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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATION BY SUZANNE BUNTING FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

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Hugh Southey KC and Stephen Toal (instructed by KRW Law) for the Applicant
Mark Robinson KC and Philip Henry (instructed by the Crown Solicitor's Office) for the Respondent
Greg Berry KC and Michael Chambers (instructed by the Special Advocates' Support Office) as special advocates appointed by the Advocate General for Northern Ireland

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SCOFFIELD J

Introduction

[1] By this application the applicant, Suzanne Bunting, challenges a decision by the Secretary of State for Northern (SSNI) ("the Secretary of State") to certify, pursuant to section 14(2) of the Coroners Act (Northern Ireland) 1959 ("the 1959 Act"), that there is information relevant to the question of whether a direction should be given for a new inquest to be held which is or includes information the disclosure of which may be against the interests of national security. Where such a certification is made, the decision on whether a new inquest should be directed transfers from the Attorney General for Northern Ireland ("the Attorney General") to the Advocate General for Northern Ireland ("the Advocate General") who is also the Attorney General for England and Wales. The applicant does not wish the decision as to whether to grant a fresh inquest to be taken by Advocate General. She is concerned that that decision should not be taken by a member of the United Kingdom Government in light of the background to the death in question.

[2] The applicant was represented by Mr Southey KC and Mr Toal; and the respondent by Mr Robinson KC and Mr Henry. As discussed in further detail below, the court was also assisted by special advocates appointed to represent the interests of the applicant in a closed material procedure, Mr Berry KC and Mr Chambers. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[3] Ronald Bunting was murdered on 15 October 1980. Mr Bunting came from the protestant and unionist background but later became involved with Irish republican organisations. He was killed in a gun attack at his family home on that date. Mr Noel Little, who was at the Bunting house as a guest, was also killed in the incident. The murder was later claimed on behalf of the UDA. The applicant in this case is Mr Bunting's widow. She is concerned that there may have been an element of state involvement (or, in her words, "hallmarks of collusion") in his death. There is a dispute as to the extent to which state actors were, or may have been, aware in advance of what may happen to Mr Bunting. The applicant's concerns are summarised in the following extracts from her grounding affidavit in these proceedings:

> "Despite the extensive coverage of this murder, in recent times my family have become deeply suspicious that we have never been told the truth about what happened.
>
> On 26 May 2016, new allegations were reported in the media. In particular, it was reported that on 15 October 1980, acting on Special Branch information, police officers from E4A were briefed to do a 'close target rescue' at our home… However, before full coverage was completed the team of police officers were ordered to stand down and return to base, even though intelligence had confirmed that a gun team were to make an attempt on the deceased's life…
>
> This information was seemingly provided by an unnamed whistle-blower who was a former member of the security forces."

[4] In light of this new information, the applicant made an application for a fresh inquest relying on section 14(1) of the 1959 Act. The applicant has also referred to a number of other published materials which, she believes, support the view that her husband's life may have been lost as a result of intelligence services' actions against the INLA. She has further referred to a number of unusual features in respect of the murder of her husband which might be thought to suggest that the murder was either facilitated or inadequately investigated.

[5] In March 2018, the then Attorney General (John Larkin KC) wrote to the Secretary of State seeking information regarding the application for a fresh inquest. In May 2018, the respondent replied. She indicated that she proposed to adopt the approach which had been taken in a related case (that of Noel Little), which involved her consulting with departments of the United Kingdom Government and requesting them to identify and provide any relevant national security sensitive material in relation to the death. The applicant contends that this was inconsistent with a protocol (discussed further below) which had previously been agreed between the Secretary of State and the Attorney General. In any event, the Secretary of State wrote to other departments asking if they had relevant material and whether that material included information that could not be disclosed consistent with national security. She was provided by the PSNI with "a bundle of sensitive materials that included not only PSNI materials but materials which originated from other agencies."

[6] In January 2019 the respondent received a submission from her officials in the Northern Ireland Office ("NIO") about the Bunting case. The submission advised that she had no discretion as to whether to issue a certificate if the conditions in section 14(2) of the 1959 Act were met, indicating that the respondent had a duty to issue a certificate in those circumstances. The submission also stated that there was material that met the relevant conditions.

[7] In February 2019, therefore, having considered the materials provided to her, the respondent wrote certifying the case under section 14(2). A certificate was issued, and the respondent's submissions have confirmed that this was because the relevant material included information in at least one of the following categories, namely:

> "a. Information relating to methods, techniques or equipment of intelligence gathering, disclosure of which would reduce or risk reducing the value of the method, technique or equipment in current or future operations;
>
> b. Information relating to persons providing information or assistance in confidence to the law enforcement agencies and/or security or intelligence agencies, disclosure of which would endanger or risk endangering the persons concerned or other persons or would impair or risk impairing their ability or willingness to continue providing information or assistance, or their ability to obtain information and assistance from the person or other persons;

c. Information relating to operations of the law enforcement agencies and/or security and intelligence agencies, disclosure of which would reduce or risk the effectiveness of those operations or of other operations, either current or future;

d. Other information likely to be of use to those of interest to the law enforcement agencies and/or security and intelligence agencies, including terrorists and other criminals, disclosure of which would impair the law enforcement agencies' and/or security and intelligence agencies' performance of their functions."

