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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

IN THE MATTER OF AN APPLICATION BY DAVID WRIGHT FOR JUDICIAL REVIEW OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

DEENY J.

[1] The applicant herein brings this application to challenge the compatibility of the Inquiries Act 2005 with Article 2 of the European Convention on Human Rights and to challenge the decision of the Secretary of State for Northern Ireland on 23 November 2005 converting an inquiry into the death of Billy Wright under the Prison Act (Northern Ireland) 1953 into an inquiry under the Inquiries Act 2005. The applicant is the father of the said Billy Wright who was shot dead on 27 December 1997 while a serving prisoner in H. M. Prison The Maze.

[2] On 21 October 1998 three members of the Irish National Liberation Army, who were also serving prisoners at HMP The Maze, were convicted of the murder of Billy Wright. On 1 August 2001 the Governments of the United Kingdom and the Republic Ireland reached an agreement at Weston Park in England. Among other matters both Governments agreed to appoint a judge of international standing to undertake "a thorough investigation of allegations of collusion (by the security forces) in the cases of the murders of Chief Superintendent Harry Breen and Superintendent Bob Buchanan, Pat Finucane, Lord Justice and Lady Gibson, Robert Hamill, Rosemary Nelson and Billy Wright". (In the event the family of Lord Justice and Lady Gibson did not wish the matter to be pursued in regard to them.) Subsequently the Honourable Peter Cory, a retired judge of the Canadian Supreme Court, accepted this task and delivered reports on the six remaining cases on 7 October 2003. Her Majesty's Government published these reports on 1 April 2004 with some redaction of passages relating in particular to the names of those involved. On that occasion the then Secretary of State announced that

the inquiry into the death of Billy Wright would be established under the Prison Act (NI) 1953. On 8 July 2004 the Secretary of State made a statement on the governing principles for the inquiry and on 16 November 2004 he announced the names of the Chairman and panel members of the inquiry and what the terms of reference would be. The inquiry panel consists of Lord MacLean, a Senator of the College of Justice in Scotland, 1990-2005, sitting with Professor Andrew Coyle and the Right Reverend John Oliver. At a preliminary hearing held in Belfast on 22 June 2005 Lord MacLean announced that he proposed to ask the Secretary of State to convert the inquiry to an inquiry under the Inquiries Act 2005 as the "list of issues requires examination of matters that go beyond the provisions of the Prison Act." Such a request was formally made on 13 July 2005. The Secretary of State issued his decision to convert the Billy Wright inquiry to an inquiry under the 2005 Act on 23 November 2005. It is that decision and its surrounding circumstances which the applicant seeks to challenge, alongside his challenge to the Inquiries Act 2005 itself.

[3] Before turning to the two principal areas of contention I touch on one preliminary matter.

[4] Section 38 of the Inquiries Act 2005 imposes a time limit for applying for judicial review of a decision made by the Minister in relation to an enquiry. Such an application must be brought within 14 days after the day on which the applicant became aware of the decision, "unless that time limit is extended by the court". The applicant herein was approximately five weeks outside that time limit. It would appear that this point on delay was taken before Weatherup J. I am satisfied on seeing a transcript of his remarks that he intended to and did extend the time for bringing the application in the light of all the circumstances, including an application for legal aid by the applicant. I am inclined to the view that, whatever might sometimes be the practice in judicial review applications made under Order 53 generally, that ends the matter and I need not deal with it at this substantive hearing. It was not pursued by the respondent at that hearing although it had been included in the skeleton argument. For completeness, however, I would take the same view as Weatherup J on that issue. Indeed reference to the digital audio recording of the Court of Appeal reveals that this view was upheld by the court when asked to consider it at the same time as an application for additional grounds of leave. No application was made to declare the fourteen day time limit in Section 38 as incompatible with Article 6 of the European Convention on Human Rights so that I need not arrive at any considered view upon that point.

[5] It is helpful to begin by referring to Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which deals with the Right to Life. It provides that:

> "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.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
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> a. in defence of any person from unlawful violence;
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
> c. in action lawfully taken for the purpose of quailing a riot or insurrection."

[6] One notes from the Article that this is not an unqualified right to life. It does not prevent those charged with the custody of prisoners from using force which is no more than absolutely necessary to prevent their escape, even if it proves fatal. It does not expressly confer a right on any person to have deaths, whether in the circumstances outlined in Article 2 or otherwise, investigated but given the circumstances outlined in which life can be taken it is scarcely surprising that the European Court of Human Rights has concluded that such a right exists. Thus in McCann and Others v The United Kingdom [1996] 21 E.H.R.R. 97, the European Court held that a general legal prohibition of killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention" requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State. It was not necessary to decide the form of investigation in the McCann case as a lengthy public inquest had in fact taken place in Gibraltar following the deaths of three persons at the hands of members of the Special Air Services Regiment.

[7] Mr Seamus Treacy QC, who appeared for the applicant with Mr Alan Kane, relied on the decision of the House of Lords in R (on the application of Amin) v Secretary of State for the Home Department [2003] UKHL 51, [2003] 4 All ER 1264. That was a case where a prisoner serving a sentence in a young offenders institution was murdered by his cell-mate who had already

manifested racial antipathy towards the victim. The principal opinion was delivered by Lord Bingham and I quote from it.

> "[30] Conclusions.
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> A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under arts 1 and 2 of the convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. The state owes a particular duty to those involuntarily in its custody. As Anand J succinctly put it in *NilabatiBehera v State of Orissa* [1993] 2 5CR 581 at 607: 'There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life.' Such persons must be protected against violence or abuse at the hands of state agents. They must be protected against self-harm (see *Reeves v Comr of Police of the Metropolis* [19991 3 All ER 897, [20001 1 AC 360). Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm.
>
> [31]
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> The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred (see *Menson* v *UK* [20031 ECHR 47916/99). It can fairly be described as procedural. But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, as noted at [16], above, effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative

> may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.
>
> [32]
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> Mr Crow was right to insist that the European Court has not prescribed a single model of investigation to be applied in all cases. There must, as he submitted, be a measure of flexibility in selecting the means of conducting the investigation. But Mr O'Connor was right to insist that the European Court, particularly in *Jordan v* UK and *Edwards v UK,* has laid down minimum standards which must be met, whatever form the investigation takes."

[8] It can be seen that Lord Bingham expressly refers to the independence of the judicial tribunal at common law, that is the coroner's court. Indeed it is hard to see how the first three purposes in his summary could be achieved by a tribunal that was not independent and seen to be independent. I note that Lord Hope also refers to an independent public enquiry at para.65 in his judgment.

[9] Mr Treacy further relied on the decision of the European Court in Finucane v The United Kingdom [2003] 37 E.H.R.R. 29. In that case a prominent solicitor, Mr Patrick Finucane, was shot dead by two masked men at his home. An illegal paramilitary group, the Ulster Freedom Fighters, claimed responsibility. The European Court reiterated the need for an investigation of such a killing in order to protect the right to life while stating that the form of investigation which would achieve such purposes may vary in different circumstances. However, the first characteristic that they mention at paragraph 68 of the judgment is as follows:

> "For an investigation into an alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence."

[10] I pause there to observe that the suspicion held by some in connection with the death of Mr Finucane was that the killing had implicated persons involved with British military intelligence. It involved a weapon stolen from an army barracks 18 months before the death. Therefore on the face of it it is not about a killing by State agents but it is alleged that that may be the reality. Likewise in Mr Wright's case it is not the case that the men who murdered

Billy Wright were actual servants of the State but the suspicion is that there may have been assistance given to them by agents of the State with a view to bringing about his death.

[11] The European Court goes on to refer to the need for such an investigation to be effective and to be conducted with reasonable expedition. At paragraph 71 the court said:

> "For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases however the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

Mr Treacy relied on the fact there that despite the police investigation and the ongoing inquiry by Lord Stevens, as he now is, the court concluded that there had been a breach of Article 2 by reason of the failure to provide an effective investigation. It will be noted that Mr Finucane's case was one of those the subject of the report by the Hon. Peter Cory. At paragraph 3.222 of his report he concludes from his review of the relevant documents:

> "… that there was sufficient evidence of collusive acts by prison authorities to warrant the holding of a public inquiry."

He sets those acts out with regard to the murder of Billy Wright. At 3.224 he sets out his view of the basic requirements for a public inquiry, the first being:

> "An independent commissioner or panel of commissioners."

With regard to the nature of that conclusion I was referred to paragraph 3.190 of his report where he says:

> "I have referred globally to the actions of State authorities, though it is clear that the primary State actors are those individuals working with and for the NIPS, other agencies may be involved to a lesser extent in acts that could be found to be collusive."

The Secretary of State for Northern Ireland is responsible for prisons and prisoners in Northern Ireland at the present time.

[12] Mr Treacy identified three aspects of independence which he contended were all violated by the Inquiries Act of 2005. These were the institutional independence of the tribunal with respect to matters of administration and other matters bearing directly on the exercise of judicial function; security of tenure and financial security. In support of that contention he relied prominently in his oral argument on the decision of Valente v The Queen [1985] 2 S.C.r 673. This decision of the Supreme Court of Canada did indeed address the issue of judicial independence. It found that a judicial tribunal should be perceived as independent. A first essential condition was security of tenure. The essentials of such security were found to be that a judge be removable only for cause and that cause be subject to independent review and determination by a process at which the judge affected is afforded a full opportunity to be heard. The court found the second essential condition of judicial independence to be one of financial security. The third essential condition was the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function e.g. assignment of judges, sitting of the court.

