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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

RAYMOND McCORD
BERNADETTE McKEARNEY
ANTHONY FOX
LINDA HEWITT

Desmond Fahy KC and Karl McGuckin (instructed by Phoenix Law) for Anthony Fox
Jude Bunting KC and Laura King (instructed by Phoenix Law) for Bernadette McKearney
Martin O'Rourke KC and Andrew Moriarty (instructed by McIvor Farrell) for
Raymond McCord
Desmond Hutton KC and Malachy McGowan (instructed by Madden & Finucane) for
Linda Hewitt
Dr Tony McGleenan KC and Philip McAteer (instructed by the Crown Solicitor's Office)
for the Secretary of State for Northern Ireland

McLAUGHLIN J

Introduction

[1] All four of these cases were listed before me for a leave hearing on 2 February 2026. In a written ruling dated 3 March 2026 (*Re McCord & Ors* [2026] NIKB 9), I decided to adjourn all of the applications until the decision of the Supreme Court was available in *Re Dillon* [2026] UKSC 15, which was ultimately handed down on 7 May 2026. In the interim period, Mr McCord applied to the Court of Appeal for leave to appeal that decision. The appeal was overtaken by events when the Supreme Court handed down its decision in *Re Dillon*. Since that time, I have conducted case management reviews on 11 June, 24 June and 9 October 2026. In the cases of *Re McCord* and *Re Hewitt*, I have been urged to grant leave and to progress the cases to a full hearing. The applicants' primary contentions in support of that position are that the state remains subject to an obligation under article 2 to

investigate the deaths; that it is for the state to choose the manner of investigation and that there should be no further delay. Following the decision in *Re Dillon*, the possibility of an article 2 compliant investigation by the Independent Commission for Reconciliation and Information Recovery (“ICRIR”) is now an option which was not previously available to either the families or to the Secretary of State.

[2] In light of the changed circumstances following *Re Dillon*, I adjourned the cases further, in order to allow both the families and the Secretary of State to decide whether they wished to refer any of the cases to ICRIR. If the Secretary of State was not minded to do so, the time allowed was also intended to afford him an opportunity to consider how he proposed to discharge the state’s investigative obligation.

[3] As set out in my ruling of 3 March 2026, the case of *Re McCord* differs from the other cases because the inquest was never halted for reasons of public interest immunity. It was halted by reason of the statutory time limit imposed by the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023. While all four applicants seek orders compelling the establishment of a public inquiry, the target of the proceedings in *Re McCord* is different insofar as there was no formal decision by the Secretary of State not to establish a public inquiry in that case. In the other cases a formal negative decision was taken and is the target of the challenge. While the applicant in *Re McCord* does contend that the Secretary of State has a duty to take a decision on the form of the future investigation, he also maintains the claim that it should be a public inquiry and has declined to refer the case to ICRIR. In *Re McCord*, there is also a potential additional distinction insofar as there remains a possibility that the inquest might be capable of resumption, if the current proposals contained within the government’s Troubles Bill are enacted by Parliament. Those proposals include a mechanism by which cases in which inquests were ordered or commenced could be reviewed to assess whether continuation was possible. In the *Re McCord* case, an additional option for future investigation may therefore become available.

[4] By letters dated 2 October 2026, the Secretary of State has now formally decided to defer a decision on how to proceed in the *Re McCord* and *Re Hewitt* cases until after the decision of the Supreme Court in *Re Brown* is available. He considers that the decision in *Re Brown* is likely to assist with the question of when he may be subject to a legal obligation to establish a public inquiry and whether there may be certain exceptional features of a case which point towards such an obligation, notwithstanding the availability of an ICRIR referral. The appeal in *Re Brown* is listed for hearing before the Supreme Court on 27 October 2026 for one day. It was therefore contended by the Secretary of State that any further delay associated with awaiting the *Re Brown* judgment was unlikely to be substantial, in relative terms.

[5] The applicants in *Re Fox* and *Re McKearney*, do not object to an adjournment of those cases until after the Supreme Court’s decision in *Re Brown* and have not requested the court to progress the leave applications in those cases.

