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Judgment: approved by the court for handing down (subject to editorial corrections)*	*Delivered:* **03/06/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

Between:

ROSEMARY BRADLEY and MARGARITA DUFFY

Applicants/Appellants

and

THE MINISTRY OF DEFENCE

Respondent

Ms Quinlivan KC with Ms Smyth (instructed by Madden & Finucane Solicitors) for the Applicant Rosemary Bradley
Mr Hutton KC and Mr Toal KC (instructed by Harte Coyle Collins Solicitors) for the Applicant Margarita Duffy
Mr McGleenan KC with Mr McMillan KC and Mr McAteer and Mr McEvoy (instructed by the Crown Solicitor's Office) for the Respondent
Mr Sharp KC and Ms Wilson (instructed by Coroners Service NI) for the Coroner in Bradley
Mr Skelt KC and Mr Sands KC (instructed by the Coroners Service NI) for the Coroner in Duffy

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Before: Keegan LCJ, Treacy LJ and McCloskey LJ

KEEGAN LCJ (*with whom Treacy LJ agrees*)

Introduction

[1] This appeal arises in the context of two legacy inquests dealing with historical deaths during the Troubles in Northern Ireland. This is an appeal from a decision of Mr Justice Humphreys ("the judge") delivered on 1 March 2024, wherein he refused an application for judicial review in both the cases. There was another case heard at the same time in relation to an inquest of *Hugh Coney* which is not pursued.

[2] In the *Bradley* case, Rosemary Bradley's son Francis, was shot dead by members of the British Army on 18 February 1986. An inquest into the death was held in 1987, but the Attorney General exercised his powers under section 14 of the Coroners Act (Northern Ireland) 1959 ("the 1959 Act") to order a fresh inquest in 2010. This commenced in 2023, before His Honour Judge Irvine KC, sitting as a coroner.

[3] When we first listed this case for hearing in September 2024, it became apparent that the coroner had completed the hearing of the case and was about to deliver his ruling. We therefore paused the hearing for that to happen and the coroner's findings were duly delivered in a comprehensive ruling dated 24 October 2024. We will return to the substance of that in our judgment in due course.

[4] The application for judicial review that was dismissed at first instance sought to impugn the delays occasioned by the Ministry of Defence ("MoD") which it was said breached the article 2 rights of the applicant. In addition, it was a case in which the application of article 2 of the European Convention on Human Rights ("ECHR") came into focus due to the date of death and the temporal limit of the Convention in domestic law explained in the Supreme Court case of *Re Dalton's Application* [2023] UKSC 36.

[5] In the *Duffy* case, the applicant/appellant is Margarita Duffy, the daughter of Patrick Duffy, who was shot and killed by British soldiers on 24 November 1978. The Attorney General also made a section 14 direction in that case in March 2019. This inquest was assigned to Her Honour Judge Bagnall on 11 May 2022. The inquest opened on 21 May 2023 but was unable to be completed. This is an inquest that, like others, has been affected by the enacting of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act"), which caused a prohibition on inquests after 1 May 2024.

[6] Therefore, on 26 January 2024, the coroner ruled that the inquest would not be listed before 1 May 2024. She did that in the context of having heard evidence from a Ms Ahad of the MoD in relation to why disclosure had not been provided, and the inquest could not continue.

[7] The coroner in the *Duffy* case provided a written ruling which the judge at first instance summarises at para [12] as follows:

(i) Ms Ahad's description of the timescales involved was broadly accurate.

(ii) The process outlined by her was not capable of being materially expedited.

(iii) As a result of the legislative effect of the Legacy Act resources had been placed under significant pressure.

(iv) The MoD would not be able to complete the disclosure process in time to allow the inquest to conclude by 1 May 2024.

(v) She was not passing judgment on whether the MoD's actions in the past were or were not sufficient.

[8] On appeal the position is maintained that the conduct of the MoD in failing to provide disclosure was irrational and also represents a breach of the applicant's rights under article 2 of the ECHR.

This appeal

[9] This appeal distils into two questions as follows:

(i) whether the judge was correct in both cases to determine that the article 2 procedural obligations were not applicable given the date of death which fell outside the temporal limit of the Human Rights Act 1998; and

(ii) whether or not the MoD's delay in proceeding with the *Duffy* inquest was irrational.

[10] Ms Quinlivan led the argument in relation to the first question of the applicability of article 2 and Mr Hutton adopted her submissions. Mr Hutton led the argument in relation to the irrationality challenge. We will deal with each of these arguments in turn.

[11] In addition, submissions were filed on behalf of the coroner in the *Bradley* case by Mr Sharpe, whereby a request is made to the court that if the judge's ruling is upheld, the coroners in cases going forward would benefit from guidance as to how outstanding inquests should be conducted.

[12] Both appellants' propositions have been helpfully set out in a document as follows:

(i) That the trial judge erred in holding that article 2 ECHR rights were not engaged in the inquest process.

(ii) The appellants had a convention right to an article 2 compliant inquest.

(iii) The appellants had such right either because the Supreme Court in *Re McCaughey's* case had said that all running inquests should be conducted in a manner that complies with article 2 ECHR or because the appellants could rely on Convention rights in the coronial proceedings by virtue of sections 7(1) and 22(4) of the Human Rights Act 1998, the coronial proceedings being proceedings brought by or at the instigation of a public authority.

(iv) The appellants having such right, that right was disappointed by the actions of the respondent in that she was deprived of the inquest she was entitled to.

(v) She was therefore entitled to relief in the form of damages for irrationality.

(vi) The trial judge erred in failing to find that the respondent had acted irrationally in failing to properly assist the coroner to vindicate the appellants' rights to an expeditious inquest.

Context

[13] In February 2019, funding for the Legacy Inquest Project was announced and the Legacy Inquest Unit ("LIU") was established to deliver the then Lord Chief Justice's ("LCJ") plan to hear legacy inquests within a five-year timeframe. The LIU was designed to provide legal, administrative and investigative support, as required by the Presiding Coroner and coroners dealing with legacy inquests.

[14] During 2019-20 the structures and processes were put in place to support the delivery of the five-year plan. The initial legacy inquest caseload under the LCJ's five-year plan comprised of 53 inquests relating to 94 deaths.

[15] The Legacy Act received Royal Assent on 18 September 2023. Section 1 defines "the Troubles" as "the events and conduct that related to Northern Ireland affairs and occurred during the period beginning with 1 January 1966 and ending with 10 April 1998." Insofar as inquests are concerned, section 44 inserts a new section 16A into the 1959 Act which provides that any existing inquest into a death resulting directly from the Troubles must be closed by the coroner responsible on 1 May 2024 unless, by that date, as per the terms of section 16A "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."

[16] A new section 16B of the 1959 Act prohibits a coroner from deciding to hold an inquest into a Troubles related death and the Attorney General from giving a direction under section 14 requiring such an inquest to be held. By section 63(3) of the Legacy Act, section 44 does not come into force until 1 May 2024. Challenges to the compatibility and legality of the 2023 Act have been launched and were heard in the High Court by Colton J in the case of *Re Dillon and others* [2024] NIKB 11 and then the Court of Appeal in *Re Dillon and others* [2024] NICA 59 who both made findings of incompatibility with the ECHR. An appeal is due to be heard by the Supreme Court in October 2025. In the meantime, the government has committed to the restoration of legacy inquests as well as civil cases.

[17] Some inquests which remain to be heard are unallocated, some are not subject to the Legacy Act since the deaths did not occur within the defined period of the Troubles and some additional legacy inquests, which did not form part of the

original five-year plan, have been the subject of directions from the Attorney General under section 14 of the 1959 Act. This means that roughly 20 legacy inquests remain to be heard or concluded when inquests are reinstated. *Duffy* is one of those.

Relevant statutory provisions

[18] This case is framed by the terms of the Human Rights Act 1988, in particular, section 2(1) which states:

> "(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
>
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights."

[19] Section 7(1) which reads:

> "(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

[20] Section 22(4) which provides as follows:

> "(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section."

[21] Article 2 of the ECHR contains the well-known right to life in article 2(1), which is described as follows:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his

> conviction of a crime for which this penalty is provided by law."

Our analysis

(i) Application of McCaughey?

[22] The European Court of Human Rights has interpreted article 2 as containing a detachable procedural obligation to carry out an effective investigation into alleged breaches of the substantive limb of article 2. This has been discussed in a number of important cases emanating from Northern Ireland with their origins in *McCann v UK* [1995] EHRR 27 and then reiterated in *Jordan v UK* (2003) 37 EHRR 2.

[23] In this appeal the first point is as to what the Supreme Court decided on the issue of the temporal limit of article 2 for historic Troubles related deaths in Northern Ireland in *Re Dalton's Application* [2023] UKSC 36. That is a case which emanates from the highest court and is binding on this court.

[24] The ancillary argument is that whilst binding and, indeed, there can be no argument about that, this decision does not, in fact, overrule a previous decision of the House of Lords in the case of *McCaughey's Application* [2011] UKSC 20. It is important at this point to set out exactly what *Dalton* decided. The Supreme Court unanimously allowed the Attorney General of Northern Ireland's appeal and held that Rosaleen Dalton could not challenge the Attorney's refusal to open a new inquest into her father's death because it occurred outside the temporal scope, ie it was too long before the coming into force of the Human Rights Act. True it is that the Supreme Court delivered four judgments, one from Lord Reed, a joint judgment from Lord Hodge, Lord Sales and Lady Rose, a judgment from Lord Leggat and a joint judgment from Lord Burrows and Dame Siobhan Keegan.

[25] However, the *ratio* is clear as to the temporal limit to be applied in domestic law to cases where reliance is placed upon article 2 of the ECHR. While allowing the appeal of the Attorney General, the Supreme Court was unanimous in rejecting the Attorney General's submissions that it should depart from the earlier decision of the Supreme Court in *Re Finucane* [2019] UKSC 7, and the obiter dicta of the Supreme Court in *Re McQuillan* [2021] UKSC 55.

[26] The reasons for the judgment on the principal issue are summarised in the UKSC's summary in six propositions which bear repeating in this judgment as follows:

> "Although there are different degrees of emphasis and some disagreement as to precisely what the European Court of Human Rights has decided on the temporal scope of the Convention. The main reasoning of the

Supreme Court is as follows [44], [51], [170], [172], [260-261], [333-334], and [337].

First, the decision in *Finucane* should not be departed from, albeit that the Supreme Court disagrees with the wide multifactorial reasoning that the majority of the justices consider was adopted in that case.

Second, the obiter dicta at para 144 in *McQuillan* with some slight amendments for clarity, set out the correct analysis.

Third, that means that the obligation under article 2 of the Convention to investigate a death is only capable of applying to deaths which occurred within an outer period of 12 years before the Human Rights Act came into force on 2 October 2000 (unless what is called "the Convention Values Test" is met). In other words, if the death occurred more than 12 years before 2 October 2000, a court should strike out proceedings alleging a breach of this obligation unless the Convention values test applies. The Convention values test imposes an extremely high hurdle for someone seeking to rely on it. What is principally in mind are serious crimes under international law, such as war crimes, genocide, or crimes against humanity.

Fourth, if the death occurred between 10 and 12 years before 2 October 2000, then a claim may only be brought in exceptional circumstances (even leaving to one side the Convention values Test). Those circumstances (as explained in *McQuillan* at para 144) are that any original investigation into the death can be seen to have been seriously deficient or non-existent and that the bulk of such investigative effort which has taken place, or which ought to have taken place, post-dates 2 October 2000.