[13] Subsequently, Mr Bernard McCloskey QC, who led Mr Tony Mc Gleenan for the Secretary of State, pointed out that this decision turned on the independence of a provincial criminal court the independence of which was guaranteed under Section 11(d) of the Canadian Charter of Rights and Freedoms. This was the equivalent of a written constitution. It was dealing with a permanent court and dealing with a situation where any accused was presumed innocent "until proven guilty according to law in a fair and public hearing by an independent and impartial trial (Section 11(d)." He submitted, I think legitimately, that that was a different context, (analogous, it might be said, to Article 6 of the European Convention), from the context with which I was dealing i.e. an ad hoc tribunal set up to investigate and report on a possible breach of Article 2 of the Convention. I bear that in mind. In any event he submitted that the Act was not in breach of the three conditions of independence laid down by the Canadian Supreme Court.

[14] Delivering the judgment of the court at paragraph 22, LeDain J, adverting to Section 11(d) of the Charter says:

> "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a

> tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoyed the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees."

[15] Mr Treacy relies on this as part of his answer to Mr McCloskey's contention that his application is in reality premature. He relied on a passage from Emmerson, Human Rights Practice at 6.119 as showing that the European Court took a similar view of independence to the Canadian Court. However I note that the chapter to which he refers was dealing with "Article 6 the Right to a Fair Trial."

[16] Mr Treacy then referred to a considerable volume of material from sources which he submitted the court should give weight to which points to a clear perception that the independence of any inquiry here would be compromised if it were held under the Inquiries Act 2005. I summarise those submissions. Firstly he quotes Judge Cory himself in a letter of 15 March 2005 to Congressman Chris Smyth.

> "Further it seems to me that the proposed new Act would make a meaningful inquiry impossible. The Commissions would be working in an impossible situation. For example, the Minister, the actions of whose ministry was to be reviewed by the public inquiry would have the authority to thwart the effects of the inquiry at every step. It really creates an intolerable Alice in Wonderland situation. There have been references in the press to an international judicial membership in the inquiry. If this new Act were to become law, I would advise all Canadian judges to decline an appointment in light of the impossible situation they would be facing. In fact, I cannot contemplate any self-respecting Canadian judge accepting an appointment to an inquiry constituted under the new proposed Act."

[17] Lord Saville of Newdigate chaired the Bloody Sunday Inquiry and is, at the time of writing, compiling his report with his colleagues at the conclusion of that inquiry. He was consulted by the Department of Constitutional Affairs about the Inquiries Bill as it then was and expressed his

views in a letter of 26 January 2005. He had had a meeting with officials but wrote to their Minister, Baroness Ashton, inter alia, in the following terms:

> "There is, however, one matter that seems to me of such importance that I should write to you. This concerns the present provisions of Clause 17 of the Bill, giving the relevant minister the power to impose restrictions at any time before the end of the inquiry on attendance at the inquiry, or on the disclosure or publication of any evidence or documents given to the inquiry.
>
> I take the view that this provision makes a very serious inroad into the independence of any inquiry; and is likely to damage or destroy public confidence in the inquiry and its findings, especially in any case where the conduct of the authorities may be in question.
>
> As a judge, I must tell you that I would not be prepared to be appointed as a member of an inquiry that was subject to a provision of this kind. This is because I take the view that it is for the inquiry panel itself to determine these matters, subject of course to the right of those concerned to challenge in court any ruling that it may make or refuse to make. To allow a minister to impose restrictions on the conduct of an inquiry is to my mind to interfere unjustifiably with the ability of a judge conducting the inquiry to act impartially and independently of Government, as his judicial oath requires him to do."

[18] Lord Saville recorded that his two colleagues, both retired senior Commonwealth judges, agreed with him that they would not be prepared to accept appointment to an inquiry. While the minister replied at length Mr Treacy submits that the matters which concerned Lord Saville have been retained in the Act as passed. The applicant contends that the difficulties foreseen in regard to the Wright inquiry have also been identified as major impediments with regard to an inquiry into the death of Mr Finucane. Mr Dermot Ahern, the Irish Minister for Foreign Affairs, on 8 March 2006 introduced a motion before Dáil Éireann calling on the Government of the United Kingdom to amend the Inquiries Act 2005. In the course of his remarks he said:

> "The UK Inquiries Act does not meet the standard set by Judge Corry, nor the understanding reached at

> Weston Park. Many difficulties exist with the new legislation. An inquiry held under it will not be regarded as sufficiently independent or transparent, given the potential use of restriction notices and the potential degree of ministerial control."

The spokesman for the other parties represented in Dáil Éireann made remarks agreeing with this all party motion. The equivalent inquiry being held in the Republic with regard to the murder of Superintendents Breen and Buchanan will be held, it is interesting to note, under the 1921 Inquiries and Tribunal Act passed before the establishment of that State. The applicant also relies on the press release of Amnesty International dated 20 April 2005:

> "urging all judges, whether in the United Kingdom or in other jurisdictions to decline appointments as chairs or panel members to any inquiry established under the recently enacted Inquiries Act 2005, including an inquiry into allegations of State collusion in the murder of Patrick Finucane. The organisation is also urging the Act's repel."

A further press release was exhibited contending that concern had been express about the Act by a very wide range of bodies including the General Councils of the Bar of Northern Ireland, England and Wales and Ireland and the Law Societies in those three jurisdictions, the U.S. House of Representatives, the International Commission of Jurists, the Haldane Society and many others.

[19] The applicant also relied on the views of the Joint Committee on Human Rights of the House of Lords and House of Commons. I was referred to their 8th Report of the Session 2004-2005. It seems to me right to refer to several passages in that report and to the response of the Lord Chancellor to some of the concerns expressed. At page 5 there is a paragraph which welcomes some amendments to the Bill but went on:

> "On the other hand the Committee considers that risks of incompatibility with Article 2 remain in the case of the ministerial power to issue restriction notices limiting attendance at an inquiry or limiting disclosure of evidence provided to an inquiry (paragraph 3.10) and in the case of the ministerial power to withdraw funding from an inquiry which the Minister believes is operating outside its terms of reference. (Paragraph 3.14)."

[20] Chapter 3 of the report deals specifically with the Inquiries Bill. There is also at Appendix 3, the letter of Lord Falconer of Thoroton QC as Secretary of State for Constitutional Affairs and Lord Chancellor responding on that topic. At 3.5 the Committee expressly reiterates concerns expressed by it in their earlier report ie:

> "The power of the responsible Minister to bring an inquiry to a conclusion at any stage before the publication of the report (clause 14(1)(b));
>
> The power of the responsible Minister to issue a restriction notice at any time during the course of the inquiry limiting attendance at the inquiry or the disclosure or publication of evidence or documents provided to the inquiry;
>
> The power of the responsible Minister to withhold material from publication in the report of the inquiry where this is required by law or where it is considered to be necessary in the public interest."

[21] At 3.8 the Committee noted the Lord Chancellor's point that "because it is theoretically possible for power to be exercised incompatibly with Article 2 rights, does not mean the Act itself is incompatible with Article 2 rights." While taking that point the Committee went on:

> "However we do not consider that this argument in itself meets our concerns as to the independence of an inquiry established under the Bill, since the independence of a tribunal is secured both by the institutional and legal structure in which it operates, and by the restraint and impartiality exercised in practice by those involved. Even given proper restraint by Ministers in the exercise of the powers considered above, their availability in respect of an inquiry would risk affecting its independence, both actual and perceived.
>
> 3.9 In our previous report on the Bill we raised concerns that the power of the responsible Minster to bring an inquiry to an end before publication of the inquiries report, without any provision in the Bill as to the circumstances in which the power could be used, or any need for reasons to be given for the decision to terminate the inquiry, could compromise independence. Amendments made to

> the Bill at the report stage in the House of Lords require a Minister to consult the chairman of an inquiry panel before issuing a notice to end the inquiry (Clause 14(3)) and require the Minister to give reasons for exercising the power to terminate the inquiry (Clause 14(4)). The Lord Chancellor further states in his letter to the Committee that the ministerial power to terminate an inquiry is intended for use in exceptional circumstances only, for example, where evidence arises that demonstrates the inquiry is no longer needed. We welcome the amendments made to Clause 14, which goes some way towards meeting our concerns, by enhancing the transparency of the decision to terminate the inquiry. However, we note that the circumstances in which the ministerial power to end the inquiry may be exercised remain wide, and will need to be exercised with considerable restraint in cases where Article 2 is engaged, in order to ensure that the requirement of independence is met."

I pause to observe that the matters referred to therein at Clause 14(3) and (4) are now to be found at Section 14(3) and (4). No reference to exceptional circumstances or any indication of the circumstances in which a Minister would exercise this power or otherwise is provided in Section 14.

[22] The Committee also expressed the view at the conclusion of 3.10 of its report that "the independence of an inquiry is put at risk by ministerial power to issue these restrictions, and that this lack of independence may fail to satisfy the Article 2 obligation to investigate, in cases where an inquiry under the Bill is designed to discharge that obligation."

Furthermore at paragraph 3.13 of their report the Joint Committee stated:

> "**In our view in inquiries designed to fulfil the Article 2 obligation of an effective and independent investigation, responsibility for publication of the report must allocated to the chairman of the inquiry at the outset under Clause 25(2) in order to ensure compliance with Article 2.** We have not received reassurances from the Government that this would be the case in relation to any inquiry which engaged Article 2. We draw this matter to the attention of both Houses."