[8] Pre-action correspondence followed in March and April 2019. The issues between the parties remained and these proceedings were therefore issued in consequence.

Summary of the parties' cases

[9] The applicant now challenges the legality of the Secretary of State's decision on a variety of bases. These may be summarised as follows:

(1) That there was insufficient material before the respondent to mean that the decision was lawful ("the condition precedent issue");

(2) That the decision was wrongly taken on the basis that there was no discretion to enable the Attorney General to take the decision ("the discretion issue"); and

(3) That the relevant provisions of section 14 of the 1959 Act were ultra vires the Northern Ireland Act 1998 ("NIA") because of the law-making power used to amend that provision so as to give the Secretary of State and/or the Advocate General the role which was exercised, or is to be exercised as the case may be, in this case ("the vires issue").

[10] The respondent meets each of these issues head on, arguing that the statutory condition was clearly met in this case; that, in those circumstances, there was no discretion not to certify the case pursuant to section 14(2); and that the amendments to section 14 were validly made. The respondent emphasises that the decision-making under challenge in these proceedings is entirely procedural in nature and amounts only to a mechanism to determine which law officer will then have to make the substantive determination as to whether or not the holding of a fresh inquest is advisable. In addition, the respondent contends that the challenge is premature and ought to be dismissed on that basis since the nub of the applicant's concern is that a fresh inquest is held into her husband's death, which might yet be

directed by the Advocate General. I reject this final submission on the basis that, even if there is some practical force in it, the applicant's claim raises a legal issue of substance as to the decision-making mechanisms under the 1959 Act which ought to be resolved in the public interest.

[11] McAlinden J considered the application initially and granted leave on all grounds in October 2020. An argument based on breach of article 2 ECHR was not pursued. Before the article 2 claim was abandoned, the court issued a devolution notice under RCJ Order 120 and an incompatibility notice under RCJ Order 121. The Advocate General indicated that she did not wish to enter an appearance; but indicated that she was in agreement with the position of the respondent in the proceedings. The Attorney General (by then Dame Brenda King) has indicated she does not wish to make representations in the course of the proceedings.

Relevant statutory provisions

[12] Prior to amendment in 2010, section 14 of the 1959 Act provided as follows:

> "Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner (whether or not he is the coroner for the district in which the death has occurred) to conduct an inquest into the death of that person, and that coroner shall proceed to conduct an inquest in accordance with the provisions of this Act (and as if, not being the coroner for the district in which the death occurred, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry or investigation, held any inquest into or done any other act in connection with the death."

[13] Until 12 April 2010, the office of Attorney General for Northern Ireland was held by the person who was also the Attorney General for England and Wales. On 12 April 2010, policing and justice were devolved to the Northern Ireland administration. Section 22 of the Justice (Northern Ireland) Act 2002 had provided for the Attorney General to be appointed by the First Minister and deputy First Minister. However, this provision was only brought into force in 2010. At the same time, an amendment was made to section 14 of the 1959 Act to split the decision-making responsibilities in cases where a fresh inquest might be directed. Up until that time, decisions relating to inquests were reserved matters pursuant to para 15 of Schedule 3 to the NIA. On 12 April 2010, decisions relating to inquests generally became transferred matters. This is the result of Article 8(3) of the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 (SI 2010/977) ("the Schedule 3 Order"), which was made on 31 March 2010 under section 4(4) of the NIA. That provision removed para 15 from Schedule 3 to the NIA which had included as a

reserved matter "All matters… relating to… coroners…" By virtue of this no longer being a reserved matter, coronial issues became a transferred matter: see section 4(1) of the NIA.

[14] At the same time, on 12 April 2010, the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 (SI 2010/976) ("the Devolution Order") came into force. It was made on a different basis, pursuant to a power set out in section 86 of the NIA (to which I return below). The purpose of the Devolution Order was said to be to make provisions which were consequential on, or otherwise gave effect to, the Schedule 3 Order. (A joint explanatory memorandum dealing with both Orders in Council was published at the time.) It was the Devolution Order which created the certification procedure which is at issue in these proceedings.