Fifth, the analysis of the law approved by the Supreme Court combines the certainty of two fixed periods (10 years and 12 years) with the flexibility, for the compelling reasons explained in para 144 of *McQuillan*, to extend the primary period of 10 years to the outer period of 12 years.

Sixth, if the death occurred less than 10 years before 2 October 2000, then it must still be shown that a major

> part of the investigation took place, or ought to have taken place, after 2 October 2000.
>
> Applying that analysis of the law to the facts of this case, because Sean Dalton's death occurred more than 12 years before the Human Rights Act came into force on 2 October 2000, and because there is no question of the Convention values test being satisfied in this case, Rosaleen Dalton has no claim for the alleged infringement of her article 2 right under the HRA. Put another way, the domestic courts do not have jurisdiction under the Human Rights Act in respect of Mr Dalton's death."

[27] Of course, *Dalton* came after a long line of cases in this area beginning with *McKerr* [2004] UKHL 12. This case determined that the Human Rights Act was not retrospective. Why *McCaughey* took a different line was because of an intervening Grand Chamber case of the European Court of Human Rights called *Šilih v Slovenia* (2009) 49 EHRR 37. However, that is not the end of the jurisprudential chain. There was a further decision of the Grand Chamber in *Janowiec v Russia* (2013) 58 EHRR 30. That led to the case of *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, *Finucane* and *McQuillan*. The judge at first instance discusses all of this case law from paras [33]-[65] of his judgment after which he discusses the judgments in *Dalton* which we have already summarised in this case.

[28] We do not think it is necessary to embark on a further analysis of the law, given that it is comprehensively examined in *Dalton* and given what we have said about the *ratio* of *Dalton*.

[29] The only remaining question is a procedural one which is whether the *McCaughey* decision can be applied in support of the appellants' arguments post-*Dalton*. In a nutshell, the judge at first instance found that the *Dalton* decision, which is the most recent decision in the chain of jurisprudence dealing with the article 2 temporal limit, was binding upon him. The core of his reasoning is found at paras [94] and [95] of his judgment as follows:

> "[94] The court in *McCaughey* itself was able to depart from *McKerr* without the invocation of the Practice Statement. In turn, the court in *Finucane*, *McQuillan* and *Dalton* has done the same thing to *McCaughey*. It is able to do so through the evolutionary process referred to in both *McCaughey* and *Keyu*. The courts do so because of the changing nature of the article 2 obligation as a matter of international law. While it is not an application of the mirror principles stricto sensu, this process has been recognised as a modified mirror principle or the application of the principle by analogy.

> [95] If the next of kin argument is correct, the decision of seven justices in *Dalton* is rendered virtually meaningless. This cannot be the case. It is the express view of the UK's highest court, on appeal from the Court of Appeal in Northern Ireland and is binding on me."

[30] We cannot fault the rationale contained in para [94] above and accordingly we adopt it. We agree with the respondent's case that it would be wrong to simply apply *McCaughey* in inquest cases rather than *Dalton* because it was not expressly reversed by later Supreme Court decisions. Of course, *McKerr* has never been expressly overruled either. However, the law has developed. In particular, the decision of *McQuillan* marked a very clear staging point in the road in relation to temporal limit in legacy type cases in Northern Ireland, where the Human Rights Act was drawn in aid to establish a claim. We agree with the respondent that the clear statement of principle in *McQuillan* set out at para [167] sets the baseline for consideration of the effect of the judgment in *Dalton*.

[31] To our mind Lord Reed did not at para [28] of *Dalton* reaffirm *McCaughey* in the sense that the *ratio* would continue to apply to inquests. Rather, he noted the decision and summarised it as part of his review of the European and domestic jurisprudence (through paras [25]-[28]) as did the other justices involved in the case. Lord Reed's analysis is found at [27] and [28]:

> "27. That position was reassessed, following the European court's judgment in *Šilih*, in *In re McCaughey* [2011] UKSC 20; [2012] 1 AC 725 ("*McCaughey*"). That case concerned deaths which occurred on 9 October 1990, slightly less than ten years before the commencement date. An inquest was pending on the latter date and remained pending at the date of the hearing. The issue was whether the inquest was subject to the procedural obligation imposed by article 2. The court, by a majority, held that it was.
>
> 28. All the members of the majority recognised that *Šilih* had made it clear that the procedural obligation imposed by article 2 was distinct from the substantive obligation to protect life imposed by the same article. Beyond that, they gave differing reasons for their decision. It is unnecessary for present purposes to consider the views expressed. **It was, however, generally accepted that inquests held after the Human Rights Act came into force should comply with the relatives' article 2 rights, even if the death occurred before the commencement date." [our emphasis]**

[32] This court must apply the latest in a line of jurisprudence in a complicated area which has evolved due to consideration of temporal limit by the European Court of Human Rights. This is entirely consistent with our common law. Thus, it is wrong to say that the court at first instance was faced with "a clash of Supreme Court decisions." The appellants' reliance on *Kay & Others v London Borough of Lambeth & others* [2006] UKHL 10 is misplaced.

[33] Therefore, we reject the first limb of the argument that *McCaughey* must be applied rather than *Dalton*. Properly analysed, it is clear that, *Dalton* would apply to all cases of a legacy nature where the Human Rights Act was drawn in aid.

[34] The subsidiary point which involves reliance on section 22(4) of the Human Rights Act is also unconvincing for the following reasons. It is quite clear that the majority decision in *R(Hurst) v Commissioner of Police of the Metropolis* [2007] UKHL 13, militates against this argument. The judgment of Lord Brown from paras [63]-[64] is clearly against the appellants' argument, which states as follows:

> "[64] Inquest proceedings are in no sense brought *against* those participating in them. Least of all are they brought against those like this respondent whose sole concern is that such proceedings *should be* brought. In the present case, your Lordships will appreciate, the inquest stands adjourned, and it is the respondent who seeks, the coroner who refuses, its re-opening. The true analysis here is that the respondent is herself 'bring[ing] proceedings against the authority' within the meaning of section 7(1)(a) rather than relying on a Convention right in a legal proceeding brought by a public authority within the meaning of section 7(1)(b)."

[35] Ms Quinlivan frankly accepted that her only support for this argument derived from *obiter* comments from Lady Hale in *McCaughey* at para [86]:

> "The exception applies to "proceedings brought by or at the instigation of a public authority"; in such proceedings, a victim may rely on a Convention right whenever the act in question took place: section 22(4) read with section 7(1)(b). It was argued in Hurst that an inquest was "proceedings brought by or at the instigation of a public authority" and that the mother of the deceased was therefore entitled to rely on her Convention right to an article 2 compliant inquiry whenever the death took place. That argument was roundly rejected (at paras 60 to 64) on the basis that the exception was meant to allow people against whom a prosecution or civil proceedings had been

> brought to rely upon his Convention rights to defend himself against the state:
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> > 'Convention rights may be used as a shield to defeat proceedings brought against victims by public authorities, but not as a sword.'" (Lord Brown of Eaton-under-Heywood, at para 62)."

[36] This admittedly *obiter* view cannot dilute the force of the authority of *Hurst* set out above. Hence, the appellants' argument based on section 22(4) of the Human Rights Act must fail.

[37] What all of this means is that the judge was right to say that the inquest in both cases, given the temporal limit, did not fall to be considered as an article 2 inquest. We will come to what the effect of this is on inquests already in the system later in our judgment. But, for the reasons we have given we reject the first ground of appeal.

(ii) Irrationality?

[38] As the first instance court records, this ground of challenge was comprehensively examined and determined by the coroner in the *Duffy* case. She received a sworn affidavit by Ms Ahad and evidence was called from her. The MoD's decision freely and clearly expressed was that it could not resource discovery in this particular case given the demands on the MoD as a result of the enactment of the Legacy Act.

[39] There could be no complaint that this matter was not dealt with comprehensively, in particular, the coroner did conduct a preliminary hearing on this point which sought to explain alleged delays in disclosure by the MoD and found Ms Ahad to be a truthful witness. The coroner went on to make the following comments:

> "[18] Ms Ahad stated that her department has been faced with an unprecedented number of inquests going ahead between now and the end of April. She explained the pressure on resources in her department. When asked if the timetable could be reduced, Ms Ahad said that she had tested this but had come to the conclusion that it could not. She explained that the team working on legacy inquests had been resourced on the basis of a five year plan, but that this is not the environment they were now working in, with 20 inquests ongoing and 14 listed at present. …

> [21] Ms Ahad was asked about additional resources and whether that could ameliorate the difficulties with disclosure. Ms Ahad advised the court that it is simply not a realistic proposal to recruit more individuals to carry out the work particularly that concerning the SMU at this juncture as there is a very limited pool of people with appropriate knowledge, expertise and security clearance and, furthermore it would take time to train them."

[40] Whilst valid questions arise as to why there were limited personnel in the specialist disclosure unit, the fact of the matter was that legacy inquest cases were timetabled in Northern Ireland as part of the five-year plan to avoid all cases being heard together and to spread resources practically to allow inquests to be heard.

[41] When inquests concertinaed into a period just prior to the enactment of the Legacy Act, the question of resources was clearly going to arise. That is plain. In November 2023, the Presiding Coroner specifically referred to this when making a statement as to ongoing case management of outstanding inquests as follows**:**

> "I am, of course, conscious of the obligation imposed on coroners both by Rule 3 of the Coroners (Practice and Procedure) Rules 1963 and, where appropriate, article 2 of the ECHR to act promptly and to hold inquests as soon as practicable. The ability to comply with such obligation is tempered by the finite nature of resources. As will be evident, there are a series of inquests which are part heard and where coroners intend to complete hearing evidence over the course of the next five months. The net result of this is that resources have been stretched to their limit. These are resources in terms of LIU solicitors and support staff, legal representatives and disclosure experts in the various state agencies, courtrooms and court staff, counsel with expertise in the field, expert witnesses and coroners.
>
> Coroners have displayed a willingness to bring the inquests they are managing to conclusion before 1 May 2024. In order to achieve this, they will require the focussed input of all concerned.
>
> The unfortunate, but inevitable, effect of the position which all PIPs and practitioners find themselves in is that there are simply no resources available which would enable me, in my role as Presiding Coroner, to allocate responsibility for any of the remaining legacy inquests to coroners at the moment. Even if I were to do so,

> experience indicates that it would be very difficult for an inquest to come to a conclusion prior to 1 May 2024. I recognise the disappointment, upset and anger this will cause to the relatives whose loved ones have died and who have an expectation that an inquest will be held to find out how the death occurred."

[42] Despite his best-efforts Mr Hutton could not point to a particular breach or deliberate default within the context in which this issue arose and so we find no basis for the irrationality claim given the hurdle that it must reach in any public law case. The resource issue was plain and was explained by the MoD and that evidence was accepted by the judge.

[43] Considering all of the above, we see no reason to depart from the judge's observations at paras [117] and [118] as follows when he said:

> "[117] …The Judicial Review court does not act as a Court of Appeal from coroners and, in any event, this application does not seek to impugn the coroner's decision. There is therefore no basis to impeach her findings.
>
> [118] The irrationality claim is unsustainable as there is no evidence of a deliberately unlawful act taken by the public authority."

[44] The second ground of appeal therefore fails, and we are bound to dismiss this appeal.