> A more recent Report of the Committee expressed similar concerns.

[23] In his letter of 6 February 2005 to the Committee the Lord Chancellor made a number of observations. He pointed out that in an inquiry under this Act the court will rarely discharge an Article 2 obligation alone. Inquest proceedings and other types of investigation were also likely.

The Lord Chancellor indicated, as mentioned above, that the provision to end an inquiry was

> "…. intended for use in exceptional circumstances when it is clear that the inquiry is no longer required. This situation may arise out of evidence being presented that clearly shows there is no further need for any further inquiry, or that the matter should be dealt with by another process (for example criminal or civil proceedings). This provision will allow the Minister to intervene and bring an inquiry to a close so that there is no wastage of public money and resources."

This considered indication of the circumstances in which it might be proper for a Minister bring an inquiry to an end prematurely does not find expression at Section 14 of the Act.

[24] The silence at Section 14 might be contrasted with the position regarding the publication of reports with which the Lord Chancellor also dealt. One does find at Section 25 of the Act express provisions describing the circumstances in which it would be right and justified to withhold information and prevent the publication of matters. I will return to that later. It does however provide a contrast with the absence of such stipulations at Section 14. This is relevant to Mr McCloskey's submission that this court should place considerable reliance on the fact that decisions of a Minister would be subject to judicial review. With regard to a refusal of publication the court could form a view as to whether the Minister was justified under Section 23 in concluding that publication of particular matters would, for example, cause harm or damage to the economic interests of the United Kingdom or in a part of the United Kingdom. But how is the court to form a view so as to enable it to make an order with regard to the propriety of the exercise of a Minister's power to end an inquiry under Section 14? Although the Minister is obliged to state his reasons, having consulted with the Chairman before exercising the power to end the inquiry, the reasons are completely at large. Would it not be difficult for an applicant in those circumstances to mount an attack on the Minister's exercise of that power in

those circumstances? I note the important point that not all inquiries under this Act will be related to Article 2 and the right to life. No doubt there will be inquiries not so related eg as to matters of administration or finance.

[25] Counsel for the respondent, having submitted that Valente was not a fully apposite authority on the topic of independence under the jurisprudence relating to Article 2 of the Convention, then provided a helpful note of relevant authorities on the topic. One of these was Ogur v Turkey [2001] 31 EHRR 40. In that case the European Court not only held by 16 to 1 that there had been a violation of Article 2 as regards the planning and execution of the operation that led to the death of the applicant's son but held unanimously that there had been a violation of Article 2 of the Convention as regards the investigations carried out by the national authorities. The court had a number of criticisms of the quality of examination carried out by the investigators. At page 21(d) the following passages occurs:

> "At all events, serious doubts arise as to the ability of the administrative authorities concerned to carry out an independent investigation, as required by Article 2 of the Convention. The investigating officer appointed by the governor was a Gendarmerie Lieutenant Colonel and, as such, was subordinate to the same chain of command as the security forces he was investigating. As to the administrative council, whose responsibility it was to decide whether proceedings should be instituted against the security forces concerned, it was composed of senior officials from the province and was chaired by the governor who, in this instance, was administratively in charge of the operation by the security forces."

In this connection, the evidence of one of the members of the Sirnak Administrative Council should be noted, according to which, in practice, it was not possible to oppose the governor: either the members signed the decision prepared by him or they were replaced by other members who were willing to do so. Other serious defects were noted and the court concluded that they investigations could not be regarded as effective investigations and there had been a violation of Article 2. (Paragraphs 91-93 of judgment). While obviously a very different factual context from this one the fact that the Secretary of State here has the power to remove the chairman and/or panel conducting the inquiry and is also responsible for the prison service and for certain other State agents must create some analogy with the present situation.

[26] In McShane v United Kingdom (App No 43290/98), 28 May 2002 the court considered whether there had been on effective investigation of the death of Mr Denis McShane when he was crushed behind a hoarding into which a police vehicle had driven in a riot situation. The court there was critical of the investigation in several regards including lack of independence of the police officers investigating the incident from the officers implicated in the incident. This is something that was taken on board by the authority subsequently. Other matters relating to inquests familiar from the considerable raft of litigation on that topic one touched upon. I observe with reference to this case that in spite of the limitations on the verdicts adverted to in that judgment to be given by an inquest the Coroner cannot actually be removed by the Government Minister responsible for the police. Nor can the Director of Public Prosecutions, who declined to prosecute be removed by a Government Minister, although he is subject to a measure of direction in a limited way from the Attorney General who is a member of the Government but has a duty to act quasi judicially in the appropriate circumstances.

[27] In Re McKerr [2004] NI 2112 Lord Nicholls was content in referring to the requisites of an Article 2 investigation to refer back to the decision of their Lordships House in Amin already quoted by me above. I also take into account the cases referred to in the substantial submission from the Northern Ireland Human Rights Commission including Bryan v The United Kingdom (App No 44/1994/491/573, 26 October 1995).

[28] It seems to me that from a consideration of the cases cited herein and the other authorities to which the court was referred by counsel, that the independence of the individual or body carrying out an Article 2 compliant investigation is both essential and important. I therefore turn to consider the statutory provisions which the applicant contends would fatally undermine the independence of the tribunal here if acting under the Inquiries Act 2005. In order to do so it is appropriate to consider preceding statutory provisions to some extent.

Statutory Framework

[29] The inquiry into the death of the late Billy Wright was originally established under Section 7 of the Prison Act (NI) 1953. I set it out in full.

> "Sworn Inquiries
>
> 7-(1) The Minister may cause an inquiry to be held where it appears to him advisable to do so in connection with any matter arising under this Act or otherwise in relation to any prison.

> (2) For the purposes of such inquiry the provisions of Section 65 of and the 7th Schedule to the Health Services Act (Northern Ireland) 1948 (which relates to inquiries) shall have effect for the purposes of this Act in like manner as they have effect for the purposes of that Act."

[30] It can readily be seen that the terms of Section 7(1) are wide. The sworn inquiry can be into any matter arising under this Act or otherwise in relation to any prison. Counsel conveyed the concern of the Chairman of the Inquiry that the matters into which he would look would go beyond the curfews of the prison. It was suggested that the application of the 2005 Act would enable him to look into any matter. But counsel was unable to point to any matter in connection with the investigation of Billy Wright that could not be said to be "otherwise in relation to any prison". He suggested the 2005 Act would put the matter beyond per adventure. I am unable to see that there is any real difficulty here with Section 7. The murder of this man took place in the prison. Three other prisoners have been convicted of that murder. If they were facilitated in obtaining weapons or in the arrangements in the days and weeks prior to the shooting to which Justice Cory has referred it must have involved the steps taken within the prison. Even if persons outside the prison, whether State agents or otherwise, conspired in connection with or facilitated the introduction of weapons into the prison or the alteration of arrangements to facilitate the shooting those steps must have been "in relation to any prison" ie the one in which he was shot.

[31] The last mentioned provision at Section 7(2) was repealed by Section 92 of the Health Services Act (NI) 1971 (cf Schedule 12), itself since repealed. The applicable provision at the time the inquiry was set up was Schedule 8 of the Health and Personal Social Services (NI) Order 1972. The Schedule empowers the Ministry to appoint a person to hold an inquiry and to report thereon to the Ministry. Various collateral powers including the power to require persons to attend are provided for. Paragraph 6, 7 and 8 deal with the question of the costs of the inquiry to which I shall have to return in due course. What does strike one, inter alia, about Section 7 and the applicable Schedule is that neither Minister nor Ministry had any power to remove the person appointed to conduct an inquiry. It may be that under paragraphs 6 to 8 of the Schedule the Ministry could have cut off funding from the inquiry but it is not explicit. It does not seem to me implicit that there was a power to actually stop the person from completing their inquiry and making a report to the Ministry. There was no express right to have that report published, I note. I also draw attention, although it was not actually opened to the court, to Section 39 of the Act which deals with notification of and inquiry into the death of a prisoner. In that event the Governor of a prison shall give immediate notice to the Coroner within whose area the prison is situated and he shall hold an inquest into the cause of death. Neither the Governor of the

prison nor the Minister would have any power to stop a Coroner holding an inquest or to remove him from office. It would reinforce my view that Section 7 cannot be read as implying any such power on the Minister. Therefore one sees that, although it may not have been drawn to the Inquiry's attention, that they move from a position where having been appointed under the Prison Act they can proceed of their own will to complete their inquiry and make a report to the Ministry, subject only to some possible difficulty about expenses, to a position where the Secretary of State can terminate their appointment, under s. 14 or s. 12 of the 2005 Act.

[32] Apropos of the submission that the Prisons Act of 1953 may not give the inquiry all the powers it needs, one must observe that this difficulty does not seem to have been identified at the time the original decision was made to hold the inquiry under that Act. If it was thought, in the light of Justice Cory's report that the matters to be looked into were not covered by the Act "or otherwise in relation to any prison" the Minister could have ordered an inquiry under the Tribunals of Inquiry (Evidence) Act 1921. It is interesting to note that when one looks at that legislation while there is a power to exclude the public under Section 2, which may be relevant later, there again is no power vested in Her Majesty or the Secretary of State to bring to a halt the workings of a tribunal set up under that Act on foot of resolutions of both Houses of Parliament.