[15] In particular, Article 12 of the Devolution Order brought into effect its Schedule 14. Para 1 of that Schedule made various amendments to section 14 of the 1959 Act. It made the initial text (see para [10] above) sub-section (1) and inserted two further sub-sections in the following terms:

> "(2) Subsection (3) applies in relation to the death of a person if the Secretary of State certifies that there is information relevant to the question of whether a direction should be given under this section in relation to the death which is or includes information the disclosure of which may be against the interests of national security.
>
> (3) The functions of the Attorney General under this section are to be exercised by the Advocate General for Northern Ireland instead."

The condition precedent issue

[16] The applicant's first ground of challenge is that the respondent has failed to demonstrate that a condition precedent is met in order to issue a certificate under section 14(2) of the 1959 Act, in that the Secretary of State must demonstrate that there is information relevant to the question of whether there should be a fresh inquest which is or includes information the disclosure of which may be against the interests of national security.

[17] In order to meet this ground, the respondent made an application under section 6 of the Justice and Security Act 2013 ("the 2013 Act") for a declaration that these were proceedings in which a closed material application may be made to the court. The court may make such a declaration where it considers that two conditions are met. The first condition includes circumstances where a party to the proceedings (here, the SSNI) would be required to disclose sensitive material in the course of the

proceedings to another person (here, the applicant) or would be required to make such a disclosure were it not for the possibility of a claim for public interest immunity ("PII") in relation to the material. In this case, in order to meet the challenge that no such material existed on the basis of which the SSNI could lawfully have made her decision, she would have been required to disclose that material in the course of these proceedings. The second condition is that it is in the interests of the fair and effective administration of justice in the proceedings to make a declaration. I was satisfied that this condition was met also since, otherwise, the respondent would have been disabled from refuting the applicant's first ground and demonstrating how and why it had been concluded that the condition set out in section 14(2) of the 1959 Act was in fact met.

[18] Having granted a section 6 declaration, in due course a closed material procedure ("CMP") under section 8 of the 2013 Act ensued, in the course of which a number of closed hearings were convened at which the applicant's interests were represented by special advocates appointed by the Advocate General for that purpose under section 9 of the 2013 Act. I considered a range of closed material, as did the special advocates. An agreed gist of the closed material was settled upon in June 2021 which could be provided to the applicant's open representatives, in the following terms:

> "1. The SOSNI [Secretary of State for Northern Ireland] was provided with a range of sensitive material relevant to the death of Mr Bunting. Included in this material was intelligence relating specifically to Mr Bunting and those suspected of killing him.
>
> 2. The material provided to the SOSNI did not include any reporting which showed that the security forces had any pre-emptive intelligence that could have prevented the murder of Mr Bunting.
>
> 3. The material provided to the SOSNI included material indicating that loyalist paramilitaries murdered Mr Bunting."

[19] After the provision of the gist, an issue arose about the interpretation to be placed upon it, which was the subject of some further correspondence between the Crown Solicitor's Office ("CSO") on behalf of the respondent and the Special Advocates Support Office ("SASO"). This arose in the following way. The applicant's open representatives had raised a similar query with both the CSO and SASO, namely whether the special advocates had been given sight of *all* of the materials and intelligence available to the police relating to the death. CSO responded to indicate that the special advocates had been shown all of the materials which had been provided to the SSNI. In parallel (and unaware that CSO had

received a separate query and responded independently) SASO proposed to the CSO a joint response in the following terms:

> "The Special Advocates saw all RUC/PSNI material that was shown to the Secretary of State. However, the SAs [special advocates] do not know if this amounts to all material held by PSNI/RUC in relation to this matter."

[20] Since the query had been addressed to both CSO and SASO separately, the CSO had already replied to the effect mentioned above. CSO did not make any assertion, either positive or negative, that the materials the special advocates (and the court) had seen during the CMP was the entirety of relevant intelligence material which may have been held by the police in relation to the death; merely that those materials were all that the SSNI had seen before making her decision which is impugned in these proceedings. Neither I, nor the special advocates, know whether there is any further such material held by the police (and, indeed, the police themselves may not know in the absence of further checks). The important issue is that I, and the special advocates, were able to see the material which was before the SSNI and was the basis upon which her impugned decision was made. That is not in doubt. That was both necessary, and in my view sufficient, for the court to deal with the applicant's first ground of challenge.

[21] I was and am satisfied on the basis of the closed material which was considered – summarised in the gist set out above – that it was lawful for the respondent to take the view that the condition set out in section 14(2) of the 1959 Act was met, namely that there was information relevant to the question of whether a direction for a fresh inquest should be given which was or included information the disclosure of which may be against the interests of national security. There was intelligence information speaking to those suspected of killing Mr Bunting; and information of that type, which would be disclosable by state agencies to a coroner holding an inquest as potentially relevant information (which ought then to be disclosed to properly interested persons in the inquest proceedings and, potentially, deployed in some form in the inquest proceedings themselves) is plainly relevant to the question of whether the holding of an inquest is advisable. The gist further discloses that there was a range of "sensitive material" relevant to Mr Bunting's death. "Sensitive material" was a carefully chosen term with a defined meaning under the 2013 Act under the provisions of which the CMP was held. Section 6(11) of the 2013 Act defines it in this way: ""sensitive material" means material the disclosure of which would be damaging to the interests of national security."