The consequential issue?

[45] As we understand it 20 or so inquests may be reinstated by amendment of the Legacy Act and some inquests have been heard and adjourned for judgment. These inquests were originally constituted and timetabled to proceed before the coroner's court under the five-year plan. No issue was taken with the application of article 2 in all of these cases. The legal landscape as regards the application of article 2 has changed as we have discussed in our judgment above. Thus, it is that senior counsel in the *Bradley* case properly raised the consequential issue with this court. In the event, we adjourned the hearing of this appeal for the *Bradley* findings to be delivered.

[46] The judge at first instance addressed the consequential issue at paras [100], [104], [108] and [109] as follows:

> "[100] It will be a matter for individual coroners charged with the conduct of a particular inquest to determine the

> scope, the relevant evidence and the nature and extent of the verdict and conclusions. Whether or not article 2 applies may have an impact on some or all of these questions. However, it may be observed that the difference might not be all that pronounced.
> …
> [104] Lord Brown commented in *McCaughey*:
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> > 'It may be doubted whether in reality there is all that much difference between an article 2 compliant inquest (a *Middleton* inquest – see *R(Middleton) v West Somerset Coroner* [2004] 2 AC 182) and one supposedly not (a *Jamieson* inquest: *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1).'
>
> …
> [108] Having noted the restrictions, the coronial jurisprudence in recent times has recognised that the coroner is nonetheless under a duty 'to ensure that the relevant facts are fully, fairly and fearlessly investigated' (per Sir Thomas Bingham in *Jamieson*). The same judge said in *Jordan v The Lord Chancellor* [2007] UKHL 14 that whilst a verdict of unlawful killing is not open in Northern Ireland, an inquest may find facts which may point very strongly to the existence of criminal liability.
>
> [109] Given the potential scope for such findings, and the need for a full fact-finding exercise, it may be therefore in any given case that the application or otherwise of article 2 is a point of academic interest only, making little practical difference to the running or the outcome of the inquest."

[47] There is much practical wisdom in Lord Brown's *obiter* comments in *McCaughey*. In the event, in the *Bradley* inquest the coroner made his own assessment and found that article 2 was not engaged. However, having made that assessment, he determined the scope of the inquest broadly and provided comprehensive findings after receiving submissions from all interested parties.

[48] Importantly, we note that in submissions the MoD and the Police Service of Northern Ireland did not take any issue with the fact that the inquest would proceed in the same way if it were an article 2 inquest or not. The only divergence was as to whether the inquest findings would be expressed in a different way. Having obtained the views of all interested parties the coroner provided an extremely comprehensive ruling reported at [2024] NICoroner 30.

[49] The coroner did not limit the scope of the inquest notwithstanding finding that article 2 did not apply. Furthermore, whilst the coroner decided that article 2 was not applicable, he proceeded to deliver his findings in accordance with his duty to ensure that all relevant facts are fully, fairly and fearlessly investigated and, accordingly, his findings reflected that.

[50] The coroner also acted in accordance with the relevant coronial rules which he referenced as follows. Rule 15 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 as amended, sets out the matters to which proceedings of an inquest shall be directed in the following terms:

> "15. The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely:
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> (a) who the deceased was;
>
> (b) how, when and where the deceased came by his death;
>
> (c) the particulars for the time being required by the Births and Deaths Registration Order (Northern Ireland) 1976 to be registered concerning the death."

[51] Rule 16 provides that neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in rule 15. Finally, rule 22(1) provides that after hearing the evidence, the coroner shall give a verdict in writing, which verdict shall, so far as such particulars have been proved, be confined to a statement of the matter specified in rule 15.

[52] In para [518] of his ruling, the coroner decided that the use of lethal force was justified because Soldier C held the honest belief that it was necessary to prevent the loss of life. He decided that the force was both reasonable and proportionate. The coroner went on to decide that the operation was planned and controlled in such a way as to minimise to the greatest extent possible the need for recourse to lethal force. Plainly, these findings engage with the core issues which needed to be dealt with (although we recognise that the next of kin may not agree with the outcome).

[53] It must also be remembered that the Coroners Act 1959 could not have contemplated the type of inquest that is now being heard as a legacy-type inquest. Northern Ireland has not been subject to the legislative change that England & Wales has and does not, for instance, have the facility to reach a verdict of unlawful killing. In this jurisdiction coronial practice has had to adapt to the unique context of legacy cases. These legacy inquests have almost invariably been heard by judges rather than a judge sitting with a jury given the complexities which arise. In addition, we

do not have the short form verdict used in England. Instead, the coroner records findings in narrative form on the relevant form and provides a written ruling which contains narrative findings. This procedure which has been followed for many years now in our jurisdiction is required given the complexity of these cases and the need to provide comprehensive answers to the question of how a deceased died during the Troubles.

[54] In the absence of reform post the 1959 Act and 1963 Rules as amended coronial practice has developed under common law. The common law exists to allow courts to adapt to changing needs and it is characterised by its practicality. By way of illustration, procedures for anonymity and screening and other methods of taking evidence in a coronial case have all been established under common law.

[55] It follows, that even if the article 2 procedural obligation is not in play in a legacy inquest due to the temporal limit, an inquest will have to properly cover the territory which each case is engaged with. Legacy inquest cases typically require examination of large amounts of material and consideration of disputed evidence as to the use of force by police, soldiers or terrorists. Adjudication requires close and detailed examination of the facts. Whilst this is an inquisitorial process it also has adversarial elements given the issues that arise and the need to ensure transparency and involvement of the next of kin. Such principles are clearly articulated in the article 2 jurisprudence but also derive from common law considerations of fairness and transparency.

[56] Of course, we recognise that an individual coroner has a discretion as to how to conduct an inquest as it is an inquisitorial process. However, given the nature of legacy inquests in Northern Ireland some consistency is desirable. We consider that the approach taken in *Bradley* was permissible under domestic law. There is no reason in principle why it cannot be followed in the 20 or so inquests, most of which are part heard, which were timetabled under the five-year plan but remain outstanding. To our mind, it would be unfair to the next of kin affected by these outstanding inquests if they felt in some way their inquest was dealt with in a less forensic and detailed way than the inquests that have already been heard, some of which, incidentally, would have fallen outside of temporal scope based on the current law. Another benefit of this approach is the avoidance of further litigation as it would be unfortunate if a coroner adopted a narrow approach in an inquest and then further litigation was pursued in the civil courts.

[57] The *Bradley* findings are a concrete example of how this approach works in practice in the unique circumstances of Northern Ireland legacy inquests. The common law facilitates such an approach which is fact sensitive, does not conflict with statute, is reasonable and fair, and is reflective of the needs of the people of Northern Ireland to achieve resolution in these outstanding cases.

Conclusion

[58] Accordingly, we affirm the decision of Humphreys J and dismiss this appeal.

McCLOSKEY LJ (*concurring*)

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Preface

Since preparing this judgment I have considered the draft judgment of the Lady Chief Justice. While our reasoning may not be identical we have reached the same conclusions on the central issues. With regard to the Chief Justice's obiter observations in paras [45]–[55] concerning outstanding legacy inquests in Northern Ireland, I would prefer to reserve my views given the current prevailing uncertainty, the incognito of future legislation and the desirability of more focused argument.

Introduction

[59] It is appropriate to highlight at the outset that the adjudication required of this court arises out of two tragic and controversial deaths. Rosemary Bradley and Margarita Duffy are, respectively, the mother and daughter of Francis Bradley and Patrick Duffy, both shot and killed by members of the British Armed Forces on separate dates, namely 18 February 1986 and 24 November 1978. Each of these deaths has been the subject of inquest proceedings.

[60] In their applications for judicial review the primary question to be determined is whether the procedural/investigative dimension of article 2 ECHR (via section 6 of the Human Rights Act 1998) applies to either inquest. The High Court answered

this question in the negative, basing its decision on certain recent decisions of the UK Supreme Court. This is the subject of the two appeals to this court.

Factual matrix

[61] The material facts are few and uncontested. They are the following:

(i) On 24 November 1978 Patrick Duffy was shot and killed by members of the British Armed Forces.

(ii) On 18 February 1986 Francis Bradley was shot and killed by members of the British Armed Forces.

(iii) On 2 October 2000 most of the provisions of the Human Rights Act 1998 ("HRA 1998") came into operation, thereby converting article 2 ECHR to a provision of the domestic law of the United Kingdom ("UK").

(iv) From April 2023 to April 2024 the inquest into the death of Francis Bradley was conducted and the outcome was promulgated on 24 October 2024 (see [2024] NICoroner 30). The Coroner found that the use of force under scrutiny was lawful.

(v) On 21 April 2023 the inquest into the death of Patrick Duffy began and on 1 May 2025 was extinguished as a matter of law by virtue of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 (the "Legacy Act").

(vi) The judicial review proceedings in the two cases were initiated on 19 December 2023 and 22 December 2023 respectively, judgment was given on 1 March 2024 and the appeals to this court were admitted to the case management phase in September 2024.

At first instance

[62] Humphreys J, commendably, processed and completed both cases within a period of some two months: see [2024] NIKB 12. At para [3] of his judgment, he observed that each of the applications, at its core, raised the same fundamental question, namely:

> "Does the article 2 ECHR investigative obligation apply to the inquest as a matter of domestic law?"

The judge continued at para [4]:

> "The question posed is a binary hard-edged matter of law."

[63] Answering the aforementioned question in the negative, the key conclusion of Humphreys J is found at para [98]:

> "The dates of the three deaths at issue in these proceedings were 18 February 1986, 24 November 1978 and 6 November 1974. All of these fall outside the 12 year outer limit and therefore the article 2 procedural obligation does not apply to these inquests as a matter of domestic law."

The third death to which this passage refers is that of Hugh Gerard Coney: this was the subject matter of a third application for judicial review at first instance which has not given rise to an appeal to this court.

The applicable jurisprudence

[64] The jurisprudence pertaining to the central question of law determined by the trial judge comprises in the main six decisions of the Supreme Court of the United Kingdom and two of the European Court of Human Rights ("ECtHR"). These are, in chronological sequence:

Re McKerr [2004] UKHL 12

Šilih v Slovenia [2009] 49 EHRR 37

Re McCaughey [2011] UKSC 20

Janowiec v Russia [2014] 58 EHRR 30

R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69

Re Finucane [2019] UKSC 7

Re McQuillan [2021] UKSC 55

Re Dalton [2023] UKSC 36

The issues in a nutshell

[65] The decision of the Supreme Court in *Re McCaughey* represents the cornerstone of the appellants' cases. While there is substantial volume in the written and oral submissions on behalf of the appellants presented to this court, these may be reduced to the contention that the investigative dimension of article 2 ECHR applies to the inquests in both cases. The correctness of this argument requires this

court to determine whether *McCaughey* determines this core issue, irrespective of the subsequent decisions of the Supreme Court listed above.

[66] In the case of Margarita Duffy (only), there is a further and separate argument, namely that the appellant can rely on article 2 ECHR by virtue of sections 7(1) and 22(4) of HRA 1998 because the inquest constitutes proceedings brought by or at the instigation of a public authority. There is also a complaint of irrationality (para [86] ff *infra*).

The Human Rights Act 1998

[67] The material provisions of HRA 1998 are the following:

> Section 1(1)(a)
>
> "(1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—
>
> (a) Articles 2 to 12 and 14 of the Convention."
>
> Section 2(1)(a)
>
> "Interpretation of Convention rights.
>
> (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
>
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, … "
>
> Section 6
>
> "Acts of public authorities.
>
> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) …

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order."