[33] Before looking in detail at the provisions of the Inquiries Act 2005 I note that counsel were agreed that its provisions had been judicially considered in one previous case namely R(D) v The Secretary of State for the Home Department [2006] 3 All ER 946; [2006] EWCA Civ 143. Counsel for the Secretary of State submitted, at paragraph 82 of their revised skeleton argument, that the English Court of Appeal specifically considered whether the provisions of the 2005 Act were compatible with Article 2. "The unhesitating and unanimous conclusion was that no incompatibility exists." Counsel for the applicant was strongly critical of that submission and in my opinion justifiably so. When one reads the judgment of Sir Anthony Clarke on behalf of the court it is clear that no such conclusion was reached. The court was concerned as to two aspects of an investigation to be carried out by the Prisons Ombudsman following the near death and serious brain damage of a prisoner who attempted suicide in custody. It is not necessary for me to go through the helpful judgment in detail but it is interesting to see what he said at paragraph 15 and 16 with regard to the proposed inquiry:

> "The Home Secretary accepts that the Draper investigation and report did not themselves satisfy the United Kingdom's obligation under Articles 2 and 3 because the Draper report was not published and neither D nor his representatives played any part in it. Further as the Judge said there is

> another fundamentally important reason why the Draper investigation and report cannot satisfy the State's obligation, namely that Ms Draper was not `independent'.
>
> Although the Home Secretary places some reliance on the fact of the Draper inquiry, he principally relies upon his proposal that the Prisons and Probation Ombudsman, Mr Stephen Shaw should carry out the inquiry and Mr Shaw has agreed to do so. We should say at once that Mr Shaw is an entirely independent person and is correctly accepted as such on behalf of D."

Therefore one finds an express endorsement of the importance of independence in the judgment of the court. They were not concerned with the Inquiries Act 2005 save in one secondary respect. It was not in force at the time that the Prisons Ombudsman was asked to conduct the investigation. The court took the view that if it subsequently became necessary to compel the attendance of a witness at the inquiry it could be converted into an inquiry under the Inquiries Act 2005 so that the Chairman could require a person to attend to give evidence. There appears to be no argument before them whatsoever as to whether the bringing in of the 2005 Act would have other consequences. The death in question was in 2001.

Retrospectivity

[34] In Re McKerr [2004] NI 212, the House of Lords held that there was no obligation to hold an investigation into a killing which occurred before the 1998 Human Right Act came into force, since that obligation was triggered by the occurrence of a violent death and did not exist in the absence of such a death. Nor did a continuing breach of Article 2 give rise to such a duty. Before 2 October 2000 there could not have been any breach of a human rights provision in domestic law because no such right existed until the 1998 Act had come into force. The son of Gervase McKerr therefore had no Article 2 right to require an investigation into the shooting dead of his father by members of the Royal Ulster Constabulary on 11 November 1982. In their opinions their Lordships expressly referred to Section 6 of the Act i.e. dealing with acts by a public authority incompatible with a Convention right and held that it did not apply. At the time of writing the Court of Appeal in Northern Ireland has delivered two judgments on matters relevant to this issue. In Re Jordan's Application [2005] NI 144; [2004] NICA26 the court took a view on this issue which a differently constituted court did not follow in Police Service of Northern Ireland v McCaughey and Grew, [2005] NI 344; [2005] NICA 1. Both these decisions have been appealed to the House of Lords but the hearing has not yet taken place.

[35] No application was made to me to decide this as a preliminary point ad limine. Counsel for the applicant submitted that the decision in McKerr did not and should not preclude me from reaching a decision as to whether the sections of the Inquiries Act to which he objected were or were not compatible with the Human Rights Act pursuant to Section 4 of the Act.

[36] Mr McCloskey QC for the respondent quarrelled with the contention in the applicant's Order 53 statement that the procedural dimension of Article 2 should apply to the current inquiry, a position, which I understood Mr Treacy to accept in oral argument, but conceded that I could properly make a decision with regard to Section 4. If I may say so that would, I think, necessarily imply that I ought to consider Section 3 of the Human Rights Act also. Subsequently Mr Larkin QC for the Inquiry objected to the contention that I could make a declaration of incompatibility if I was so persuaded, contrary to the attitude of Mr McCloskey. His submission was that the rights under Article 2 were not retrospective. He submitted that as Section 6 had been held by the House of Lords not to be retrospective in effect the applicant in these proceedings could not be a victim in the terms of the Convention and was not therefore entitled to bring proceedings under Section 7. Therefore he was not entitled to raise the issue of Section 4 before the court.

[37] Mr Treacy pointed out that this submission of Mr Larkin in oral argument had not been presaged by any written skeleton argument until one was requested by the court. Nor had he objected when Mr McCloskey effectively conceded Mr Treacy's submissions to the contrary. But leaving those procedural issues aside, he submitted that there was a clear distinction between Sections 3 to 5 and Sections 6 to 9. The first three related to and had the heading "Legislation" whereas the next three had the heading "Public Authorities". Section 3(2)(a) of the 1998 Act expressly provides that this section "applies to primary legislation and subordinate legislation whenever enacted". Furthermore Section 4(1) dealing with declarations of incompatibility reads:

> "Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right."

While maintaining that Mr Wright was in fact a victim his submission was in effect that there was no need for him to be one under Section 7. Incompatibility arose in any proceedings. He had a valid judicial review application before the court in these proceedings and was entitled to have this issue tested. I observe, without going into the authorities helpfully summarised by the Human Rights Commission in their written intervention, that this is a case where the decision had already been taken to hold an inquiry into the death of Billy Wright. What is in contention is the form of

that inquiry and whether the form which the Secretary of State has decided upon is compatible with the Human Rights Act. Therefore he submitted that a decision on the part of this court would rule on the compatibility or otherwise of the 2005 Act with the European Convention and was entirely consistent with the decision of the House of Lords in McKerr.

[38] There is at least one other relevant decision of the House of Lords, in Wilson v First County Trust Limited [2003] 4 All ER 97; [2004] 1 AC 816. There their Lordships had to consider the situation that affected lenders who were in breach of Section 127(3) of the Consumer Credit Act 1974. It provided that a failure to state all the prescribed terms in a consumer credit agreement, in this case a loan on the security of a car, precluded the court from enforcing the agreement at all. When this matter reached the Court of Appeal it granted a declaration that that provision was incompatible with both Article 1 of the First Protocol of the Convention and Article 6(1) as denying in effect the lender access to the courts as well as depriving it of its property in the money lent. A key issue before the court was whether the courts were entitled to make a declaration of incompatibility in this situation. The House of Lords held that the Court of Appeal lacked jurisdiction to make a declaration of incompatibility. The reasons for so doing are important. Firstly in paragraph 12 of his opinion Lord Nichols drew a distinction between Sections 3-5 and 10 which were concerned with the interpretation and amendment of legislation and Sections 6-9 which were concerned with making it unlawful for a public authority to act in a way incompatible with the Convention right. In paragraph 7 he noted that Section 3 "is retrospective in the sense that, expressly, it applies to legislation whenever enacted". In discussing the presumption against retrospective operation and the similar and rather narrower presumption against interference with vested interest, at paragraph 19, Lord Nichols cited with approval the dictum of Staughton LJ in Secretary of State for Social Security v Tunnicliffe [1991] 2 All ER 712 at 724:

> "… the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them unless a contrary intention appears."

At paragraph 20 he agreed with a dictum of Mummery LJ in Wainwright v Home Office [2002] QB 1334:

> "… that in general the principle of interpretation set out in Section 3(1) does not apply to causes of action accruing before the section came into force. The principle does not apply because to apply it in such cases and thereby change the interpretation and effect of existing legislation might well produce an unfair

> result for one party or the other. The 1998 Act was not intended to have this effect.
>
> [21] I emphasise that this conclusion does not mean that Section 3 never applies to pre-act events. Whether Section 3 applies to pre-act events depend upon the application of the principle identified by Staughton LJ in the context of the particular issue before the court. To give one important instance: different considerations apply to post-Act criminal trials in respect of pre-Act happenings. The prosecution does not have an accrued or vested right in any relevant sense.
>
> [22] In the present case Parliament cannot have intended that application of Section 3 should have the effect of altering parties' existing rights and obligations under the 1974 Act."

The emphasis by Lord Nichols on the effects on the existing rights of the parties seems to me to be a pointer to a distinction being drawn in a case such as this where that can not be said to apply but where one is essentially dealing with the procedure chosen to be adopted to enquire into the death of the deceased. On the other hand there is an analogy between a cause of action accruing and a death occurring before the Act came into force. The opinion of Lord Hope was in accord with that of Lord Nichols as was that of Lord Hobhouse. So too was that of Lord of Scott of Foscote. At paragraph 161 he said, inter alia:

> "Whatever may be the position where there is an ongoing transaction and intervening legislation, the present involves a simple six month loan transaction. All the relevant events, bar the completion of the appeal process, pre-dated the coming into effect of the 1998 Act. There is nothing to rebut the presumption that Parliament did not intend the Act to operate retrospectively so as to alter accrued rights or to impose obligations where none previously existed."

Lord Rodgers in his deeply considered opinion dealing with the whole issue of retrospective and retroactive legislation arrived at a similar conclusion with emphasis on the rights of the parties. Thus at paragraph [219] he said:

> "…. not only is the unfairness of interfering with the rights of parties to pending proceedings very considerable but it is distinct and different in kind

> from the unfairness which may have to be balanced as one of the competing interests whenever Article 1 is given effect."