[22] The SSNI must simply certify whether there is such information in a particular case. Where he or she does so, the functions of the Attorney General under section 14(1) of the 1959 Act are then to be exercised by the Advocate General. The certification exercise does not require reasons to be provided. Such a certification is likely to be challengeable in public law terms only on very limited grounds. Through the CMP I have been able to review the decision of the

respondent by reference to the same material which was before her and can see no legal error which would vitiate her decision. On the contrary, certification appears to have been inevitable.

[23] Mr Southey argued that the sensitive material had to be relevant to the decision on whether to hold a fresh inquest and that this was an objective test for the court, rather than a judgment for the SSNI subject only to rationality review. I need not conclusively determine which approach is appropriate since, on either view, I consider the respondent was lawfully entitled to reach the decision which she did. Nonetheless, I incline to the view, advanced by the applicant, that whether material is relevant to that decision or not is a question of law for the court. At the same time, I accept the respondent's submission that a broad approach to the question of relevance is appropriate in this field. That is particularly so because a law officer making a decision under section 14(1) as to whether it is "advisable" to direct a new inquest will wish to be – or is at least entitled to take the view that they should be – fully appraised of information held by the state in relation to the death before making such a decision. Here, the nature of the allegations raised by the applicant on the basis of which she contends for a fresh inquest made it virtually inevitable (because of the suggested knowledge and actions of informants) that sensitive material would be at issue and would have to be considered by the decision-maker.

[24] It was further argued that, since the sensitive material would be subject to an application for PII at any fresh inquest and, so, not disclosed, it could not properly be considered relevant to the decision on whether it was advisable for a fresh inquest to be held. In short, the applicant contended that, if the coroner would uphold a PII claim in respect of such material, it could not be said to be relevant to the decision as to whether or not to direct a fresh inquest. I reject that submission. In the first instance, sensitive material held by the state may still be information which is relevant to the section 14(1) decision even if it might later be the subject of a PII claim were a fresh inquest to be directed. In addition, it is not for the SSNI at the stage of section 14(2) certification to second guess whether a PII claim would in due course be made if a further inquest is directed, much less whether such a claim would be upheld by the coroner, or possibly resolved by way of gisting. Further, a law officer may decide that it is advisable for a fresh inquest to be held even where it appears likely that a PII claim may be made and upheld. There may be a public interest in that process being undertaken with supervision by a judicial officer and a publicly disclosed outcome. In summary, sensitive information may still be relevant to a section 14(1) decision even if there is no expectation that it will later be publicly disclosed in any later inquest.

The discretion issue

[25] The applicant's second ground was that the respondent fettered her discretion by considering that the power to certify contained within section 14(2) of the 1959 Act was mandatory rather than discretionary. She contended that there was no requirement, whether under the 1959 Act or at all, for the respondent to issue a

certificate transferring the decision-making function to the Advocate General *even if* there was information which was relevant to the question of whether to direct an inquest the disclosure of which may be against the interests of national security.

[26] I was provided with a copy of a draft protocol, which was previously in the course of development between the Office of the Attorney General for Northern Ireland and the Secretary of State, which seemed to suggest that there was a discretion on the part of the SSNI in this regard. The draft protocol was appended to a letter from the Attorney General of 28 March 2018 but was referred to by him as "a draft Protocol that was in circulation shortly after [his] appointment [in mid-2010]." The draft protocol envisaged that all requests for a section 14 direction should be made to the Attorney General in the first instance; that the Attorney General could make a decision without access to sensitive information; that the Secretary of State would not consider any request for section 14(2) certification unless certain conditions were met (including that the Attorney General had requested sight of additional information which he considered necessary and a relevant organisation had objected to its disclosure; and that, even if all of the conditions specified in the draft protocol for certification were met, the SSNI would consult the Attorney General "before exercising his powers under section 14(2)." Although Mr Southey relied on this document and asserted that the construction for which the applicant contended reflected both the previous Attorney General's understanding of the position and that implicit in the draft protocol, he accepted that this issue ultimately resolved to one of statutory construction of section 14 of the 1959 Act.

[27] Mr Robinson contended that the draft protocol had never been formally agreed and had no legal standing. I am sympathetic to that submission given the terms in which it is described in the Attorney General's correspondence of March 2018, including the following:

> "The draft protocol is sent not because it is in anyway binding on you (it was clearly not agreed) but because it conveys an insight into the construction of section 14 emanating from those who were responsible for paragraph 1 of Schedule 14 to the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010."