Section 7(1)

"(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act."

Section 22(4)

> "(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section."
>
> Schedule 1, Part 1
>
> Article 2 ECHR :
>
> "Right to life
>
> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

The jurisprudence considered

[68] In *Re McKerr*, the subject death occurred on 11 November 1982 and was perpetrated by police officers. Some 20 years later, following the commencement of HRA 1998, the next of kin commenced judicial review proceedings contending that the UK government was obliged by article 2 ECHR (via section 6 of HRA 1998) to conduct an investigation into the death. The issue was whether HRA 1998 was applicable to deaths pre-dating 2 October 2000. The House of Lords unanimously answered this question in the negative. They emphasised the distinction between rights arising under ECHR and rights created by HRA 1998. The former existed prior to the introduction of HRA 1998 and continued to exist but did not form part of UK domestic law. The separate contention advanced, namely that there was a common law right kindred to that protected by article 2, was also rejected.

[69] The rejection of the appellant's primary contention was based on an exercise of statutory construction. In a sentence, the rights and corresponding duties introduced by HRA 1998 on 2 October 2000 were held not to apply to deaths pre-dating the operative date of the statute. Per Lord Hoffmann at para [71]:

> "In my opinion Parliament intended section 6 of the 1998 Act to be enforced but enforced only in respect of breaches occurring after it came into force."

This was the unanimous view of the Judicial Committee. Lords Nicholl, Steyn, Rodger and Brown expressed themselves in comparable terms: see paras [22]–[23], [50], [83] and [91]–[92]. Lord Rodger of Earlsferry, in passing, noted that this was

"subject to" section 22(4) which had no application to the case in question: see para [79].

[70] Sequentially, the decision of the ECtHR in *Šilih v Slovenia* falls to be considered next. It is important to consider this decision with article 28 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") in mind. Under the rubric "Non-retroactivity of Treaties", article 28 provides:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the entry into force of the treaty with regard to that party."

The non-retroactivity of international treaties is, therefore, an established general principle of international law.

[71] In *Šilih*, the subject death occurred in 1993, one year prior to ratification of the ECHR by Slovenia. The Grand Chamber expressly acknowledged article 28 of the Vienna Convention. At para [150] the court adverted to one previous decision of a chamber which, it was said, illustrated a preparedness to have "some regard" to facts predating the "critical date" (ie the date of ratification of the Convention) because of their causal connection with later facts forming the sole basis of the complaint. This is the case of *Balasoiu v Romania* (No 37424/97), an article 3 ECHR case, where the court decided that it had jurisdiction to examine the procedural limb of the complaint on the ground that the proceedings against those responsible for the alleged ill treatment had continued after the critical date.

[72] At para [152] the Grand Chamber set itself the following task:

> "Having regard to the varying approaches taken by different Chambers of the Court in the above cases, the Grand Chamber must now determine whether the procedural obligations arising under Article 2 can be seen as being detachable from the substantive act and capable of coming into play in respect of deaths which occurred prior to the critical date or alternatively whether they are so inextricably linked to the substantive obligation that an issue may only arise in respect of deaths which occur after that date."

At para [159] the court concluded that the investigative obligation under article 2 ECHR had evolved into:

> "… a separate and autonomous duty … capable of binding the state even when the death took place before the critical date."

In thus deciding, the court answered in the affirmative the question which it had posed at para 152, concluding that:

> "… the procedural obligations arising under Article 2 can be seen as being detachable from the substantive act and capable of coming into play in respect of deaths which occurred prior to the critical date …"

In the lexicon which has developed, the procedural duty under article 2 ECHR is "detachable" from its substantive relative.

[73] At paras [161]–[163] the court elaborated on the temporal reach of this discrete duty, emphasising that it was not "open-ended." Drawing attention to the principle of legal certainty, the court emphasised that this temporal effect applied only where there was a "genuine connection" between the subject death and the entry into force of the Convention in the member state concerned. This genuine connection could be established where a "significant number of the procedural steps required by article 2" had been, or should have been, carried out after the critical date (which test was satisfied in the particular case). The court did not specify any concrete temporal limit. The court further held that, in certain circumstances, the necessary connection could be provided by the need to ensure the underlying values of the Convention. Reservations about the absence of any concrete temporal limit were expressed in both concurring and dissenting judgments of the Grand Chamber.

[74] In *Re McCaughey* the Supreme Court grappled with the decision in *Šilih*. By a majority of 6/1 the court determined to give effect to *Šilih*. Doctrinally, the basis for doing so was the *soi-disant* "mirror principle." This principle is based upon a combination of section 2(1) of HRA 1998 (*supra*) and the "living instrument" characterisation of the Convention. It features particularly in the judgments of Lord Phillips, Baroness Hale, Lord Brown and Lord Kerr: see paras [62], [91], [101] and [134]. I shall examine the "mirror principle" more fully *infra*.

[75] Of the four members of the majority only Lord Phillips confronted squarely the reality that this conclusion required it to depart from *McKerr*. Lord Phillips, who provided the main judgment, at para [62] first debated whether a departure would be required, given that the question, "Is the presumed intention of Parliament when enacting the HRA that there should be no domestic requirement to comply with this international obligation?" was "very different" from that considered in *McKerr*. Having done so, he was "inclined to think" that a departure was required, concluding:

> "… it is a departure that it is right to make having regard to the fact that the decision in *Re McKerr* was premised on the existence of an international obligation which was very different from that which is now seen to exist."

The full reasoning of Lord Philips can be gauged from paras [24]–[25], [42], [49], [56], [58]–[59] and [60]–[62]. The juxtaposition of international law and domestic statute law in para [56] is noteworthy:

> "…This country is under an international obligation under the Convention to ensure that, if it does hold an inquest into an historic death, that inquest complies with the procedural obligations of Article 2. The issue directly raised by these appeals is whether that obligation is, on true interpretation of the HRA, one to which that Act applies ..."

As para [62] makes clear, Lord Philips applied the "mirror principle." In stating that this principle should "prevail", he reasoned simultaneously that this principle "… reinforces an interpretation that does not exclude [the article 2 procedural] obligation from the ambit of the HRA."

[76] The issue of departing from *McKerr* received limited attention in the judgments of the other Supreme Court Justices. It emerges most forcefully in the dissenting judgment of Lord Rodger at para [155]ff. Both the "mirror principle" and section 2(1) of HRA 1998 also featured in some of the other judgments: see paras [71]–[72] (per Lord Hope), para [91] (per Lady Hale) and para [134] (per Lord Dyson).

[77] In *Janowiec v Russia* [2014] 58 EHRR 30, decided some two years later, the ECtHR considered the question of the temporal limit of the investigative obligation under article 2 ECHR in a context where the subject deaths had occurred in 1940 and the respondent state, Russia, had ratified the Convention on 5 May 1998. At para [127] the Grand Chamber restated the general principle enshrined in article 28 of the Vienna Convention. The court then considered the question of whether the "genuine connection" test should incorporate a temporal limit. At paras [140]–[141] the court acknowledged the uncertainties arising from its decision in *Šilih*, recognising the need for clarification. The court decided that the "genuine connection" test entailed satisfying the following two requirements:

(i) The lapse of time between the triggering event and the critical date should not exceed ten years – subject to, exceptionally, a longer period where the requirements of the "Convention values" test have been satisfied: para [146].

(ii) A major part of the investigation must have been carried out, or ought to have been carried out, following the critical date.

[78] It is necessary to reproduce paras [143] and [146] in full:

> "…The Court further considers that the reference to "procedural acts" must be understood in the sense inherent in the procedural obligation under art.2 or, as the case may be, art.3 of the Convention, namely acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party. This definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing a historical truth …
>
> The Court considers that the time factor is the first and most crucial indicator of the "genuine" nature of the connection. It notes, as it previously did in the Chamber judgment, that the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the "genuine connection" standard. Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed 10 years. Even if, in exceptional circumstances, it may be justified to extend the time-limit further into the past, it should be done on condition that the requirements of the "Convention values" test have been met."

At paras [149]–[151] the court elaborated on the "Convention values" test, explaining firstly that this operates as an exception to the "genuine connection" test. It provided the illustrations of war crimes, genocide, crimes against humanity or other serious crimes under international law. Highlighting that the events under scrutiny had unfolded during the decade of the 1940s, more than 10 years before the ECHR was adopted, the court concluded that neither test was satisfied. The date of this decision, 21 October 2013, is to be noted.

[79] *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69 concerned the question of whether the relevant Government ministers were legally obliged to establish a public enquiry relating to the deaths of 24 unarmed civilians in Malaysia perpetrated by members of the British Armed Forces. As the appellant's case was based on article 2 ECHR it was necessary for the Supreme Court to examine the decisions of the Strasbourg Grand Chamber in *Šilih* and *Janowiec*.

[80] While Lord Neuberger espoused the date on which the United Kingdom had recognised the right of individual petition to the ECtHR (13 January 1966) as the

"critical date", this did not survive subsequent jurisprudential developments (see *infra*). As Lord Neuberger's summary of *Re McCaughey* at paras [94]–[96] demonstrates, (and as noted above) in the latter case the question of whether *McKerr* had been overruled was left unclear. Lord Neuberger opined that overruling *McKerr* would not be appropriate "… unless we have reached a clear and unanimous position on it": para [97]. The judgment of Lord Kerr is particularly noteworthy for its extensive analysis of the "critical date" issue, at paras [210]–[242]. In these passages he took cognisance of the "mirror principle" at paras [231]–[232]. At para [243]ff Lord Kerr was careful to note the distinction between the Convention and HRA 1998. The outcome of *Keyu* was, as Mr McGleenan submitted, an unqualified endorsement by the Supreme Court of a 12 year outer time limit.

[81] *Re Finucane* [2019] UKSC 7 is the next case in which the Supreme Court considered the decision in *Janowiec*. In that case the killing occurred on 12 February 1989, 11 years and 8 months prior to the operative date of HRA 1998. Lord Kerr gave the unanimous decision of the court. The contours of the judicial review challenge are framed at para [50] thus:

> "The appellant claims that she had a legitimate expectation that a public enquiry into her husband's death would be held. This, she says, is based on the unequivocal assurance given to her by the then Secretary of State for Northern Ireland and his statement to the House of Commons on 23 September 2004."

Lord Kerr continues at para [53] [2019] UKSC 7:

> "It is further argued that the failure to establish a public inquiry constitutes a violation of the appellant's rights under article 2 of the ECHR and section 6 of the Human Rights Act 1998 (HRA). This was not advanced as a freestanding argument for a declaration that the investigations into Mr Finucane's death which have so far taken place are not sufficient to constitute an article 2 compliant inquiry. Rather, the argument was made in support of the appellant's claim that the government should be held to its promise of a public inquiry."

Lord Kerr, supported by all other members of the court, made what he described as the "inescapable" conclusion that an article 2 ECHR compliant enquiry into the subject death had not yet taken place: see para [140]. The outcome was a declaration to this effect (para [153]).