It might be thought that no unfairness arises out of a decision of the court, if such were made, that one or more sections of the 2005 Act are incompatible with the European Convention on Human Rights. The inquiry has begun its work only at a preliminary stage in which it has had to deal with a number of difficult issues but not in a way that would preclude it continuing in one form or another in due course.

[39] Before arriving at a conclusion on this point myself, which I feel obliged to do despite the concession of the respondent, I must consider whether in fact this court is bound not only by the decision of the House of Lords in McKerr, which of course binds me but which counsel submitted was distinguishable, but directly by the decision of the Court of Appeal in Northern Ireland in Police Service of Northern Ireland v McCaughey and Grew [2005] NI 344. As Sir Brian Kerr LCJ points out in that decision the contrary view in Jordan about the applicability of Section 3 of the 1998 Act to events following a death preceding the coming into operation of the Human Rights Act was an obiter dictum of Girvan J (with whom McCollum LJ concurred). The decision of the Lord Chief Justice in McCaughey includes as part of the ratio the conclusion of the court that Section 3 of the 1998 Act will only apply where compatibility with Convention rights was at issue. The judgment of the Lord Chief Justice was the judgment of the court. I set out paragraph 44 thereof:

> "[44] The effect of Girvan J's judgment was to declare that Mr Jordan was entitled to have the inquest into the death of his son conducted in compliance with article 2, notwithstanding that the death occurred before 2 October 2000. This was to be achieved by requiring the Coroners Act to be interpreted in a manner that complied with the convention. The flaw in this approach, in our opinion, is that section 3 only applies where convention rights are in play. Neither the appellant in *Jordan* nor the respondents in the present appeal have access to convention rights in the domestic setting because of the non-retrospective effect of HRA. Section 3 is not triggered unless compatibility with convention rights is in issue. It was not in issue here, nor was it in *Jordan*, because the deaths involved occurred before the Act came into force. This much is clear not only from the passage from the opinion of Lord Nicholls in *McKerr* quoted above but also from the opinions of other members of

> the Appellate Committee. Lord Hoffmann put in bluntly, "Either the Act applies to deaths before 2 October 2000 or it does not". He held that it did not. But if Girvan J's approach was followed, the Act would be applied to deaths occurring before that date. Lord Rodger of Earlsferry put it thus:-
>
> > '… the right to an investigation under the Act is confined to deaths which, having occurred after the commencement of the Act, may be found to be unlawful under the Act.'
>
> Finally Lord Brown of Eaton-under-Heywood expressed the same concept in this way: -
>
> > '[91] The duty to investigate is, in short, necessarily linked to the death itself and cannot arise under domestic law save in respect of a death occurring at a time when article 2 rights were enforceable under domestic law, i.e. on and after 2 October 2000'."

The dicta quoted above would appear to preclude a s.4 consideration here. In the circumstances therefore I consider that I am bound by the decision in McCaughey and Grew. I will not, subject to the following paragraphs, proceed to consider whether the sections of the Inquiries Act 2005 complained of are incompatible with the European Convention on Human Rights. It seems to me that Sections 3 and 4 of the Act are closely tied together, as Lord Nicholls observed and, despite the respondent's concession, it would not be appropriate to proceed to make a decision on incompatibility in the light of the authorities on that topic. It would seem absurd to conclude that Parliament intended the court to be able to declare a provision incompatible under s.4. but be unable to read the same provision in a Convention compatible way under s. 3.

[40] My obligation to follow the decision of the Court of Appeal in McCaughey is reinforced by the dictum of Denning J, as he then was, in Minister of Pensions v Higham [1948] 2 KB 153 at 155:

> "In this respect I follow the general rule that where there are conflicting decisions of courts of co-ordinate jurisdiction, the later decision is to be preferred if it is reached after full consideration of the earlier decision."

This dictum was expressly approved and followed by Nourse J in Colchester States (Cardiff) v Carlton Industries Plc [1984] 2 All ER 601.

Independence

[41] In case a different view is taken by the House of Lords with regard to the issue of compatibility under ss3 and 4 I consider it appropriate to comment briefly on the main thrust of the applicant's case here, in the light of the extensive written and oral argument which the court received. Section 12 of the Inquiries Act 2005 deals with "Duration of appointment of members of inquiry panel". Section 14 of the Inquiries Act 2005 provides that the inquiry comes to an end either

> "(1)(a) On the date, after the delivery of the report of the inquiry, on which the Chairman notifies the Minister that the inquiry has fulfilled its terms of reference; or
>
> (b) On any earlier date specified in a notice given to the Chairman by the Minister."

It is true that the Minister must consult the Chairman before exercising this power and he must set out in the notice his reasons for bringing the inquiry to an end and lay a copy of that notice before the relevant Parliament or Assembly. However the power is otherwise untrammelled. There is no reference to the exceptional circumstances referred by the Lord Chancellor in his correspondence with the Joint Committee. There are no comparable provisions to the limitations in Section 12 under which a Minister may terminate the appointment of an individual member of the inquiry for ill health or failure to comply with duty or possession of an interest etc. Again it is to be contrasted with the provision regarding the publication of reports. The Minister's power in this regard was also criticised but at Section 25 one sees the grounds on which the Minister must act before deciding not to publish the report of an inquiry in full. It may be proper for a Minister to bring an inquiry to an end if it has wholly departed from the terms of reference which it was originally given. Or if the ongoing costs of the inquiry are out of all proportion to what might be learned from any continuing investigation. Or, perhaps, if civil or criminal proceedings might more effectively achieve legitimate public objects than the inquiry. But those reasons are not set out in the section as reasons justifying the Minister's decision. If he were to make a decision for another reason, it seems to me that it would be difficult for a party aggrieved by that decision to challenge it by way of judicial review because Parliament has left such a wide discretion to the Minister. In those circumstances one has to ask whether an inquiry

conducted under a sword of this nature, which was perhaps not Damoclean but still rested in the scabbard of the Minister, would or could be perceived to be truly independent.

[42] The applicant relies on a considerable volume of expressed public concern about these provisions to argue that there is a lack of public confidence in the independence of the inquiry. As I have indicated it seems to me that public confidence and perception is important here to establish "that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed"; to quote two of the purposes of such an investigation identified by Lord Bingham in Amin. If the public do not have confidence in the independence of the tribunal they will not conclude that wrongdoing has been fully exposed and their concern will not be allayed if the inquiry concludes that nothing sinister had emerged from its investigations.

[43] Reality is, of course, more important than perception. The need is to have an effective investigation to achieve all the purposes identified by the courts for such an investigation in cases where life has been lost. But that is not to say that perception is not important in itself as I believe it to be here. As Lord Hewart L.C.J. said in The King v. Sussex Justices [1924] 1 K.B. 256 at 258, " it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." The court would not be swayed by the mere volume and noise of a campaign in arriving at a view about this matter. But it would have to take into account the quality of the representations made expressing such concern and the origins of those representations. Where, as here, many of the individuals and bodies expressing concern are of stature, weight must be given to that by the court.

[44] In assessing the issue of independence here one seeks for some analogous positions. One possible analogy might be with the work of scientists. Scientific investigation carried out by an independent scientist and published in a peer reviewed journal might seek to allay public concern about some pharmaceutical product, for example. But if it became known that the scientist had agreed at the commencement of his research that the money for the research would not only come from a large pharmaceutical company, keenly interested in the outcome of the investigation but that the chairman of the company could terminate the research at any time for any reasons which were not wholly irrational, could anyone reasonably describe that scientist as independent? His work may have been scrupulous and authoritative in reality but would it allay public concern if he compromised himself by accepting appointment on those conditions? If an independent actuary were to be retained in a transaction in which one insurance company was acquiring the assets of another, with the objective of ensuring fairness to policyholders,

could he be described as independent if the Chairman of one of the insurance companies had the power to dismiss him?

[45] In the circumstances of my earlier conclusion I do not propose to proceed seriatim through the objections raised by the applicant and by the Northern Ireland Human Rights Commission in its very helpful submission with regard to the other sections of the Inquiries Act. However, subject to the point below, several of those sections must inevitably tend to reduce the independence of the Inquiry.

[46] It is appropriate to consider a particular point which divided the parties in the consideration of the various sections of the Act of 2005. Counsel for the respondent argued that any perceived imperfections, if they existed, were in any event cured by the ability to seek judicial review of a decision of the Secretary of State or of the inquiry to which objection was taken. Mr Treacy for the applicant strongly contended that this reliance on judicial review which he described as the "composite approach" was misconceived and inapposite in the context of Article 2 enquiries. Insofar as he makes a general point based on that contention it does not seem open to me to conclude at this point in time that the ability to review a decision by way of judicial review cannot assist in rendering a panel compliant with the European Convention. As he acknowledged the composite approach has been upheld in the administrative field by Bryan v United Kingdom (1996) 21 EHRR 342 and by the House of Lords in the planning and social welfare fields in On the application of Alconbury Developments Limited v Secretary of State for the Environment [2001] 2 All ER 929 and Runa Begum v Tower Hamlets London Borough Council [2003] UKHL 5; [2003] 1 All ER 731. It does not seem to me that it has been demonstrated that the Article 2 context is so clearly and sufficiently different to allow one to distinguish those authorities by holding that judicial review can play no part in considering the compatibility of the sections of the Act with the European Convention, if it was necessary to do so. I do observe that if one confines the argument to the issue of independence it has greater weight.