[28] No further detail was provided as to how or why the draftsperson's insight was conveyed. The SSNI's response said:

> "You also raise the issue of a draft protocol dating from 2011 which, as you note, has no legal status and is not binding. I am afraid I do not share your view that the draft protocol conveys an insight into the construction of section 14 of the Coroners Act (NI) 1959 as amended but rather represents a subsequent attempt to reach a working

> arrangement on how the provisions should operate in practice, which was never agreed. In any event, Parliament imposed a duty on the Secretary of State in section 14 of the 1959 Act to certify the case where the statutory conditions are met and a protocol could not of course supersede that."

[29] I consider that I can deal briefly with the first ground issue given that it is a matter of straightforward statutory construction. In my view, the exercise to be undertaken is not a matter of discretion for the Secretary of State. It is for the Secretary of State to consider whether information exists (or not) the disclosure of which may be against the interest of national security and which is relevant to the question of whether a direction for a fresh inquest should be given. Some limited element of judgment might be required in determining whether disclosure of certain information may be against the interests of national security (a type of judgment with which ministers, and certainly the SSNI, will be well familiar); or in determining whether such information is relevant to the question of whether a fresh inquest should be held. As to the latter issue, I have already indicated that I consider that a generous approach to the notion of relevance is likely to be appropriate.

[30] However, once the Secretary of State has formed the view that such information exists and is relevant to the substantive question of whether a direction should be given, he or she is then bound to certify that fact, which has the consequence that the Advocate General then exercises the function which would otherwise fall to the Attorney General. It is not a matter of discretion for the Secretary of State to determine whether or not to certify, taking into account which of those law officers should or should not consider the substantive question of whether a fresh inquest should be held.

[31] My conclusion in this regard flows from three inter-related matters. First, the use of the verb "certify" is significant. A process of certification does not, in the ordinary use of that term, involve the exercise of a multi-faceted discretion. It is an assessment and attestation of whether a certain standard is met or, as in this case, whether a certain set of circumstances pertain. Second, the rest of the wording of section 14(2) gives no hint that a wider discretionary judgment on the part of the Secretary of State is required. There is no mention of the classic discretionary language that the SSNI "may" certify. The sub-section proceeds on the basis that *if* there is relevant information which is sensitive in national security terms, certification will follow. Third, in my view, this is also consonant with the general purpose and scheme of section 14. It is designed to ensure that cases which fall within the territory of an excepted matter – involving national security implications – remain for determination at Westminster, rather than Stormont. With limited exceptions, that is a clear-cut distinction in policy and legislation.

[32] Any relevant discretion as to whether or not a fresh inquest should be held, and the impact on national security information in respect of that decision, is a

matter for the relevant law officer. I accept the respondent's submission that section 14(2) is essentially an administrative mechanism by which only the appropriate decision-maker is determined. It is the substantive decision-maker who is then called upon, pursuant to section 14(1), to exercise their judgment as to whether or not the conduct of a further inquest is advisable in the circumstances. Although the applicant is correct to note that there is no language in section 14(2) which is in classically mandatory terms (for instance, "the Secretary of State *must* certify…), in my view that is the effect of the language used when construed in context.

[33] In the provisions dealing with determinations as to eligibility for compensation on the basis that an individual has suffered a miscarriage of justice – found in section 133(6A) to (6K) of the Criminal Justice Act 1988, as amended by the Devolution Order at issue in these proceedings – it is clear that there is a further judgment to be exercised by the SSNI once he has determined that there is "protected information", that is to say information the disclosure of which may be against the interests of national security, relevant to the application. In such circumstances, under section 133(6F) the SSNI must consider whether it is nonetheless "feasible" for the Department of Justice (including any assessor appointed by the Department) to be provided with either the protected information or a summary of the protected information that is sufficiently detailed to enable the Department (including any assessor) to deal properly with the application. The point is that, where the Devolution Order intended there to be a judgment on the part of the SSNI as to whom the appropriate decision-maker should be, that was specifically spelt out in the amended statutory scheme with detailed provisions setting out both the process and basis for such a decision. That is entirely absent from the much simpler provisions set out in the amended text of section 14 of the 1959 Act. This supports the view that, where the statutory scheme admits of an exception to the general rule that cases involving national security implications should not be allocated to the devolved administration for decision, this will be expressly provided for in statutory scheme.