[82] Lord Kerr's consideration of article 2 ECHR begins at para [82]. This contains the following salient features:

(i) At para [94]ff Lord Kerr considered the decisions in *Šilih*, *McCaughey* and *Janowiec*. At para [101] he recorded the respondent's argument that in the latter case the Grand Chamber had identified three limitations on the jurisdiction to examine pre-ratification (and, by analogy, in the United Kingdom pre-October 2000) claims in paras 143 and 146–148 together with 149–150, of its judgment. At para [107] Lord Kerr concluded that a genuine connection had been established between the triggering event (the killing) and the critical date (the operative date of HRA 1998).

Lord Kerr's reasons for this conclusion begin at para [107], where he invokes the decision of the ECtHR Grand Chamber in *Mocanu v Romania* [2015] 60 EHRR 19 and the decision of the Chamber in *Mladenovic v Serbia* (Application No 1099/08).

[83] At para [108] Lord Kerr reasoned:

> "A period of ten years or less between the triggering event (the murder of Mr Finucane) and the critical date (the coming into force of the HRA) is not an immutable requirement. The time which elapsed between the two dates is a factor of importance but, when taken into account with the circumstance that the vast bulk of noteworthy inquiry into his death has taken place since the HRA came into force (Stevens III, the Cory inquiry and the de Silva review), the significance of the time lapse diminishes. Nothing in *Janowiec* detracts from the proposition in *Šilih* that the decision as to whether there is a genuine connection involves a multi-factorial exercise and the weight to be attached to each factor will vary according to the circumstances of the case."

It is convenient to interpose at this juncture the observation that in its later decision in *McQuillan* (*infra*) a differently constituted chamber of Supreme Court Justices considered this latter statement controversial. At para [109] Lord Kerr continues:

> "Moreover, in *McCaughey* it was made clear that an inflexible ten-year limit was not essential and the consideration that most of the investigation took place after the critical date could compensate for the length of the time lapse - see paras [118], [119] and, in particular, [139] where Lord Dyson said:
>
> 'The deaths were ten years before the HRA came into force. That is a relevant factor to be taken into account when considering whether there is a sufficient connection between the deaths and the coming into force of the Act. But *Šilih v Slovenia* 49 EHRR 996 shows that it is not the

> only factor. In particular, of considerable importance is the fact that at that date the investigation had been initiated, but a significant proportion of the procedural steps required to be taken had not yet been taken. In that respect, the facts of the case are similar to the facts in *Šilih v Slovenia*. This is the feature of *Šilih v Slovenia* which is emphasised by the majority at para 165 and by Judge Lorenzen at para O-I4 of the EHRR report.'
>
> Significantly, we were not invited to depart from the decision in *McCaughey."*

[84] At paras [110]–[111] Lord Kerr rejected the respondent's submission that the application of the principles in *Šilih* and *Janowiec* to domestic law remained undecided. At para [111] he stated:

> "…The plain and inescapable fact is that this court in *McCaughey* unequivocally adopted the decision in *Šilih* as indicating the principled approach in domestic law to the issue of genuine connection."

At paras [112]–[113] Lord Kerr declined to express a conclusion on the "Convention values" test.

[85] At this juncture some analysis is appropriate. The first of the two decisions of the ECtHR invoked by Lord Kerr is *Mocanu*. This was a decision of the Grand Chamber relating to a killing perpetrated in 1990, four years prior to ratification of the Convention by Romania. The salient passages of the judgment are at paras [208]–[211]. As appears from para [205]ff the Grand Chamber unambiguously endorsed its decision in *Janowiec* and, more specifically, the clarification which it had provided of its judgment in *Šilih* on the temporal limitations issue. At para [107] of his judgment in *Finucane* Lord Kerr quotes from para [206] of *Mocanu* where one finds the formulation "… a reasonably short lapse of time that should not normally exceed ten years." This discrete passage has a footnote (No. 23) which specifies para [146] of *Janowiec*, namely the key passage wherein the ten-year temporal limit is enunciated.

[86] The second of the two ECtHR decisions invoked by Lord Kerr is *Mladenovic v Serbia*. This is a decision of a chamber of the court sandwiched between *Šilih* and *Janowiec* which applied *Šilih*. It concerned a fatal shooting in 1991 in circumstances where ratification of the Convention by Serbia was not effected until 2004, outside the outer limit of 10/12 years contemplated in *Janowiec*. I consider that, carefully analysed, neither this decision nor that in *Mocanu* provides support for the analysis of Lord Kerr in para [108]:

> "A period of 10 years or less between the triggering event (the murder of Mr Finucane) and the critical date (the coming into force of the HRA) is not an immutable requirement …
>
> Nothing in *Janowiec* detracts from the proposition in *Šilih* that the decision as to whether there is a genuine connection involves a multi-factorial exercise and the weight to be attached to each factor will vary according to the circumstances of the case."

[87] At para [109] of *Finucane* Lord Kerr prayed in aid para [139] of the judgment of Lord Dyson in *McCaughey:*

> "The deaths were ten years before the HRA came into force. That is a relevant factor to be taken into account when considering whether there is a sufficient connection between the deaths and the coming into force of the Act. But *Šilih v Slovenia* 49 EHRR 996 shows that it is not the only factor. In particular, of considerable importance is the fact that at that date the investigation had been initiated, but a significant proportion of the procedural steps required to be taken had not yet been taken. In that respect, the facts of the case are similar to the facts in *Šilih v Slovenia*. This is the feature of *Šilih v Slovenia* which is emphasised by the majority at para 165 and by Judge Lorenzen at para O-I4 of the EHRR report."

This passage was the foundation for the observations of Lord Kerr reproduced at para [26] above.

[88] As the passage quoted from the judgment of Lord Dyson indicates, it was underpinned by the decision in *Šilih*. That decision was subsequently overtaken by *Janowiec,* which was expressly designed to clarify *Šilih* and did so. This is not addressed by Lord Kerr in para [109]. What Lord Dyson stated in *McCaughey* must be confined to the jurisprudential context then prevailing. Separately, it is at least doubtful whether Lord Dyson's statement forms part of the ratio decidendi of *McCaughey*.

[89] Continuing his analysis, Lord Kerr considered it significant that in *Finucane* the Supreme Court had not been invited to depart from *McCaughey*. Considered in its full context, this statement must denote Lord Kerr's version of *McCaughey*. The unsustainability of this version is exposed in the immediately preceding paragraphs. There are two further factors of significance. First, at the stage when *Finucane* was decided it had become necessary to consider *McCaughey* subject to *Janowiec*. This orthodoxy was required by the "mirror principle" and section 2(1) of HRA 1998.

Second, in *McCaughey* the death occurred less than ten years prior to the "critical date" (the commencement of HRA 1998) and, therefore, comfortably satisfied the "genuine connection" test.

[90] At para [111] Lord Kerr continues:

> "Sir James Eadie QC for the respondent, founded his argument that the applicability of the principles in *Šilih* and *Janowiec* to domestic law remains undecided, on the decision of this court in the case of *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355. In particular, he fastened on statements made by Lord Neuberger of Abbotsbury at paras 98 and 99 of his judgment. It is unnecessary to set out Lord Neuberger's observations in those paras. It is quite clear that he was there examining the question of whether it had been decided by the court in *McCaughey* that the decision in *McKerr* remained good law. The remarks of Lord Neuberger, attributing to Lord Phillips, Lord Dyson and me the view that *McKerr* was no longer good law were not without controversy - see my comment on them at paras 247-248. But that is nothing to the point. The plain and inescapable fact is that this court in *McCaughey* unequivocally adopted the decision in *Šilih* as indicating the principled approach in domestic law to the question of genuine connection."

While this passage begins with a reference to both *Šilih* and *Janowiec*, the final sentence refers only to *McCaughey* and *Šilih,* omitting any reference to *Janowiec*. This sentence enshrines Lord Kerr's conclusion on the issue debated. It therefore attracts my preceding analysis.

[91] The following features of Lord Kerr's judgment in *Finucane* were highlighted in the submissions of Mr McGleenan. First, *Finucane* is not an article 2 ECHR temporal limit case. Second, it does not engage with section 2(1) of HRA 1998. Thirdly, it fails to apply the "mirror principle" in respect of *Janowiec*. I consider each of these submissions well made.

[92] In *Re McQuillan* [2021] UKSC 55, the foregoing passages in the judgment of Lord Kerr were addressed directly in the single, unanimous judgment of the Supreme Court. At para [144] [2021] UKSC 55 the judgment states:

> "With respect to Lord Kerr, he did not identify any clear principle by which one could tell when and to what extent it might be appropriate to water down a strict ten-year requirement as the Grand Chamber of the Strasbourg

> Court had appeared to lay down in *Janowiec*, para 146. We have reservations as to whether Lord Kerr was right to interpret *Janowiec* as he did. This court has not been invited to depart from its decision in *Re Finucane* but we note that the extension beyond ten years allowed in *Re Finucane* involved less than two more years. It would significantly undermine the legal certainty which the Grand Chamber sought to achieve in *Janowiec* if longer extensions than this were to be contemplated or permitted. Moreover, in *Janowiec*, para 146, the Grand Chamber emphasised that the time factor is the "most crucial indicator" in relation to the "genuine connection" test and that the test requires that "the lapse of time between the triggering event and the critical date must remain reasonably short." In our judgment, an extension beyond the normal ten year limit of up to two years is permissible where there are compelling reasons to allow such an adjustment constituted by circumstances that (a) any original investigation into the triggering death can be seen to have been seriously deficient and (b) the bulk of such investigative effort which has taken place post-dates the relevant critical date ..."

In short, the Supreme Court endorsed a backstop time limit of 12 years governing the genuine connection test ie the elapse of 12 years maximum between the "triggering event" and the "critical date."

[93] The Supreme Court also made clear that the "critical date" is 2 October 2000 (thereby rejecting Lord Neuberger's espousal of January 1966, when the right of individual petition was introduced, in *Keyu*). In so doing, it adopted the dissenting judgment of Lord Rodger and the concurring judgment of Lord Brown in *McCaughey*. See para [165]:

> "… As Lord Rodger observed in *Re McCaughey*, para 159, "[m]aking the HRA apply to the investigation of violent deaths occurring as far back as 1980 or 1990 would have raised particularly sensitive questions … [which] would have had significant practical effects", especially in relation to Northern Ireland, which Parliament can hardly be thought to have overlooked when it decided that the HRA should not have retrospective effect. We would add that these points apply with even more force when it is recognised that the submission of Mr Southey takes the relevant starting date back to ten years or so before 1966 and that pursuant to it the range of investigative obligations is expanded to cover cases of alleged conduct

> contrary to the standards in article 3 as well as deaths. Referring to Lord Brown's formulation in Re McCaughey, para 100, quoted above: to construe the HRA by reference to a critical date of 14 January 1966 rather than 2 October 2000 would create major practical difficulties in its application which Parliament cannot have intended should arise."