Non- Convention Grounds

[47] I now turn to consider the grounds otherwise advanced by the applicant for challenging the decision of the Secretary of State. The first of these is to be found at paragraph 3(i), (ii) and (iii) of the amended Order 53 statement. The applicant's contention is that he has an enforceable and legitimate expectation that the inquiry into the death of his son would be compliant with the recommendations of Justice Cory and that the inquiry would be held under the Prison Act (NI) 1953. The applicant relied on the following representations, promises or undertakings in support of this contention. Firstly he relies on a statement by the then Secretary of State for Northern Ireland, Mr. Paul Murphy, in the House of Commons on 1 April 2004:

> "The Government stands by the commitment that we made at Weston Park. In the Wright case, there are no outstanding investigations or prosecutions, and the inquiry will start work as soon as possible; it will be established under the Prison Act (NI) 1953. … The inquiries will have the full powers of the High Court to compel witnesses and papers. The powers are the same as those granted to inquiries set up under the Tribunals of Inquiry (Evidence) Act 1921 under which the Bloody Sunday Inquiry operates. In addition the Police and Prisons Acts enable me, as Secretary of State, to make provision for certain matters – for example costs and expenses. … We will, of course, take all reasonable steps to control costs in the inquiries that I have announced today, including capping legal costs where appropriate. We will ensure that the inquiries have the maximum powers, as well as aiming for better, quicker inquiries."

[48] Following that Mr. Wright received a letter himself from the Secretary of State on 16 November 2004 informing him that the inquiry would be formally established with the current membership. He was also informed of the terms of reference. There was express reference to Section 7 of the Prison Act (NI) 1953. On 29 December 2004 the Private Secretary to the Secretary of State wrote to the applicant's solicitors in the following terms:

> "I can assure you that there are no plans for the inquiry into the death of Billy Wright to be converted into one under the Inquiries Bill and that it will continue to be held under Section 7 of the Prison Act (NI) 1953. Officials have advised Lord McLean of this position."

[49] Finally the applicant relies on a meeting which he had with the present Secretary of State and officials on 13 October 2005. This was at the time when the Secretary of State was considering Lord McLean's request to convert the inquiry into an inquiry under the 2005 Act. It does not seem to me that this adds anything to what had gone before. Counsel for the applicant then submits that his client's legitimate expectation will be frustrated if the inquiry is now held under the 2005 Act and that the Secretary of State is not at liberty to make that decision. It will be recalled that the initiative for the conversion came from the inquiry itself by a letter of 20 June 2005. I will return to that subsequently.

[50] Mr McCloskey submitted that the Secretary of State could not possibly bind himself or his office not to alter the mode of inquiry which had initially been announced in this case. Firstly he could not ignore the fact that Parliament had passed the Inquiries Act of 2005. Secondly he could not lawfully fetter his own discretion or, as in this case, the discretion of his office in the way he sought to be relied on by the applicant. Furthermore the nature of the statements were in effect statements of fact rather than true undertakings or promises of the sort contemplated in the application of legitimate expectation.

[51] I think it is worthwhile also considering R v Department of Education and Employment ex parte Begbie [2000] 1 WLR 1115 where, inter alia, Laws LJ thought a promise would be more likely to be enforced where it was made to an individual or a few individuals. It seems to me that the announcement of these inquiries, although of particular interest obviously to the immediate relatives of the deceased, was a matter of wider public interest and that it would be straining language to describe these announcements, whether in this case or the other cases as a promise to a small number of people. I also note the comment of Laws LJ, at p. 1131:

> "The more the decision challenged lies in what may inelegantly be called the macro political field, the less intrusive will be the courts supervision. More than this: in that field true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of grounds which enjoyed expectations generated by an earlier policy."

It must be borne in mind that the doctrine of legitimate expectation is a category of the wider doctrine of abuse of power. It evolved to a significant extent from promises made to individual taxpayers. See R v North and East Devon Health Authority ex p. Coughlan [2001] QB 213, and In re Neale and Others [2005] NIQB 33 paras. 19-38. It does not seem to me that the decision here of the Secretary of State was of such unfairness or constituted an abuse of power to justify this ground.

[52] The second contention under the ground was that there was legitimate expectation that the inquiry would comply with the recommendations of Justice Corry. Accepting for these purposes that it is arguable that the inquiry will not so comply it does not seem to me, nevertheless, that this contention is made out. It does not seem to me that there is any clear representation that it would so comply. It is also right to say that the role of the Canadian jurist

was to advise whether inquiries were necessary rather than the particular form of the same. Binding a statutory inquiry in the United Kingdom to the particular recommendations, essentially obiter, of Justice Cory would, I respectfully say, be surprising. I also take into account the submissions of Mr McCloskey citing Ex parte Coughlin [2001] QB 213, BiBi v Newham LBC [2002] 1 WLR 237 and the decision of our Court of Appeal in Re SOS Application [2003] NIJB 257 at paragraph 19. Taking all these factors into account it does not seem to me that, a legitimate expectation preventing the Secretary of State from changing the statute under which the inquiry was held has been demonstrated or should be enforced by the court. It will be understood that in saying that I am not therefore making any finding as to whether there was, for example, an overriding justification in policy for altering the earlier decision.

[53] One matter raised in the Order 53 statement was at para. 3(vi). This was one of a number of points which were pursued less actively at the hearing than the central point of independence but which having been addressed and having helpful written submissions from the respondent in regard to the same I propose to rule on where possible and appropriate. The ground here was that the Secretary of State had failed to obtain before making his decision to convert the inquiry, the consent of the Right Honorable Paul Murphy who had held the office of Secretary of State for Northern Ireland and who had established the initial inquiry. It was submitted that this was contrary to Section 15(1) of the Inquiries Act itself which provided that:

> "Where –
>
> (a) An inquiry is being held, or is due to be held by one or more persons appointed otherwise than under this Act,
>
> (b) A Minister gives a notice under this section to those persons, and
>
> (c) The person who caused the original inquiry to be held consents,
>
> the original inquiry becomes an inquiry under this Act as from the date of the notice or such later date as may be specified in the notice (the 'date of conversion')."

It is accepted that the Secretary of State did not consult his predecessor personally before making the decision to convert. The applicant submits therefore that the decision was thereby unlawful. However it will be seen immediately that there is a certain ambiguity in this provision. Is the person referred to at Section 15(1)(a) the individual, who is holding a particular office

at the time he caused the original inquiry to be held or is it the holder for the time being of that office? The respondent referred to the dictum of Lord Diplock in Bushell v Secretary of State for the Environment [1980] 2 All ER 607 at 612:

> "To treat the Minister in his decision-making capacity as someone separate and distinct from the Department of Government of which he is the political head and for whose actions he alone in constitutional theory is accountable to Parliament is to ignore not only practical realities but also Parliament's intention. Ministers come and go; departments, though their names may change from time to time, remain. Discretion in making administrative decisions is conferred on a Minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who serve the Crown in the department of which, for the time being he is the political head."

Therefore counsel submitted the reference to the person is to the holder of the office who had set up the original inquiry. In that case it would be Mr Hain himself and it would be obviously absurd for him to consult himself. In support of that contention counsel also relied on the observation by Weatherup J at the original leave hearing that in constitutional theory there is only one Secretary of State, although that is, as he pointed out, a legal fiction.

[54] One would be inclined to prefer that interpretation on the basis that if an individual is intended, presuming that some Minister set up the original inquiry, the then holder of the office could at the relevant time be dead or retired or, as here, on the back benches of the House of Commons or still in the House but in opposition. This range of possibilities indicates to me that in all likelihood Parliament did not intend a personal consultation with a person who held the office, especially as no alternative is provided if the person were dead. This would be reinforced in my own mind by the knowledge that, of course, many decisions of the Secretary of State are delegated to junior ministers within his department. Who is to be consulted if it is the individual who is sought? The Secretary of State who bore the legal responsibility for the decision or the Minister who actually read the papers and in reality made it?

[55] As the Court of Appeal were persuaded, when granting leave, there is a certain ambiguity in the text. This was commented on as the Bill, as it then was, went through the House of Lords by Lord Goodhart QC. In Pepper (Inspector of Taxes) v Hart [1993] AC 595 the House of Lords held that

Parliamentary material may be used to assist in the interpretation of legislation in cases where such legislation is ambiguous or obscure. I consider this an appropriate application of that principle. I note that exhibited to the affidavit of Mark Sweeney in this application there is not only a short passage from the debate in committee in the House of Lords but a subsequent letter of January 2005 from Baroness Ashton to Lord Kingsland QC which contains the following paragraph:

> "Secondly I undertook to write to all members of the (Grand) Committee to explain the definition of a person in Clause 14(1)(c) I confirm it should be read as 'office' and not the individual who happened to be in office at the time the inquiry was set up. This point has been discussed with Parliamentary Counsel who believes that the Bill does not need to be amended to make it explicit. However given your concerns I think it might be helpful to include a reference to this in the explanatory notes."

I consider that of assistance. I consider that interpretation an entirely reasonable one ie. that if an inquiry was set up by the head of one Government department then subsequently the head of another Government department wished to convert it into an inquiry under the 2005 Act he should consult the then head of the other department which had originally set up the inquiry. I therefore conclude that there was no illegality on the part of the Secretary of State in failing to consult his predecessor on a personal basis and that this ground also fails.