[34] The applicant also drew attention to the wording used in the transitional provisions in Schedule 14 to the Devolution Order, at para 1(4) to (7). These provisions apply where, before the coming into force of the Devolution Order, the Attorney General had begun to consider whether to give a direction under section 14 but had not made any decision. In such circumstances, it was provided that the Advocate General must take a view as to whether there was information relevant to the question of whether a direction should be given which is or includes information the disclosure of which may be against the interests of national security; and that, if the Advocate General took a view that there *was* such information, "the Advocate General *must* deal with the case as if section 14(3)… applied" [italicised emphasis added]. It was also provided that, "Otherwise, the Advocate General must refer the case to the Attorney General for Northern Ireland to be dealt with by the Attorney accordingly." The applicant contrasted the expressly mandatory duty imposed in paragraph 1(6) of Schedule 14 for these transitional cases with the absence of any mandatory wording in the amended text of section 14(2). On the respondent's part,

it was contended that the mandatory nature of the obligation in paragraph 1(6) of Schedule 14 supported the construction of section 14 for which they contended.

[35] I did not consider these arguments to be of any great assistance. A different formulation was used in Schedule 14 of the Devolution Order to cater for cases the consideration of which straddled the devolution of policing and justice. However, the different statutory text used (in circumstances where, pre-devolution, the Attorney General and Advocate General posts were, as a matter of fact, occupied by the same person and the SSNI had no certification role) does not displace the construction of section 14 which I have set out above. Insofar as relevant, I agree with the respondent's suggestion that it would be strange if the Advocate General was under an obligation to determine the transitional applications for a fresh inquest where there was relevant information the disclosure of which may be against the interests of national security but that, after devolution, the Secretary of State was imbued with a discretion as to decision-making allocation. For the reasons given above, were that to be so, I consider that this would have been made clear and that the amended section 14 would not be in the terms in which it now is.

[36] Although the applicant's article 2 claim was not pursued, insofar as her concern about independence of the substantive decision-maker remains relevant to her second ground of challenge, I also do not consider it to be persuasive. To whomever of the two law officers the substantive decision falls, they will be expected to exercise their functions independently and in good faith. Although the Attorney General for Northern Ireland has a statutory recognition of the independence of her role (in section 22(5) of the 2002 Act), the Advocate General is nonetheless, just as is the Attorney General for England and Wales, expected to discharge her public interest functions independently of government interests. I need not decide whether, when the Advocate General is exercising the functions of the Attorney General under section 14(3), she is then directly bound by the obligation in section 22(5) of the 2002 Act to exercise that function independently of any other person. It seems to me strongly arguable that she is; but in any event, this should make no practical difference given the conventions in relation to the independence of the law officers when exercising quasi-judicial functions.

[37] I also do not consider there to be some presumption in favour of local decision-making because there is something inherently qualitatively better about the Attorney General, rather than the Advocate General, making a decision of this type. Although it might be said to be a basic underpinning principle of devolution that local decisions should be made by local office-holders, that applies only insofar as the devolution settlement has devolved matters for local decision-making. It was and is for Parliament to set the bounds of what is transferred to the devolved administration. It is in the interests of legal certainty that the dividing lines are clearly drawn. As I have set out above, where a discretion exists as to the allocation of decision-making responsibilities, this should be set out expressly.

The vires issue

[38] In *Re Ryan's Application* [2020] NIQB 47 it was noted that the Devolution Order was made under section 86 of the NIA, which resulted in it being approved by each House of Parliament. In contrast, the Schedule 3 Order was made under section 4 of the NIA, after a motion for a resolution that policing, and justice matters should cease to be reserved matters had been tabled by the First Minister and the deputy First Minister acting jointly and had been passed by the Northern Ireland Assembly with the requisite cross-community support required by section 4(2A) of the NIA.

[39] The applicant contends that the Devolution Order, which results in the bifurcation of decision-making the consequences of which she wishes to avoid, was unlawfully made because it ought to have been made under section 4 of the NIA – and so have been subject to a cross-community voting requirement in the Assembly – rather than having been made by Her Majesty under section 86 of the NIA under which there is no such requirement.

[40] On the applicant's case, section 86 of the NIA was not intended to be used in this way: it is a limited power, intended only to permit necessary or expedient amendments which does not apply where section 4 could be used to effect the desired alteration to the devolution settlement. A number of more technical points include that section 86(2) expressly requires that a relevant power must have been exercisable in Northern Ireland on the day before the legislation was made under section 86, which was not the case in relation to inquest powers on the day before 12 April 2010; and that the Devolution Order does not in fact transfer functions but simply amends a provision. It is said that this was not consequent upon the Schedule 3 Order but actually arose because of the provisions of the 2002 Act which made the appointment of the Attorney General a question for the devolved administration. The relevant provisions of the 2002 Act in this regard were only commenced in April 2010. In addition, it is contended that the power to order a fresh inquest, where considered advisable, is not a decision as to an excepted matter such as national security. The availability of PII procedures in the course of an inquest would ensure that national security is protected during the inquest, such that a decision to hold a further inquest could not of itself threaten national security.

