decision had been taken to prosecute soldiers A and C for murder. An application was made to stay the criminal proceedings as an abuse of process which was refused by Maguire J in a detailed judgment handed down on 30 January 2020 ([2020] NICC 6). The matter proceeded to trial before O'Hara J, sitting alone.

[11] On 30 April 2021 O'Hara J issued a ruling to the effect that neither the statements given to SIB in 1972 nor the contents of the interviews given to HET in 2010 were admissible in evidence against the applicants. The prosecution elected not to appeal this decision and offered no further evidence. Soldiers A and C were formally acquitted on 4 May 2021.

[12] On 22 June 2021 the next of kin renewed the application seeking a direction from the AGNI under section 14 of the 1959 Act. On 1 June 2022, following the decision of the Supreme Court in *Re McQuillan's Application* [2021] UKSC 55, the AGNI determined that there was no article 2 ECHR investigative obligation in relation to the death of Mr McCann.

[13] In October 2023 the submissions of the next of kin in relation to a fresh inquest were made available to the applicants' legal advisors who provided submissions in writing to the AGNI on 1 December 2023. These were met with further submissions from the next of kin's legal representatives in February 2024.

The evidence of the soldiers

[14] Soldier A has sworn an affidavit in which he deposes to various health issues from which he is suffering. He states that he has significant memory loss and has little or no recall of the previous investigations. The criminal prosecution generated considerable stress and this is likely to recur if a fresh inquest takes place.

[15] Soldier C deposes to the huge impact the prosecution had on him and his family. He says that the AGNI decision has caused his anxiety and sleeplessness to return. He is profoundly concerned about how this will affect his future.

The impugned decision

[16] The decision of the AGNI, dated 18 April 2024, consists of a direction to the Presiding Coroner to hold an inquest into the death of Mr McCann, and an Annex which sets out some of the background and the reasons for the decision.

[17] The AGNI determined that it would be advisable to order a new inquest for the following reasons:

(i) Whilst many of the relevant witnesses were now deceased or could not be traced, four civilian witnesses gave evidence at the 2021 trial. Soldiers A and C may well invoke the privilege against self-incrimination at the inquest but it would have the benefit of their previous written statements;

(ii) There was new evidence in the form of the HET review report;

(iii) Although the impact of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ('the Legacy Act')was such that there was no practical possibility of a fresh inquest being concluded, the AGNI was committed to using her section 14 discretion up until the date of commencement of the relevant provision;

(iv) The inquest would not be inhibited from considering the soldiers' written statements and could receive oral evidence from military and other witnesses and would thereby provide a public record of what occurred.

The test for leave

[18] It is incumbent on the applicants, at this stage, to establish that they enjoy an arguable case, with realistic prospects of success, which is not subject to any discretionary bar such as delay or alternative remedy.

The power to direct an inquest

[19] Section 14 of the 1959 Act states:

> "Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner … to conduct an inquest into the death of that person."

[20] In *Re Burns' Application* [2022] NIQB 18, I held that section 14 vested a broad discretion in the AGNI which permitted only a 'light touch' review. In relation to the question of 'advisability', I stated:

> "In simple terms, 'advisable' means prudent or sensible. In order to make such a judgment, it must be permissible to examine not only the circumstances of the original inquest (if there has been one) but also the circumstances which now prevail. As such, the AG's examination of the utility of holding a fresh inquest is an entirely legitimate and appropriate line of enquiry. The nature and source of any new evidence which has come to light would be central to this assessment of utility." (para [33])

[21] The power to direct a fresh inquest must be understood in the context of rule 15 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 which provides that an inquest is directed solely to the questions of who the deceased was and how, when and where he came by his death.

The impact of the Legacy Act

[22] The Legacy Act was enacted on 18 September 2023. With effect from 1 May 2024 section 44 inserted new sections 16A and 16B into the 1959 Act:

> "**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.
>
> **16B Death resulting directly from the Troubles: prohibition of new inquest**
>
> On and after the day on which section 44 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 comes into force—
>
> (a) a coroner must not decide to hold an inquest into any death that resulted directly from the Troubles, and
>
> (b) the Attorney General or Advocate General for Northern Ireland must not give a direction under section 14 for the conduct of an inquest into any death that resulted directly from the Troubles."

[23] Section 63(3) of the Legacy Act confirmed that the day section 44 came into force was 1 May 2024.

[24] As a result, no inquest could continue (save for the limited circumstances foreseen by section 16A(1)) nor could any be initiated after 1 May 2024. The power enjoyed by the AGNI under section 14 continued up to that date even though it must have been evident that it would not be feasible or practical to start and conclude an inquest within a short period of time.

[25] The current United Kingdom Government has pledged to restore legacy inquests but no steps have been taken to introduce any primary legislation to give effect to this promise. As matters stand, therefore, any direction given by the AGNI under section 14 is legally incapable of compliance.

The grounds of challenge

[26] The applicants rely on a number of grounds which are characterised variously as illegality and irrationality:

(i) Error of law in relation to the purpose of the inquest;

(ii) Error of fact in the treatment of the 1972 statements;

(iii) Want of adequate reasons; and

(iv) The impact of the Legacy Act.