[56] The applicant, as an aspect of his case for procedural unfairness, in para 3(xi), (xii) and (xiii) of the Order 53 statement contends that the respondent erred by operating a presumption in favour of conversion and therefore in effect a burden of proof on those opposed to conversion and failing to tell such opponents that he was operating such a presumption. These three grounds which are in effect one all stem, in the submission of counsel, from a short passage in the submission of Ms Sloan to the Secretary of State dated 16 September 2005. (Tab 48 of bundle 2). It begins with some paragraphs on the background to the issue of conversion and then at paragraph 5 advises that the paper will deal with relevant factors regarding conversion.

> "In summary, it is the Inquiry's view that conversion to the Inquiries Act would allow it to go about its work more effectively; and the contention of those opposed to conversion that the Inquiry is wrong to suggest that conversion is legally necessary to achieve this; and/or that conversion would prejudice the independence and openness of the tribunal and

> renege on previous Ministerial commitments. As you will see from the paper, in our view there is no legal impediment to conversion. A number of the concerns raised are arguable; one or two are wrong in law. We can find no legal grounds for believing that the Act would actively harm the effectiveness or independence of the Inquiry. Against that background, we consider that the presumption should be in favour of the wish of the Inquiry, which they have repeated strongly and frequently in the face of the representations made. You will also wish to take account of the consequences that refusing the Inquiry's request could have. Given the complexity of the issues involved as well as the near certainty that your final decision will attract controversy, we recommend that you discuss with officials before you reach a considered view."

The applicant's contention is based on that single word used by the official in the course of this very lengthy document furnished to the decision maker, with the reference to "the consequences" of refusal. It is contrary to the normal canons of construction of documents to seek to take a word in isolation out of its context and ground these contentions upon it. There is of course no presumption in favour of granting the wish of the members of the Inquiry. A document should be read in its entirety and "without excessive legalism or exegetical sophistication" per Sir Thomas Bingham MR in Clarke Homes v Secretary of State [1993] 66 PCR 263 p.272. I may say that the courts in this jurisdiction have in several cases involving the Planning Appeals Commission concluded that their use of the phrase "we are not persuaded…" did not mean that they were applying a burden of proof when none existed.

One might therefore have rejected this ground were it not for a passage in the letter of the Secretary of State to Lord McLean informing him of the decision. It may be not insignificant that he informed him eight days before Parliament was told. I quote. "It is my wish and yours that the full facts in relation to the murder of Billy Wright should be established and, in view of your belief that conversion is necessary for your inquiry to be as thorough and effective as possible, I am content to give my consent for the Inquiry to be converted to the Inquiries Act." (Tab 39, p.407). The language here of being content in the light of the other's belief does lend itself to the view that there was thought to be a presumption of sorts in favour of the Inquiries wish for conversion.

[57] At paragraph 3(xiv) the applicant contends that the Secretary of State "was materially mis-directed" that "since Mr Wight's death occurred before the Human Rights Act came into force in October 2001 (sic) no Convention rights would be engaged." The thrust of the point here is not of course the

date but the contention of the applicant's (a) that the Human Rights Act is engaged to the extent of section 4 and (b) that this overlooks the decision of the Court of Appeal in Jordan. It will be noted that it is a single sentence in a lengthy submission made to the Secretary of State. In the light of my own view of the authorities including Re McKerr [2004] NI 212 and Re McGaughey & Grew [2005] NI 344, I am of the opinion that the statement, apart from the date, was correct. Given my own earlier finding there could be no question of granting relief under this ground. If one takes this sentence in its context one sees that there is wider discussion of the interaction of the 2005 Act with the Human Rights Act in the submission as a whole. It is also right to say that at page 10 of Tab 48 of Book 2 of the papers ie the submission by Ms Sloane to the Secretary of State it is said that Annex D is an attempt to:

> "..distill the legal issues raised by those who have made representations to you in opposition to Lord MacLean's request."

At the height therefore the author might or should have referred to the alternative point of view on the issue of the applicability of the Human Rights Act but the Secretary of State could scarcely have been expected to act on that view if advised, as I found would have been proper in the circumstances, that the decision in Re McKerr, properly interpreted, excluded such application. If I am wrong on that issue of retrospective effect then it can be seen that the Secretary of State was being given legal advice which has proved in the event to be erroneous, if the House of Lords so decides when hearing the cases of Jordan and McGaughey and Grew.

The applicant's ground of 3(xv) is essentially the same point ie that the Secretary of State was not advised of Jordan and Hurst and therefore failed to take them into account. I believe this point is covered by my preceding remarks ie that he could not be misdirected if the law is that the Human Rights Act does not have retrospective effect in the way sought by the applicant.

[58] While the main thrust of the applicant's case was that the holding of this inquiry under the 2005 Act was unlawful because certain sections of that Act were incompatible with the European Convention, Mr Seamus Treacy Q.C. for the applicant was careful in his submissions to address the situation in which the court now finds itself ie. that it was against him on the issue of incompatibility. At paragraph 3(iv) of the amended Order 53 statement the applicant had contended the Secretary of State's failure to establish a Cory compliant inquiry was unreasonable, irrational and contrary to the rules of natural justice. The first aspect of "Cory compliance "was independence (3(ii)).

Para 3(v) was to like effect while also referring to the Secretary of State having erred as to the extent of the Inquiry's powers under the Prisons Act of 1953.

In his oral submissions at this point counsel concentrated his fire on Annex D and a particular passage thereof. The role of this document must be clearly understood. As has frequently been said in the field of judicial review context is all. The Secretary of State received a document dated 16 September 2005. The cover document was relatively short, one passage in it about the presumption I dealt with elsewhere in this judgment. While the author properly draws to the attention of the Secretary of State the difficult and indeed controversial nature of the decision he was being asked to make she does not at any point advert to the independence issue in particular. What she does do is attach certain annexes reflecting the views of Lord McLean and opponents of conversion and setting out some of the submissions that it provided. At Annex D we find an analysis of the legal position with regard to conversion. This, in a way which was no doubt essential to the Secretary of State, identifies the legal issues involved, comments on the points made and seeks to analyse them. Issue 5 is entitled : "Independent/Ministerial Control under the Inquiries Act". The arguments of various bodies including the Northern Ireland Human Rights Commission are set out in summary form. The point made by the British and Irish Rights Watch that the powers of independent chairs to control inquiries had been usurped and placed in the hands of Government Ministers by this Act was dealt with. It was pointed out by the official in the analysis that Ministers had always set up inquiries, set the terms of reference and appointed the inquiry chairman or panel whether under the Prison Act or otherwise. With regard to the power of dismissal or to end an inquiry the Secretary of State was advised that that already arose under the Prison Act "by the implication from the power of appointment or establishment". This "legal advice" was not pursued before me nor any authority drawn to my attention to support that advice to the Secretary of State. I do not accept it. Even before the implementation of the Human Rights Act I believe that such a view would have been rejected in the courts.

The analysis on this important topic concluded as follows:

> "In summary, although Ministers' powers under the Inquiries Act are more clearly defined, the only real difference in relation to the Prisons Act is that a Minister can issue a restriction notice under the Inquiries Act (as set out under Issue IV)."

(Tab 48, p 93).

Mr Treacy submitted that this was "a complete and absolute travesty of what the Inquiries Act actually does". It does seem to me that the Secretary of State has not been alerted in the way that he was entitled to be to the very substantial question mark that had been raised over the independence of an inquiry under the 2005 Act. Independence is particularly important where, as here, the Secretary of State was responsible for the prison and directly or

indirectly for persons whom it is alleged may have assisted in the murder of Billy Wright. In my opinion he needed to be much more clearly alerted and correctly alerted to the significance of Section 14 of the Act. It can be seen that there is no reference as such to Section 14 at all. The reference to the Prison Act is misleading. Claiming equivalence with the 2005 Act save for restriction notices is clearly wrong in law. A wholly new power exists under s.14, inconsistent with past law and practice.

[59] This situation seems to me to have been exacerbated by Annex E which is expressly stated to be an attempt to distill the legal issues raised by the representations of those opposed to Lord McLean's request. Under the heading: "Can the Members of the Inquiry Panel be Suspended or Dismissed?" the Secretary of State is advised that under the 2005 Act:

> "Yes but only for an undisclosed interest in the subject matter, formed as conduct, or because that panel member was unable to carry out his or her duties (for example, because of physical or mental illness)."

This may be a reasonable summary of Section 12 but it quite clearly does not deal with Section 14 and the power of the Secretary of State to simply stop the inquiry for any reason that seems proper to him. The rest of the documents also fails to deal with Section 14. Furthermore in the initial confidential minute, as indicated this issue of independence is not addressed at all.

[60] In the light of that one turns to the Secretary of State's decision to see any evidence that this misdirection as to law had been corrected in his own mind before his decision. One does not see that in the statement of the Secretary of State under Section 15(1)(b) of the Inquiries Act 2005 dated 23 November 2005 (Tab 39 case page 405). Nor one does one see it in the letter to Lord McClean conveying the Secretary of State's decision, on 14 November 2005. On the contrary he concludes with the following sentence:

> "I know that you will want to take such steps as you consider appropriate to ensure that public confidence in the inquiry is maintained."

Without placing undue weight upon a single sentence it does seem to me to be at least consistent with the view that the Secretary of State had no appreciation of the lack of confidence in the inquiry, or similar inquiries ,which would stem from the lack of independence of the inquiry. The letter to the applicant is in similar terms.