[41] An Order in Council must be made under section 4 of the NIA where it amends Schedule 3 to the NIA in one of the specified ways (*viz* either by providing that a reserved matter become a transferred matter or that a transferred matter become a reserved matter). However, the Devolution Order did *not* amend Schedule 3 to the NIA in this way, or indeed at all. Moreover, it did not relate to a transferred matter becoming a reserved matter. Rather, it made provision (in this instance) for an *excepted* matter, national security, when it arose in the course of an otherwise transferred responsibility.

[42] The Schedule 3 order *did* amend Schedule 3 to the NIA in order to, in general, devolve matters relating to inquests. It did so by removing inquests from Schedule 3

to the NIA, so converting them from a reserved matter to a transferred matter. However, when that occurred, it was in my view appropriate for the Devolution Order, made under section 86, to make arrangements for the limited category of cases where national security was involved to be dealt with by a law officer of the UK Government rather than of the devolved administration. This was necessary "in consequence" of the general transfer of coronial functions under Schedule 3 Order but in order to preserve the overall structure of national security matters remaining excepted.

[43] This is essentially the same analysis as was adopted by Sir Ronald Weatherup in *Ryan* at first instance, at paras [36], [41] and [43] of his judgment. That case involved a similar issue whereby the eligibility for and assessment of compensation for miscarriages of justice was devolved to the Department of Justice in Northern Ireland, but with such cases as involved national security being allocated to the Secretary of State for determination. The same two pieces of secondary legislation as are at issue in this case were under consideration; and the same, or similar, points were argued on behalf of the applicant in that case (with Mr Southey KC appearing for both respective applicants). There are a variety of other issues in respect of which, as here, a function or matter is generally transferred but with a 'carve-out' for cases involving national security: where, as Sir Ronald put it, "the transferred matter within the remit of [the devolved administration] meets the excepted matter of national security within the remit of [the Westminster administration]."

[44] Section 86(1) of the NIA is in the following terms:

> "Her Majesty may by Order in Council make such provision, including provision amending the law of any part of the United Kingdom, as appears to Her Majesty to be necessary or expedient in consequence of, or for giving full effect to, this Act or any Order under section 4 or 6."

[45] I reject the applicant's submission that there was no reason why the whole of the legislative package should not have been effected through delegated legislation made under section 4 of the NIA and therefore subject to the requirement of cross community support. Section 4 relates only to the inter-relationship between reserved matters and transferred matters, converting one to the other. In addition, it is clear from section 4(2) that it is a limited power focused upon "amending Schedule 3" so that a particular matter "ceases to be or, as the case may be, becomes a reserved matter with effect from such date as may be specified in the Order." It cannot be used to make provision in respect of excepted matters. In addition, it contains no broad power to make consequential provisions in the course of a section 4 Order.

[46] In contrast, section 86 is not so limited. It provides a broad power to make provision which appears "necessary or expedient" either in consequence of or to give full effect to the NIA and/or any Order made under section 4. It was the

appropriate vehicle, in my view, to make consequential provision for determinations as to the holding of a fresh inquest in cases where national security issues (and, hence, an excepted matter) arose.

[47] In oral submissions on behalf of the applicant, Mr Southey accepted that a section 86 Order could be used to deal with excepted matters. He did not accept, however, that the holding of an inquest could have any potential implications for national security (because of the possibility of the making of a PII claim to safeguard any national security issues). I do not accept that this distinction can be drawn so clearly. In paragraph 17 of Schedule 2 to the NIA, "national security" is defined in non-exhaustive terms. In the present context however, as the text of section 14(2) indicates, it is to be taken as including the possible disclosure of information which is against the interests of national security. It is not possible to say that there are no national security implications of the holding of an inquest where sensitive material is relevant, for the reasons summarised at para [24] above. However, the more important point is that the Devolution Order is not dealing with the practicalities of the inquest itself but, rather, the decision-making in cases involving national security material. The disclosure of such material outside of the UK authorities to devolved administrations for decision-making is legitimately to be viewed as dealing with (or "concerned with", using the words of section 86(2)(a) of the NIA) an excepted matter. Even more importantly, however, in order for the provision made in the Devolution Order to be lawful, it need only fall within the category of provision which is either necessary or expedient in consequence of a transfer of functions under a section 4 Order. I am satisfied that the amendments to section 14 of the 1959 Act made by the Devolution Order were lawfully considered necessary or expedient in consequence of the general devolution of coronial matters effected by the Schedule 3 Order in order to reserve decision-making which national security issues arose.