This is reiterated in para [167]:

> "In our view, against the background of the general position of non-retrospectivity of the HRA and in recognition of the distinct nature of the rights established by the HRA, the only plausible inference is that Parliament intended only a modest qualification of the non-retrospectivity of the domestic law regime in current circumstances by analogy with the principle in *Šilih* and *Janowiec*, treating 2 October 2000 as the "critical date" for the purposes of application of the genuine connection test articulated in those cases. Interpreting the HRA in this way gives effect to the general mirror principle of the Act, by following the principle laid down in the jurisprudence of the Strasbourg Court, while at the same time taking account of the non-retrospective effect of the Convention rights in the Act, which is a specific and cardinal feature of the Act. In that regard, the difference in the view of Lord Rodger between *Al-Skeini* and *Re McCaughey* is instructive: there were no specific indications in the HRA to show that the mirror principle underlying the Act should not outweigh the usual presumption of territorial effect of a statute; by contrast, there were strong indications in the Act that the presumption against non-retrospective effect was intended to have real force. As general guidance, the mirror principle cannot be taken to outweigh the specific choice that Parliament has made that the HRA should not have retrospective effect, other than by treating that effect as qualified to the limited extent we have set out. The investigative obligation under article 2 only arises where there is a death which is a relevant triggering event, and as Lord Scott observed in *Wilson* (para 161) it is unusual for legislation to alter rights and obligations resulting from events that have already taken place. In the context of interpretation of the HRA, the mirror principle can only justify a departure from that general position to the limited extent we have indicated."

[94] Soon thereafter, in *Re Dalton* [2023] UKSC 36 the Supreme Court revisited these themes. This was an appeal against the decision of the Northern Ireland Court of Appeal that the Attorney General for Northern Ireland was required by article 2 ECHR to direct a fresh inquest in respect of a death which had occurred on 31 August 1988, over 12 years prior to the "critical date." While this gave rise to four separate judgments, each of which must be considered, there is no equivocation about the starting point: the Supreme Court unanimously allowed the Attorney General's appeal. In a sentence, article 2 ECHR did not require the Attorney General to order a new inquest into the death because it had occurred on a date outwith the temporal scope of HRA 1998.

[95] There were two single judgments (Lord Reed and Lord Leggatt), one of triple composition (Lord Hodge, Lord Sales and Lady Rose) and one of dual composition (Lord Burrows and Dame Siobhan Keegan). These judgments contain much discussion about what precisely the ECtHR had previously decided with regard to the temporal scope of the Convention. With careful analysis, however, it is possible to link a series of passages in the judgments given, thereby identifying a consistent thread. The main passages in this respect are paras [44], [51], [170], [172], [260]–[261], [333]–[334] and [337]. This exercise yields the following analysis.

[96] First, while the Supreme Court disagreed with the broader approach to temporal scope espoused in the judgment of Lord Kerr, it declined to depart from the decision in *Finucane*. Pausing, it is not difficult to ascertain the rationale of this approach since (a) the death in the *Finucane* case occurred close to the boundary of the outer limit specified in *Janowiec* ie 12 years and (b) there was no dissent from Lord Kerr's assessment that the bulk of the investigative steps had postdated the "critical date", being 2 October 2000. Summarising, this later constitution of the Supreme Court affirmed the result in *Finucane*, while disagreeing with certain aspects of the judgment delivered. This disagreement chimes with my analysis in paras [27]–[33] above.

[97] Second, the Supreme Court addressed para [144] of *McQuillan,* characterised this passage *obiter* and corrected it in the following terms, at paras [170]–[172]:

> "On further reflection, having considered the judgments of Lord Reed, Lord Leggatt, and the combined judgment of Lord Burrows and Dame Siobhan Keegan, it is clear (i) that the panel is not at one in interpreting *Janowiec* and (ii) that, as set out in the judgment of Lord Burrows and Dame Siobhan Keegan, this court in *McQuillan* has devised a genuine connection test for the HRA which, while not a precise application of the mirror principle, achieves a high degree of legal certainty. The test is that, in the absence of acts which meet the Convention values test, the period between the triggering event (the death) and the critical date should normally not exceed ten years

but there can be an extension for a further two years to an outer limit of 12 years only for the compelling reasons specified in para 144 of the *McQuillan* judgment, namely (i) that any initial investigation was seriously deficient and (ii) the bulk of the investigative effort has taken place after the critical date.

… For these reasons and because it is not necessary for the determination of this appeal, it would not meet the criteria of the 1966 Practice Statement for this court to depart from its earlier judgment in *McQuillan* at para 144."

[98] The majority judicial group's conclusions on "Issue 1" followed:

"… It may be helpful if we summarise our conclusions, which are in line with the reasoning of Lord Burrows and Dame Siobhan Keegan, especially at paras 333-334 and 337, on the test to be applied on the question of a genuine connection with the coming into force of the HRA. We consider that the authorities support the following summary:

(i) We would uphold the result in *Finucane* while not agreeing with the multi-factorial reasoning in that judgment as we treat the judgment in *McQuillan* as the correct analysis of the domestic test.

(ii) That means that there is an outer period of 12 years since the death of the person (unless the Convention values test is met) in order to bring a claim under the HRA.

(iii) In other words, if the death occurred more than 12 years before 2 October 2000, those proceedings should be struck out, even if there has been a *Brecknell*-type revival of the duty more recently.

(iv) If the death occurred between 10 and 12 years before 2 October 2000 then in exceptional circumstances there may be a genuine connection with the coming into force of the HRA (even leaving to one side the Convention values test). Those circumstances (as explained in *McQuillan* at para 144) are: (i) any original investigation into the death can be seen to have been seriously deficient

or non-existent and (ii) the bulk of such investigative effort which has taken place, or which ought to have taken place, post-dates 2 October 2000.

(v) If the death occurred less than 10 years before 2 October 2000, then the claim meets the "within a reasonable time" limb of the test but must still overcome the second part of the *Janowiec* test that a major part of the investigation took place or ought to have taken place after 2 October 2000."

[99] Third, the Supreme Court decided unambiguously that the article 2 ECHR investigative obligation cannot arise in respect of any death predating 2 October 1988 (being 12 years before the commencement date of HRA 1998), with the result that a court should strike out proceedings alleging a breach of this obligation where the death preceded this date, unless the "Convention values" test is satisfied. This establishes in the clearest terms imaginable a powerful general retrospective effect backstop of 12 years (in the terms explained above).

[100] Fourth, the Supreme Court decided, again unequivocally, that there is but one exception to the 12-year retrospective temporal rule. This exception arises where the "Convention values" test is satisfied. The threshold for satisfaction of this test is particularly elevated: in the main it can be satisfied only where the subject death is attributable to serious crimes under international law such as war crimes, genocide or crimes against humanity.

[101] Next the Court gave specific consideration to the topic of deaths occurring between 10 and 12 years prior to 2 October 2000. It decided that the investigative obligation under article 2 ECHR can apply to such deaths only in exceptional circumstances. The court defined exceptional circumstances – as explained in *McQuillan* para [144], as corrected – as cases where any original investigation into the death can be seen to have been seriously deficient or non-existent and the bulk of such investigative steps which have been carried out, or which ought to have been carried out, postdates 2 October 2000.

[102] The court then addressed specifically the category of deaths occurring less than 10 years prior to 2 October 2000. It decided that in such cases the article 2 ECHR investigative obligation can arise only where it is demonstrated that a major part of the investigation was carried out, or ought to have been carried out, after 2 October 2000.

[103] Finally, the Supreme Court addressed the principle of legal certainty. It considered that its analysis and conclusions (rehearsed above) had the virtue of combining the certainty of two fixed periods (10 years and 12 years) with the

flexibility of extending the "primary period" of 10 years to the "outer period" of 12 years in accordance with *McQuillan*, para [144], as modified.

[104] The upshot of the foregoing is that the temporal reach of the procedural dimension of article 2 ECHR under the scheme of HRA 1998 depends upon which of four distinct categories to which the subject death belongs. These are (a) deaths post-dating 2 October 2000, (b) deaths occurring less than 10 years before 2 October 2000, (c) deaths occurring between 10 and 12 years before 2 October 2000 and (d) deaths occurring more than 12 years before 2 October 2000. Category (a) presents no complications. Each of the other three categories, however, has its own particular test.

Precedent in the Supreme Court

[105] Bearing in mind the appellants' central contention, namely that *McCaughey* is intact and should be followed, it is necessary to address the operation of the doctrine of precedent in the United Kingdom Supreme Court. The starting point, as noted by Humphreys J at para [27], is the Practice Statement adopted by the Appellate Committee of the House of Lords (the predecessor of the Supreme Court) in 1966. It is in these terms:

> "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules. Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose, therefore, to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so. In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law. This announcement is not intended to affect the use of precedent elsewhere than in this House."

([1966] 1 WLR 1234, per Lord Gardner LC.)

[106] Its predecessor was what was known as the "1898 Rule", attributable to the then Lord Chancellor, was that the House was bound by its previous decisions (*London Tramways Company v London City Council* [1898] AC 375). The Practice

Statement, some 70 years later, reflected the Law Lords' preference for increased flexibility.

[107] Writing in 1972, Lord Reid, then Senior Law Lord, highlighted the tension between the values of certainty and fairness (or justice):

> "People want two inconsistent things: that the law shall be certain and that it shall be just and shall move with the times. It is our business to keep both objectives in view."

(The Judge as Law Maker (1972) 12 JSPTL 22, page 26.)

These sentiments provided one aspect of the backdrop to the Practice Statement. Another aspect was the interface between the judicial role and the legislative function. In his seminal lecture, Lord Reid added:

> "There was a time when it was thought almost indecent to suggest that judges make law – they only declare it … But we do not believe in fairy tales any more. So we must accept the fact that for better or worse judges do make law and tackle the question how do they approach their task and how should they approach it."

[108] In subsequent cases, particularly *Jones v Secretary of State for Social Services* [1972] AC 944, Lord Reid provided guidance on when the new flexibility in the Practice Statement should be applied. As subsequent events have demonstrated, conservatism came to dominate. The foregoing was highlighted in 2007 by Lord Bingham in *Horton v Sadler* [2007] 1 AC 307, at para 29:

> "Over the past 40 years the House has exercised its power to depart from its own precedent rarely and sparingly. It has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors ..."

[109] The Supreme Court of the United Kingdom was established by statute (Part 3 of the Constitutional Reform Act 2005) and came into existence on 1 October 2009. Being a newly created court it was inevitable that, sooner or later, it would confront the question of how it should approach its previous decisions and those of the House of Lords. Significantly, the Supreme Court has neither revoked nor modified the Practice Statement.

[110] At an early stage of the Supreme Court's existence, Lord Hope, Deputy President, addressed this issue, in *Austin v The Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28. He made clear that both the Practice

Statement and the relevant jurisprudence of the House of Lords carried over. This was the stimulus for Supreme Court Practice Direction No 3 (Applications for Permission to Appeal). This required, per para 3.1.3, an indication at the permission stage of whether the putative appellant was requesting the court to depart from any of its precedents or any precedent decision of the House of Lords. This approach is further reflected in the composition of judicial panels. As appears from the published criteria of the Supreme Court, a panel of more than five Justices must be convened in any case where the possibility of departing from an earlier decision of either the court or the House of Lords has been identified.

[111] It is generally held that the approach of the Supreme Court to departing from previous decisions has been at least as conservative as that of its predecessor. Indeed, one commentator has observed:

> "… if anything, the Court has been even less willing than the House of Lords to use the freedom."

(Paterson, Final Judgment, p 267.)

Another commentator, having examined a series of decisions and while espousing the view that departure from precedent "… should be done clearly and deliberately, with an appreciation of the consequences", nonetheless acknowledged certain idiosyncrasies:

> "We have not seen a consistent approach in the decisions which we have examined. I have suggested that the possibility of departing from previous decisions, as recognised by the House of Lords in the Practice Statement and now adopted by the Supreme Court, may have had a paradoxical effect on judicial decision making in our highest court. That effect is that the Court, because it can depart from is own decisions when 'right' to do so, it is not always clear about whether it is actually doing so."