(i) Error of law

[27] The applicants contend that the direction of the AGNI to hold an inquest in order to "provide a public record" was ultra vires since it purports to convene an inquest for a purpose which is outwith the 1959 Act and 1963 Rules.

[28] The modern coronial practice does not result in bare factual answers to the statutory questions. Rather, the inquest will produce narrative findings, analysing the evidence, within the framework of rule 15 of the 1963 Rules. One of the byproducts of this exercise will be the production of a public record. This is not, in and of itself, a reason to direct a fresh inquest but it will be an incident of such a direction.

[29] The reasons given by the AGNI refer to the evidence which a new inquest could receive and states that it "would thereby be able to provide a public record of what occurred." The use of the word 'thereby' indicates that the AGNI treated this outcome as a byproduct of the fresh inquest rather than an end in itself. I am not therefore persuaded that the applicants have established an arguable case on this ground.

(ii) Error of fact

[30] It is contended that the AGNI has committed a material error of fact which vitiates the section 14 direction.

[31] In *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, Carnwath LJ summarised this basis for review as follows:

> "First, there must have been a mistake as to an existing fact, a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning." (para [66])

[32] In her reasons, the AGNI states:

> "The inquest would also have the benefit of their previous written statements." (para [26])
>
> "An inquest would not be inhibited from considering the soldiers' written statements'" (para [30])

[33] In her response to the pre-action protocol letter issued by the applicants, the proposed respondent's advisors state:

> "The Attorney noted, inter alia, that an inquest would be able to consider written statements made by those implicated in Mr McCann's shooting that were not available to the original inquest."

[34] It is arguable that the AGNI has fallen into error in failing to recognise that the 1972 statements were adduced in evidence at the original inquest and taken into consideration. It is also arguable that this factor played a material part in the AGNI's reasoning.

(iii) Reasons

[35] It is well-established that reasons for a public law decision should be intelligible, adequate and sufficient for the reader to understand why the decision was made – see *South Bucks District Council v Porter (No 2)* [2004] UKHL 4.

[36] The applicants complain that the Annex to the AGNI letter dated 18 April 2024 fails to meet these minimum standards.

[37] Having considered the content of the letter and the Annex, I am not satisfied that any arguable case has been made out in relation to deficiency of reasons. It is evident that the applicants disagree with the reasons given but there is no basis to contend that they are inadequate or insufficient. Importantly, an applicant relying on this ground of challenge must also show that he has been substantially prejudiced by

the alleged inadequacy (see para [36] of the speech of Lord Brown in *South Bucks*). No such case has been made out on the evidence in this application.

(iv) The Legacy Act

[38] The applicants say that by issuing a section 14 direction 12 days before the Legacy Act came into force, the AGNI was seeking to compel another public authority to take a step which it could not legally fulfil. It is argued that, in these circumstances, it could never be 'advisable' to direct a fresh inquest or, alternatively, it represents an irrational decision on both substantive and procedural bases.

[39] In her reasons, the AGNI stated that she was committed to continue exercising the statutory power until such time as the new section 16B to the 1959 Act came into force. Whilst it is true that Parliament expressly preserved the section 14 power until 1 May 2024, it is arguable that this was a factor which ought to have been taken into account when analysing the question of 'advisability'. Equally, and for similar reason, it is at least arguable that the impact of the Legacy Act was a material consideration in the decision making process.

Utility

[40] The proposed respondent refers to the relief sought by the applicants in these proceedings, which is an order of certiorari quashing the decision made by the AGNI. The object of the litigation is clearly to prevent any further inquest taking place. The point is made that these proceedings can have no practical utility since there is no prospect of any such inquest taking place in the immediate or foreseeable future.

[41] The Secretary of State for Northern Ireland is on record as saying that primary legislation will be introduced "when parliamentary time allows" to restore legacy inquests (see para [72] of *Re Brown's Application* [2025] NICA 16). However, no draft legislation has been produced nor has any timetable been set for such steps to be taken.

[42] It is inescapable that, on the law as it currently stands, there can be no fresh inquest into the death of Mr McCann. Legislative change may occur, but it remains a matter for Parliament to determine whether, and to what extent, inquests caught by the Legacy Act may resume.

[43] The AGNI therefore submits that the court should decline to grant relief on the basis of a lack of utility or, in the alternative, should adjourn or stay the proceedings.

[44] The court must take into account the overriding objective in Order 1 rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980 in terms of the allocation of court resources, saving cost and dealing with cases expeditiously and fairly. It would not be consonant with the overriding objective, in terms of the use of court time and the incurring of costs, to proceed to a substantive hearing whilst the section 16A prohibition remains in place. It would not be a prudent use of resources either to

proceed to a full substantive hearing of this application or to require the applicants to issue fresh proceedings in the event that legacy inquests resume.

Conclusion

[45] For the reasons outlined, I am satisfied that the applicants have established an arguable case in relation to the grounds of error of fact and the impact of the Legacy Act. I propose, therefore, to grant leave on those grounds and I direct that the applicants serve the requisite notice of motion in the usual way but that no further steps be taken in this litigation until further order.

[46] The parties will have liberty to seek to lift the stay which I have imposed in light of any legislative or other developments.