[48] It is also perhaps relevant to note that Weatherup J's decision in the *Ryan* case was later upheld by the Court of Appeal in *Re Ryan's Application* [2021] NICA 42 (and, I understand, permission to appeal against that decision was refused by the Supreme Court on the basis that the application did not raise an arguable point of law). The focus of the argument on the *vires* issue in the appeal appears to have been on the question of whether compensation for miscarriage of justice fell within the reserved matter of "treatment of offenders." It is clear, however, that the Court of Appeal found no illegality in the way in which the bifurcation of functions had been brought about by means of the Schedule 3 Order converting a reserved matter to a transferred matter but the Devolution Order 'holding back' to the Westminster Government a category of cases where the excepted matter of national security was engaged.

[49] I do not consider that the interaction between these legislative provisions and the 2002 Act (or, more accurately, the Justice (Northern Ireland) Act 2002 (Commencement No 14) Order 2010 (SR 2010/113) which brought into effect section 22 of the 2002 Act) alters the analysis above. Although the 2002 Act conferred the

power to appoint the Attorney General on the First Minister and deputy First Minister, that power was not exercisable until the coming into effect of the Schedule 3 Order. The power to locally appoint the Attorney and the general devolution of policing and justice functions came together as a package and were inextricably linked.

[50] Nor do I consider there to be force in the temporal point made by the applicant, to the effect that a section 86 Order can only transfer a function from a Northern Ireland authority to a United Kingdom authority where that function was exercisable by the Northern Ireland authority the day before the Order. This argument was based on section 86(2)(a), which provides that "Orders under subsection (1) may make provision for transferring to a United Kingdom authority, with effect from any date specified in the Order… any functions which immediately before that date are exercisable by a Northern Ireland authority and appear to be concerned with a matter which is an excepted… matter…" The applicant's point is that the Devolution Order came into force on the same day as the Schedule 3 Order (see article 1(2) of the Devolution Order) such that the relevant function of section 14 decision-making was not exercisable by a Northern Ireland authority "before that date." However, there are two reasons why I do not consider this argument can avail the applicant even if (which I doubt) section 86(2) is intended to limit, rather than simply illustrate, the breadth of the law-making power conferred by section 86(1).

[51] First, on the day before devolution of policing and justice section 14 *did* confer the relevant decision-making power on a Northern Ireland authority, namely the Attorney General for Northern Ireland. As it happens, that post was held by a member of the Westminster Government, who was also the Attorney General for England and Wales but, in making any decision under section 14, the then Attorney General for Northern Ireland (the Rt Hon Dominic Grieve KC) would have been acting as a Northern Ireland authority within the meaning of section 86(7)(c) of the NIA as the holder of public office in Northern Ireland. On the day when the Devolution Order came into force, it transferred some decisions under section 14 which would previously have been taken by the Attorney General (a Northern Ireland authority) to the Advocate General (who is a United Kingdom authority within the meaning of section 87(8)(g)). Second and in any event, the way in which section 14 operates is not to transfer such decision-making generally on the date of devolution of justice but, rather, to do so on a case by case basis upon section 14(2) certification by the Secretary of State in relation to decision-making as to a particular death. In this way, the function is only transferred upon certification occurring and, up to that date, the function is exercised by a Northern Ireland authority, the locally appointed Attorney General.

Practical issues

[52] As highlighted in the respondent's submissions, there may be cases where representations are made to the Attorney General to the effect that a fresh inquest

ought to be held in a particular case (such representations usually coming from the family member of a deceased) where the Attorney General feels able to make a decision based on the information provided to her with no involvement on the part of the Secretary of State. So far as I can see, there is no bar on the Attorney General granting a section 14 direction for a new inquest in the absence of the Secretary of State having certified the death under section 14(2). In the way of things, however, many such requests in this jurisdiction relate to cases where there is an allegation of some state involvement in the death. It is to be expected in many such cases that the Attorney General will either put the Secretary of State on notice that a request for a direction has been made to her; or that this will occur in the event that the Attorney General requests disclosure of additional documentation from state agencies in order to assist her in her decision-making. It is entirely sensible that some agreed arrangements or protocol between the Office of the Attorney General and the Northern Ireland Office is in place in order to cater for such circumstances and to ensure that the Attorney General does not purport to make a decision where a section 14(2) certification has occurred or, in the alternative, does not make a decision in a case where the Secretary of State might have so certified had he been aware that the matter was under consideration or where he is in the process of considering the issue. If this has not already occurred, I would encourage engagement between the Office of the Attorney General and the Northern Ireland Office to seek to reach agreed arrangements around the management of section 14 decision-making.

[53] As Mr Robinson emphasised in his submissions, whichever of the law officers is the appropriate decision-maker, the same statutory test will be applied; and I would expect there to be little, if any, discernible difference in how the decision-making process is approached. It is in all parties' interests, and the public interest, that disputes over decision-making allocation are avoided.

Conclusion

[54] For the reasons given above, I do not find any of the applicant's grounds to be made out and will dismiss the application for judicial review accordingly. I will hear the parties on the issue of costs.