(James Lee, The Doctrine of Precedent and the Supreme Court, p 21.)

[112] The Supreme Court dilated on its approach to precedent and the Practice Statement in *Knauer v Ministry of Justice* [2016] UKSC 9. This was a decision of a seven Justice chamber. The Justices were unanimous. As appears from para [1] of their judgment, the issue to be decided was whether the Supreme Court should depart from previous decisions of the House of Lords (namely *Cookson v Knowles* [1979] AC 556 and *Graham v Dodds* [1983] 1 WLR 808). This issue was addressed at para [19] ff. The principled framework for the determination of this issue is rehearsed at paras [21]-[23]:

"Furthermore, it is important not to undermine the role of precedent in the common law. Even though it appears clear that both the reasoning and conclusion on the point at issue in *Cookson v Knowles* and *Graham v Dodds* were flawed, at least in the light of current practice, it is important that litigants and their advisers know, as surely as possible, what the law is. Particularly at a time when the cost of litigating can be very substantial, certainty and consistency are very precious commodities in the law. If it is too easy for lower courts to depart from the reasoning of more senior courts, then certainty of outcome and consistency of treatment will be diminished, which would be detrimental to the rule of law.

… In our view, therefore, the issue is whether this is a case where this court should apply the 1966 Practice Statement. In that connection, it is well established that this Court should not refuse to follow an earlier decision of this Court or the House of Lords merely because we would have decided it differently - see per Lord Bingham of Cornhill in *Horton v Sadler* [2007] 1 AC 307, para 29. More than that is required, not least because of the desirability of certainty in the law, as just discussed. However, as Lord Bingham said in the same passage, while "former decisions of the House are normally binding … too rigid adherence to precedent may lead to injustice in a particular case and unduly restrict the development of the law.

… This court should be very circumspect before accepting an invitation to invoke the 1966 Practice Statement. However, we have no hesitation in concluding that we ought to do so in the present case. At least in the current legal climate, the application of the reasoning in the two House of Lords decisions on the point at issue is illogical and their application also results in unfair outcomes. Further, this has encouraged "courts … to distinguish them on inadequate grounds" (to quote Lord Hoffmann in *A v Hoare* [2008] AC 844, para 25), which means that certainty and consistency are being undermined. Above all, the fact that there has been a material change in the relevant legal landscape since the earlier decisions, namely the decision in *Wells v Wells* and the adoption of the Ogden Tables, when taken with the other factors just mentioned, gives rise to an overwhelming case for changing the law."

[113] In *Knauer*, the Supreme Court decided that it should indeed depart from the two previous decisions in question on the grounds that (a) their reasoning was considered illogical and (b) their application resulted in unfair outcomes. Within these passages there are clearly identifiable echoes of what Lord Gardner LC had stated in 1966.

[114] Notably, given the present context, Lord Burrows, writing extra-judicially, has highlighted the phenomenon that in certain instances both the House of Lords and the Supreme Court have overruled an earlier precedent decision without any mention of the Practice Statement ("Precedent and Overruling in the UK Supreme Court", Lord Toulson Memorial Lecture 2024, p12). As Lord Burrows notes, the statistics demonstrate that between 1966 and 2009 the Practice Statement was expressly invoked by the House of Lords in 14 cases, ie once every three years. In contrast, in the first 13 years of is existence, the Supreme Court expressly invoked the Practice Statement in only three cases. (*Knauer*, *supra*, was the first.)

[115] Lord Burrows provides examples of the Supreme Court overruling previous decisions of one of the two courts, sometimes of relatively recent vintage, without any mention of the Practice Statement. Interestingly, in his reflections on why this has occurred, he draws attention to, *inter alia,* the doctrine of the obvious:

> "It may also simply be thought unnecessary to spell out what may be considered to be very obvious ie that the court must be using the power under the 1966 PS."

(at p 5)

Another feature of Lord Burrows' treatise is the sometimes narrow dividing line between the ratio decidendi of a decision and its "further reasoning underpinning that decision." He considered *Dalton* to be a paradigm example (pp 7–8).

[116] The phenomenon identified by Lord Burrows was also recognised by Professor Brice Dickson in his erudite treatise "Activism and Restraint within the UK Supreme Court" (2015) 21(1) EJoCLI. Professor Dickson, at the time of writing (2015), identified only one decision of the Supreme Court containing express mention of the Practice Statement. In their commentaries, each of these authors devotes attention to a significant number of human rights cases. However, notably, there is no mention of section 2(1) of HRA 1998 or the "mirror principle", to which I now turn.

Enter the mirror principle

[117] Section 2(1) is one discrete facet of the new dawn ushered in by HRA 1998. Prior to 2 October 2000 the rules of precedent were exclusively judge made.

However, with effect from that date, section 2(1) (in particular) and section 6(1) of HRA 1998 had to be reckoned.

[118] The House of Lords was alert to provide guidance to lower courts on the correct approach to be adopted in cases where there was a perceived divergence between a decision of a United Kingdom court binding on them by the doctrine of precedent and a decision of the ECtHR. The requisite guidance was provided in *Kay v London Borough of Lambeth* [2006] UKHL 10, a decision of a seven Justice Chamber. As stated at para [1] by Lord Bingham, delivering the main judgment of the court with which all others agreed on the issue of precedent, the House was invited to "reconsider and depart from" its earlier decision in *Harrow LBC v Qazi* [2003] UKHL 43. As Lord Bingham stated at para [40]:

> "Reference has already been made to the duty imposed on United Kingdom courts to take Strasbourg judgments and opinions into account and to the unlawfulness of courts, as public authorities, acting incompatibly with Convention rights. The questions accordingly arise whether or domestic rules of precedent are, or should be, modified; whether a court which would ordinarily be bound to follow the decision of another court higher in the domestic curial hierarchy is, or should be, no longer bound to follow that decision if it appears to be inconsistent with a later ruling of the Court in Strasbourg ..."

[119] In *Kay* there were two conjoined appeals before the House. In one of them (the *Leeds* case) the Court of Appeal decided that the only permissible course was to follow the decision of the House in *Qazi* despite considering it incompatible with a later decision of the ECtHR and to give permission to appeal to the House. Recalling the language of section 2(1), Lord Bingham confirmed that this course was harmonious with the court's duty to *take into account* the decision of the ECtHR in question, *Connors v United Kingdom* [2004] 40 EHRR 189. Lord Bingham added, at para [43]:

> "… It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here."

[120] With the passage of time, s 2(1) of HRA 1998 gave birth to what has come to be known as the "mirror principle." This principle is a major feature of the much vaunted "dialogue" between the UK Supreme Court and the ECtHR. In one of its early HRA 1998 decisions, the House of Lords explained the operation of section 2(1): in short, Strasbourg decisions were to be followed where there was clear and constant jurisprudence on the particular issue which was not based on a misunderstanding of domestic law: *R (Alconbury Developments) v Secretary of State for the Environment* [2001] UKHL 23, para 23.

[121] The potent effect of section 2(1) is illustrated in *Secretary of State for the Home Department v AF* [2009] UKHL 28, where a nine-judge chamber of the House of Lords followed the Strasbourg decision in *A v United Kingdom* [2009] 49 EHRR 625, notwithstanding that certain members of the panel bluntly described the latter decision as "wrong" (for example, Lord Hoffmann).

[122] The "mirror principle" is traceable to the decision of the Supreme Court in *R (Ullah) v Special Adjudicator* [2004] UKHL 26, at para [20]:

> "… The Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law …
>
> It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with Strasbourg jurisprudence as it evolves over time: no more but certainly no less."

The effect of the "mirror principle" is illustrated in landmark decisions such as *AF* (above) and *Manchester City Council v Pinnock* [2010] UKSC 45.

[123] The enduring vigour of the "mirror principle" is not in doubt. Its inextricable association with section 2(1) of HRA 1998 is confirmed by Lord Bingham's formulation in *Ullah* and in subsequent decisions such as *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, per Lord Brown at para [114]. In this passage, Lord Brown further observed that this principle promotes the twin aims of (a) engaging in dialogue with the Strasbourg court and (b) bringing rights home. While there have been occasional judicial pronouncements at the highest level appearing to endorse a more flexible approach – perhaps with greater emphasis on the statutory words "have regard to" – these have neither distorted nor diminished the "mirror

principle" (see for example *Sugar v BBC* [2012] UKSC 4, para [59] per Lord Wilson, Lord Mance concurring).

The parties' core contentions

[124] In both appeals, the central contention advanced by the appellant is that the investigative obligation under article 2 ECHR applies to their inquest by virtue of the decision of the Supreme Court in *McCaughey*. The ancillary argument underpinning this contention is that *McCaughey* has not been "overturned by" any subsequent decision of the Supreme Court. It is further submitted that in *Dalton* the Supreme Court "… reaffirmed the impact of *McCaughey* without qualification ie that prospective inquests, even where the death predated 2 October 2000, were to be conducted in compliance with article 2." The appellants further compare and contrast the approach of the Supreme Court to *McKerr* in the *McCaughey* case (on the one hand) and what is said to be "…the lack of any engagement by the parties or the Court in either *McQuillan or Dalton* with whether *McCaughey* needed to be departed from or modified" (on the other). Finally, the trial judge is castigated for having impermissibly overturned *McCaughey*.

[125] The gist of the argument on behalf of the respondent is that as a result of the decisions of the Supreme Court in *McQuillan* and *Dalton* and by virtue of the application of the "mirror principle" and section 2(1) of HRA 1998, its earlier decision in *McCaughey* has been rendered subject to and overtaken by the decision of the ECtHR in *Janowiec*. The effect of this is that the narrow retrospective application of the procedural dimension of article 2 ECHR in United Kingdom law is confined to 10/12 years prior to the critical date (2 October 2000). Mr McGleenan, reducing his argument to its bare essentials, submitted that these appeals must fail having regard to paragraphs [44] and [172] of *Dalton* (*supra*).

Analysis and Conclusions

[126] As the preceding digest of the appellants' case indicates, the central issue to be determined by this court is of narrow compass. While one might formulate it in differing ways, the essential question is whether the decision of the Supreme Court in *McCaughey* has survived its subsequent decisions in *Dalton* and *McQuillan*. Can these two camps coexist harmoniously?

[127] Humphreys J answered this question in the negative. The heart of his reasoning is found at [2024] NIKB 12, para [94]:

> "The court in *McCaughey* itself was able to depart from *McKerr* without the invocation of the Practice Statement. In turn, the court in *Finucane, McQuillan* and *Dalton* has done the same thing to *McCaughey*. It is able to do so through the evolutionary process referred to in both *McCaughey* and *Keyu*. The courts do so because of the

> changing nature of the article 2 obligation as a matter of international law. Whilst not an application of the mirror principle stricto sensu, this process has been recognised as a modified mirror principle or the application of the principle by analogy."

At para [97] the judge reflected on what Lord Reed had stated in para [28] of *Dalton*. There, having observed that in *McCaughey* the members of the majority offered different reasons for reaching the same conclusion, he continued:

> "It was, however, generally accepted that inquests held after the Human Rights Act came into force should comply with the relatives' article 2 rights, even if the death occurred before the commencement date."