[6] These four applications have been case managed together for a considerable period of time. The difference in position adopted by the four applicants leaves the court in a difficult position because these cases all share many similar features and raise very similar legal issues. In *Re Fox* and *Re McKearney*, the applicants agree that the decision of the Supreme Court in *Re Brown* is both important and relevant to these cases and they accept that progress of the cases should await that decision as it is likely to inform the decision of the Secretary of State on how to progress the investigations and also assist the court. The other two applicants in *Re Hewitt* and *Re McCord* ask me to grant leave on the basis that sufficient delay has already taken place and also that the Secretary of State has not taken the opportunity to make a decision which was afforded to him by the court. They have also confirmed that they do not intend to refer the cases to ICRIR and that any referral would have to be made by the Secretary of State or one of the other authorities listed in section 9 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023.

[7] Reflecting on all of these competing submissions, I consider that, while the delay in completing these investigations is unfortunate and regrettable, the reasons for the delay are intertwined with the progress of appellate litigation in *Re Brown*. I accept that the decision of the Supreme Court in that case is likely to be relevant to the question of whether and when a court may make a mandatory order to compel establishment of a public inquiry and, if so, the types of factors which are indicative of such an obligation, notwithstanding the availability of some other form of investigation such as an ICRIR referral. The issue in *Re Brown* is precisely the primary issue in these cases. It is therefore of direct relevance to the decisions which the Secretary of State will be required to take in due course and it is likely to be of considerable assistance to the court. The decision is therefore likely to bear directly upon the grounds of challenge in this case and the issues which the court will be required to decide.

[8] I also accept the applicants' submission that these cases raise the additional issue of ongoing delay in making a decision on the form of investigation. However, that issue is also likely to be live in *Re Brown* where the completion of investigative obligations also remains outstanding and in which there is opposition to an ICRIR referral. While I acknowledge that the position adopted by the Secretary of State will result in some further delay, as I made clear in my ruling of 3 March 2026 (at [70]), delay alone is not sufficient to establish an article 2 breach. Rather, there must be culpable or unjustified delay on the part of the relevant state authorities. As the Court of Appeal made clear in *Jordan v PSNI* [2021] NI 149, awaiting the outcome of appellate litigation may be a justifiable reason for delay in progressing an investigation. In this case, it is very difficult for the court to predict at this time whether the additional delay associated with the current stance of the Secretary of State may be justified or not and I make no decision on the point. However, the matter is not clear and there is at least a plausible basis for the view that the position of the Secretary of State may not amount to or contribute to a breach of article 2. I do not consider the matter to be so clear that I could confidently conclude that the

additional delay associated with awaiting the *Re Brown* decision is unjustified and will amount to a breach of article 2.

[7] Stepping back and looking at the issues in the cases and the competing submissions, I consider that the case management and ultimate determination of these cases is likely to benefit from the decision of the Supreme Court in *Re Brown*. I consider that separate case management of these cases is undesirable in light of the overlap in issues. I also consider that, in light of the need for further decision making by the Secretary of State following *Re Brown*, the issues for determination and the relevant evidence could change in a significant and material manner, with a consequential need for revision of the pleadings. The decision may even avoid the need for litigation altogether. Accordingly, decision to progress two of the cases at this time, while pausing the other two cases is undesirable and carries a significant risk of a waste or duplication of resources. I also consider that I am likely to be greatly assisted by the decision in *Re Brown* on whether and when it might be appropriate or necessary for the Secretary of State to order a public inquiry as opposed to an investigation carried out by ICRIR. I consider that the procedural history of these four cases together with those in *Re Dillon* and *Re Brown*, all illustrate in quite stark terms the procedural and substantive problems which can arise when a court of first instance progresses very important litigation, raising difficult issues of legal principle and which involve deployment of very substantial resources, when relevant appellate litigation is progressing in parallel which could change the entire course of both the litigation and the decision making which underpins it.

[8] It is a difficult procedural balance for the court to strike as to when to progress cases and when not. But, in this case, I am clear in my view that the appropriate and proportionate course of action is to defer further case management of these cases until the conclusion of the Supreme Court litigation in *Re Brown*. In light of the proximity of the hearing in that case, I consider that any inability for the applicant to have access to the court during that period is justified by the broader case management and substantive advantages which I have described.

[9] For all of these reasons, I will adjourn all four cases until the conclusion of the case of *Re Brown* in the Supreme Court. I will also give the parties liberty to apply in the event that there are further unexpected changes in circumstances.