[61] I therefore conclude that the Secretary of State as decision-maker was advised wrongly in law and as there is no indication whatsoever to the contrary he must be taken to have misdirected himself in law on foot of that

advice. Although in support of this contention Mr Treacy referred to R v Lord Saville of Newdigate and Others, ex parte A and Others [1999] 4 All ER 860, it seems to me that that was case where the Article 2 rights of the soldiers who sought anonymity were engaged by the decision of the inquiry. I am not persuaded that it is wholly applicable to this situation. It seems to me that the matter is one of well established domestic public law. In Associated Provincial Pictures Houses Limited v Wednesbury Corporation [1948] 1 KB 223: [1947] 2 All ER 680 at 682 Lord Greene MR in the course of his judgment has the following passage:

> "In the present case we have heard a great deal about the meaning of the word 'unreasonable.' It is true the discretion must be exercised reasonably. What does that mean? Lawyers familiar with the phraseology commonly used in relation to the exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider. If he does not obey those rules, he may truly be said, and often is said to be acting 'unreasonably'. "

It seems to be here that the decision-maker, on advice, did not direct himself properly in law. Nor did he, in the alternative, call his own attention or have it called, to an important matter which he was bound to consider, namely the novel and unrestricted power given to him and his successors, whether as at present or in the future as Ministers in a Northern Ireland administration, under Section 14 of the Act. In saying that I make it clear that my criticism of the decision does not involve a personal criticism of the decision-maker. There was no question of bad faith here. He ought to have been advised, at the least, that there was a seriously contentious issue relating to the powers under Section 14, particularly when coupled with the other powers which were discussed to a greater or lesser extent. Instead an alleged implied power under the Prisons Act to dismiss the inquiry was equated with the 2005 Act without any attention being drawn to those provisions. It seems to me that was entirely unsatisfactory when dealing with a Minister even if he happened to be a practicing public lawyer who had taken a keen interest in this topic. In that unlikely circumstance he would no doubt have made clear his correct understanding of the two Acts. My conclusion that the decision was unlawful is reinforced by my concerns expressed at par 56 regarding an incorrect presumption. It is also reinforced by the absence of any significant drawback

in the Prisons Act. Cf. paras. 30 -32 above. It was wide enough to cover the issues in my view. The Inquiry misapprehended it's role on PII, where the new act raises at least as many questions as it answers. Mr. Larkin suggested there might be a lacuna in it's power to summon witnesses from other parts of the United Kingdom. But this is something the High Court can do and would, I feel sure, be willing to do to assist a public inquiry of this kind. It seems to me therefore that on traditional judicial review grounds this decision was in law an irrational one in the wider Wednesbury sense. The misdirection was important and could not in any way be described as tangential.

[62] The importance of independence in this situation pre dates the incorporation of the Convention. I am guided by the decision of the House of Lords in Brind v Home Secretary [1991] 1 All ER 720 and decide this issue on traditional grounds. But Article 2 and the case of McCann did not invent the duty in our law to investigate the deaths of prisoners. Lord Bingham deals with the topic at par. [16] of Amin. "For many centuries the law of England has required a coroner to investigate the death of one who dies in prison." He then reviews statutes commencing with Statute de Officio Coronatoris of 1276. "These statutes are not to identical effect. But in all of them deaths in prison are singled out as cases calling for inquiry. All of them require the inquiry to be conducted by an independent judicial officer (in England, Wales, Ireland and Northern Ireland a coroner, in Scotland, a sheriff or sheriff substitute). Most of them expressly require the inquiry to be before a jury and some (the Acts of 1823 and 1865 and the Irish Act of 1877) provide that no inmate or officer of the prison where the death occurred shall be a juror". I have already referred to the equivalent provision in the Prison Act regarding the coroner. I observe that no power to stop an inquiry existed under the 1953 or 1921 Acts. It is clear therefore that independence was an essential, or at the very least a very important element in investigating the deaths of prisoners long before Article 2 of the Convention. But the Secretary of State was misled about the power to stop an inquiry under the 1953 Act and was not reminded of his wide new power under s.14 of the 2005 Act. I refer to my earlier comments on independence at paras. 41-44 and to par.33

Mr. McCloskey pressed me that in the event of my being against him on any of these topics it would be appropriate in the circumstances to hold a remedies hearing. I accede to that application. When the parties have had an opportunity of considering the judgment I will hear submissions on whether there is any alternative to an order of certiorari being made.

[63] In the light of the views just expressed it seems to me that I can deal with the remaining grounds fairly shortly. At Ground 3(ix) the applicant contended that the Secretary of State was materially misdirected with regard to the inquiry's ability to deal with public interest immunity issues. In one

sense that contention is undoubtedly right. I am obliged to counsel for the respondent for their very detailed and careful consideration of the PII issues in their revised skeleton argument. They concede, in my view correctly, that the view put forward by the solicitor to the inquiry to the Northern Ireland Office (Tab 39 page 414) to the effect that the inquiry if the under the Prison Act would not determine PII issues is unsustainable, as the applicant contends. Given the weight and importance the Secretary of State described to the views of the inquiry this could have been of importance. It is clear that in the Annex D analysis to which I have previously referred the Secretary of State's advisors, having taken advice themselves, advised the Secretary of State as to the correct position in law. As I am not considering issues of incompatibility I do not have to say anything further about the sections relating to these matters in the Inquiry's Act 2005, save to state the obvious that they do give a potentially important role at times to the Minister. But from the point of view of a judicial review of these proceedings on domestic grounds the fact that the view of the inquiry was corrected to the Secretary of State leads the court to the conclusion that this would not be a freestanding ground for finding the decision unlawful. It does on the other contribute to the concern expressed at paragraph [56] above that the Secretary of State would appear to have been taking the view that there was a presumption in granting the view of the inquiry as to conversion. If the inquiry was misdirecting itself on an important point of law that would reinforce the unfortunate nature of such a presumption.

[64] The applicant at paragraph 3(viii) of the amended Order 53 statement complains that the respondent acted in a procedurally unfair manner in failing to provide the applicant with the correspondence exhibited at paragraph 2 of the second affidavit of his solicitor "thereby depriving the applicant of the opportunity of addressing the additional representations made by the Chairman to the Secretary of State in support of his request for conversion."

[65] The correspondence, when one reads the affidavit of Mr McAtamney consists of a letter of 12 May 2005 from the Chairman to the Secretary of State asking for confirmation that his inquiry would be expected to comply with Article 2 of the European Convention. By letter of 14 June 2005 the Secretary of State stated, inter alia, that the "inquiry is not itself under any legal obligation to comply with Article 2". In fact the Chairman went ahead and said that despite that ie. the absence of any strict legal obligation the inquiry would seek to satisfy the procedural requirements implicit in Article 2. I accept the averment of Mr Mark Sweeny in his affidavit (Tab 47 paras. 41-43) that this letter did not raise the issue of conversion and the applicant was not disadvantaged by a lack of awareness of this exchange of letters. I accept the submission of the respondent therefore that the ground is not made out ie. the applicant was not deprived of an opportunity of addressing "additional

representations" made by the Chairman to the Secretary of State in support of his request for conversion.

[66] The applicant contended at paragraph 3(x) that the respondent had acted in a procedurally unfair manner by failing to disclose to the applicant and others opposed to conversion the response of the Department of Constitutional Affairs (to which I have referred earlier) to the inquiry's views on the PII issue. This advice was obtained by officials, with good sense, before advising the Secretary of State on this complex and difficult issue. They then did advise the Secretary of State in the way that has been referred to. It seems to me to be going much too far to say that such legal advice to the Secretary of State should be disclosed at some early stage to the applicant merely because it differed from the view of the inquiry. I accept the view of the respondent that it is not necessary for the court to determine in this context the substantive question of law being debated ie. how PII issues should be processed and resolved in inquiries under the Acts of 1953 and 2005. Furthermore there is no doubt the applicant and his legal advisors were alert to the PII point and made cogent written representations about it as well as ventilating it with the Secretary of State at the meeting of 13 October 2005. Indeed at that meeting the substance of the DCA views was disclosed to the applicant and its representatives as appears from the minute of the meeting. One also notes that the DCA advice was contrary to the views of the inquiry which favoured conversion. It was therefore something that was supportive of the applicant rather than of a nature to undermine his opposition. In all those circumstances and having considered the various submissions from counsel in this regard I conclude that this ground is not met out.

Conclusions

[67] My conclusions with regard to this matter can therefore be briefly summarized in the following terms.

(a) In the light of authority the applicant is not entitled to challenge under s 4 of the Human Rights Act the compatibility with Article 2 of the European Convention on Human Rights of those sections of the Inquiries Act 2005 to which he objects, as his son Billy Wright died in 1997.

(b) His challenge to the decision of the Secretary of State for Northern Ireland on 23 November 2005 to convert the inquiry into the death of Billy Wright from one under the Prisons Act (NI) 1953 into an inquiry under the Inquiries Act 2005 succeeds. As the Secretary of State failed to take into account the important and relevant consideration that the independence of such an inquiry was compromised by the existence of Section 14 of the 2005 Act and as he was wrongly advised that an equivalent power existed under the Prisons Act and as he was advised and appeared to take the view that there was a presumption in favour of acceding to the request of the inquiry, I find that the decision was unlawful.

(c) The other grounds relied on by the applicant are not made out.

(d) I will hold a hearing into the appropriate remedy to be granted to the applicant when the parties have had an opportunity of considering the judgment.