Humphreys J further observed at para [97]:

> "The reference by Lord Reed at paragraph [28] in *Dalton* to the impact of *McCaughey* on legacy inquests in Northern Ireland has to be read in the context of the rest of his judgment. It is expressed in the past tense and must represent the position as it was previously understood, not the continuing requirement. Neither he nor any of the other justices in *Dalton* found that there was an exception to the temporal limit of the genuine connection test to be found in cases where inquests were ongoing or pending. Indeed, he described it as "inconceivable" that the article 2 procedural obligation could arise in domestic law outwith these time limits, aside from a Convention values case. Had he meant to say that an entirely different rule applied in the case of legacy inquests, regardless of the date of death, he would have done so ..."

[128] In the appellants' arguments it is repeatedly emphasised that if the Supreme Court in either *Dalton* or *McQuillan* had *intended* to depart from *McCaughey* it would have (a) invoked the Practice Statement and (b) expressly stated so. As to (a), no legal rule or principle to this effect was canvassed before this court. Furthermore, as noted by Humphreys J at para [97] in *McCaughey* the Supreme Court departed from *McKerr* without invoking the Practice Statement. As to (b) it is correct that there is no express statement in any of the judgments in *Dalton* and *McQuillan* that the Supreme Court was departing from *McCaughey*. However, there is no settled requirement based in either legal principle or inflexible practice to this effect. Quite the contrary: as demonstrated above, there are instances of the Supreme Court overruling its earlier decisions (or those of its predecessor) without any express mention of either the doctrine of precedent or the Practice Statement. This practice has been noted by Lord Burrows, Professor Brice Dickson and Mr James Lee.

[129] No doubt about what the Supreme Court decided in *McQuillan* and *Dalton* was canvassed on behalf of the appellants. I have highlighted in the preceding paragraph the recourse to *intention* in the appellants' arguments. This in my view adds nothing of value. The exercise of determining what another court decided in its decision in any given case is a recurring daily one for courts at every tier of the judicial hierarchy. The later court engages in an exercise of analysis and construction of the earlier decision concerned. This is a purely objective, clinical exercise. It is neither enhanced nor informed by speculation about what was in the mind of the author of the judgment under scrutiny. While it is of course incumbent upon the later court to consider in full the context to which the earlier judgment belongs, speculation of this kind is in my view more likely to mislead than guide.

[130] The effect of the appellants' central argument is that the decisions of the Supreme Court in *McQuillan* and *Dalton* do not apply to either of their cases. This, if correct, as accepted by Ms. Quinlivan, would apply to *all* inquests in the United Kingdom. The decisions in *McQuillan* and *Dalton* apply to *all inquests in the United Kingdom*. They do so *without exception*. The Supreme Court has established a single category of inquests. It has not recognised a separate category of "legacy" inquests to which different rules apply. Humphreys J was correct to highlight this.

[131] It is trite that in every case where a question arises about the meaning and effect of a judicial decision in an earlier case the later court is required to identify the ratio decidendi ie the essential reasoning of the earlier decision. In the particular case of the Supreme Court and the House of Lords Judicial Committee, neither express reference to the Practice Statement nor the absence thereof in any given decision is likely to form part of the ratio decidendi in any case. The fact of overruling an earlier decision is a consequence of the later decision, to be contrasted with its essential reasoning.

[132] The same analysis applies to the absence of express statements about departure from an earlier decision or the lack thereof. These are purely procedural and technical considerations. This highlights the fallacy in the appellants' emphasis on the absence of each of the foregoing ingredients vis-à-vis the *McCaughey* decision in *McQuillan* and *Dalton*. These arguments are overladen with technicality, superficiality and formality. I consider that they have no traction.

[133] In this context one is mindful of Lord Burrows' expressed preference for a transparent and explicit statement by the Supreme Court that in a given case it is giving effect to the Practice Statement. This exhortation has obvious attractions and is most unlikely to be controversial in any quarter. However, I consider that the realities highlighted above lend weight to the analysis in the immediately preceding paragraph. In short, in this context substance must surely prevail over form.

[134] The effect of the appellants' arguments is to invite this court to follow an earlier decision of the Supreme Court (*McCaughey*) which is manifestly and

fundamentally irreconcilable with two later decisions of the Supreme Court, namely *McQuillan* and *Dalton*. This court is invited to disregard highly material supervening developments in the legal rules bearing on the article 2 ECHR investigative obligation postdating *McCaughey*. The appellants' argument airbrushes these developments in their totality. Framed in these stark terms, the unsustainability of the argument is clinically exposed. It is in my view irredeemably misconceived.

[135] The discrete submission that Humphreys J committed the "cardinal error" of disobeying the guidance in *Kay* is similarly misconceived. As demonstrated above, the central issue before Humphreys J (and this court) is whether one decision of the Supreme Court survives two later decisions of the same court. The guidance in *Kay* is directed to a situation in which a decision of the Supreme Court (or House of Lords) is arguably incompatible with a later decision of the ECtHR. That is not this case.

[136] One further element of the appellants' arguments seeks to pray in aid evidence about developments and rulings in certain inquests subsequent to the decision of Humphreys J. I consider that these have no bearing whatsoever on the fundamental question of law to be determined by this court.

[137] A further discrete aspect of the challenge to the decision of Humphreys J entails the contention that he impermissibly overturned the decision in *McCaughey*. This too is fallacious. As this judgment demonstrates, both the High Court and the author of this judgment have conducted the exercise of determining whether *McCaughey* was in substance overruled by the Supreme Court *McQuillan* and *Dalton*. Both courts have concluded that it was.

[138] For my part, the juridical foundation of this conclusion lies unmistakeably in section 2(1) of HRA 1998 and the "mirror principle." In short, the respondent's central contention prevails.

[139] On the grounds and for the reasons elaborated I conclude that the central contention espoused by both appellants has no merit and must be rejected.

The Duffy grounds

[140] It remains only to address the two further grounds of appeal advanced in the case of Margarita Duffy, firstly, the invocation of the retrospectivity provision enshrined in section 22(4) of HRA 1998 (reproduced in para [9] above). The meaning and effect of section 22(4) were considered most fully by the House of Lords in *R (Hurst) v Commissioner of Police of the Metropolis* [2007] UKHL 13 in the judgment of Lord Brown, at paras [60]–[65] and in particular at para [64]:

> "Inquest proceedings are in no sense brought against those participating in them. Least of all are they brought against those like this respondent whose sole concern is

> that such proceedings should be brought. In the present case, your lordships will appreciate, the inquest stands adjourned and it is the respondent who seeks, the coroner who refuses, its reopening. The true analysis here is that the respondent is herself 'bringing proceedings against the authority' within the meaning of section 7(1)(a) rather than relying on a Convention right in a legal proceeding brought by a public authority within the meaning of section 7(1)(b)."

At para 62 Lord Brown endorsed the exposition of Peter Duffy KC, noting further that this had been cited with approval by Lord Hope in *R v Kansal (No 2)* [2002] 2 AC 69 at para [56]. Lord Bingham and Lord Mance concurred.

[141] Lord Brown obviously considered the issue to be clear beyond peradventure. While he did not elaborate in this way, he evidently had in mind the special character of the inquest process. This has been the subject of extensive consideration at the highest judicial levels in *McKerr v Armagh Coroner and Others* [1990] 1 All ER 865. Their Lordships were unanimous. There is a strong emphasis in the judgment of Lord Goff on the inquisitorial nature of a coroner's inquest. The House cited with approval the statement of Lord Lane CJ in *R v South London Coroner, ex parte Thompson* [1982] 126 SJ 625:

> "Once again it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."

[142] From this it follows, stressed Lord Goff, that the witnesses at an inquest are not called to give evidence by interested parties. Rather, it is the coroner who exercises this power, per section 17. Lord Goff returned to the inquisitorial theme at page 869I:

> "In considering the question which arises in this appeal it is, I think, important to bear in mind that a coroner's inquest is an inquisitorial process. The coroner has the conduct of the proceedings at an inquest. In particular, it is for the coroner to decide whether a witness shall be

> summoned to attend an inquest for the purpose of giving evidence; indeed, under section 17 of the 1959 Act, he can issue a summons for any witness whom he thinks necessary to attend the inquest for the purpose of giving evidence. The breadth of this power is reflected in rule 8(1) of the Rules … it is … misleading, in the context of a coroner's inquest, to describe the compellability of a witness as 'an important common law right.' Such language is reminiscent of civil proceedings and of the right of a party to such proceedings to cause a subpoena to be issued to compel the attendance of a witness. At a coroner's inquest, however, there are no parties. There is simply an inquisition by the coroner; and it is for him to decide whether any particular witness shall be summoned to give evidence ..."

The Northern Ireland approach is identical: see for example *Re Steponaviciene* [2018] NIQB 90, paras [48]–[50].

[143] The high watermark of the appellants' argument is an obiter reflection by Lady Hale in *McCaughey* at para [86] pointing to the possibility of a different approach while simultaneously acknowledging that this argument was "roundly rejected" in *Hurst*. The limitations of Lady Hale's observation are self-evident. In my judgement *Hurst* is conclusively determinative of this issue. Ultimately, before this court this was not contentious. It follows inexorably that this ground of appeal has no merit.

[144] The final ground of appeal involves the contention that the Ministry of Defence (the "Ministry") had acted irrationally "… in taking a decision "to frustrate the completion of this inquest." Without reference to any provision of the Coroners' Act (Northern Ireland) 1959 or the Rules made thereunder it was further submitted that it is "irrational for a public authority to deliberately default on their statutory obligations." This ground has the further ingredient that the Ministry violated three fundamental constitutional rights, namely the right to life, the right of access to justice and the principle of open justice.

[145] Humphreys J viewed the irrationality ground as an alternative to the complaint of bad faith, which he dismissed in resounding terms: see paras [110]-[113]. Observing that its manifest unsustainability arose from, *inter alia,* "the absence of a proper evidential basis", the judge, continuing at para [114], stated that the irrationality ground "… suffers from the same want of evidential foundation."

[146] As the judgment of the High Court records, the ingredients of this ground were the subject of examination and determination by the appointed coroner, an exercise which involved the receipt of the sworn testimony of a Ministerial official.

The coroner accepted that this evidence, which sought to explain alleged delays in disclosure by the Ministry, was truthful. The judge observed at para [117]:

> "… The judicial review court does not act as a court of appeal from coroners and, in any event, this application does not seek to impugn the coroner's decision. There is therefore no basis to impeach her findings ….
>
> (concluding at para [118]) …
>
> The irrationality claim is unsustainable as there is no evidence of a deliberately unlawful act taken by the public authority ..."

If and insofar as necessary, this conclusion is resoundingly buttressed by the published statement of the NI Presiding Coroner in November 2023.

[147] In my view the reasoning and conclusion in these passages are unimpeachable. Furthermore, as highlighted in the submissions on behalf of the Ministry, the case advanced before this court does not reflect the cross-examination of the Ministerial official at the inquest. Finally, the deadlines in play and their association with matters of disclosure by the Ministry were the product of primary legislation (the Legacy Act: see para [3] above) and, in the language of Humphreys J, the "finish line" of 1 May 2024. I conclude that this ground of appeal has all the trappings of a makeweight which, for the reason given, has no merit.

[148] It remains to observe only that there has been no legal challenge to the Coroner's Ruling, to which the 'omnia praesumuntur' principle (or principle of presumptive regularity) applies. I consider this to be an impermissible attempted collateral challenge.

Omnibus conclusion

[149] For the reasons given, I would dismiss both appeals and affirm the judgment and orders of Humphreys J.