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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (JUDICIAL REVIEW) PURSUANT TO ORDER 53 RULE 10

IN THE MATTER OF AN APPLICATION BY PATRICIA DOWNEY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION OF A CORONER DATED 19 FEBRUARY 2021

Before: Treacy LJ, Maguire LJ & Horner LJ

Mr David Heraghty BL (instructed by McCann & McCann, Solicitors) for the Applicant
Mr Philip Henry BL (instructed by the Coroner's Office) for the Respondent

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TREACY LJ *(delivering the judgment of the court)*

Introduction

[1] This is an appeal from the decision of Rooney J wherein he dismissed the appellant's challenge to the decision of the Coroner, Mr Joe McCrisken ("the Respondent") refusing to recuse himself from hearing the inquest into the death of the appellant's daughter, Michelle Downey (deceased).

[2] At the conclusion of the hearing the court indicated that it was unanimously allowing the appeal on the principal grounds advanced by the appellant. The court indicated that it would give its detailed reasons thereafter which we now do.

[3] The appellant alleges actual bias and/or apparent bias, in the form of predetermination, arising out of a communication which the Coroner provided to the Legal Services Agency (LSA) in relation to the inquest expressing, as contended by the appellant, a concluded view on a central question arising in the inquest, namely, whether Article 2 ECHR was engaged. It is important to record that this court is **not** concerned with whether Article 2 is in fact engaged. That is a matter to be fairly determined by whatever Coroner conducts the inquest.

Factual Background

[4] The Trial Judge has helpfully set out the factual background in his detailed written judgment and in large measure we have adopted his summary here.

[5] The appellant is the mother and next of kin of Michelle Downey (deceased) who, sadly, was found dead in her home on 3 September 2017

[6] Subsequent to Michelle's death, a Coroner (not Mr McCrisken) made a decision not to hold an inquest. The appellant requested the Attorney General ('AG') to reconsider that decision.

[7] In a letter dated 27 August 2019, following his consideration of the relevant materials, the AG, John Larkin QC, directed that an inquest be held into the death of the deceased pursuant to his powers under section 14(1) of the Coroners Act (NI) 1959. His reasoning included the following:

> "Although the immediate cause of death was established soon after it occurred, the circumstances which brought Michelle to take her own life have not been examined. … Although the scope and focus of the inquest is for the coroner conducting it to decide, given that Michelle had been recognised by the state as doubly vulnerable, both as a person receiving mental health services and as a victim of crime, and the state had a heightened responsibility towards her, in my view, an inquest is an appropriate vehicle for the circumstances of Michelle's death to be examined. The Belfast Trust conducted its own significant event audit; this is not without value **but would not be sufficient to discharge the obligations which I believe to arise under Article 2 ECHR."** [our emphasis]

[8] The appellant agreed with the AG's view that an Article 2 ECHR compliant inquest should be held. She considered that the actions and inactions of the Belfast Trust ("the Trust") and the police required further scrutiny and that, if the authorities had taken sufficient action her daughter, who was a very vulnerable individual, might

not have taken her own life. The appellant and the AG were of the view that lessons could be learned from an Article 2 inquest so as to prevent further tragedies in the future.

[9] An initial pre-inquest review was held on 11 December 2019. A draft witness list and draft scope document was circulated after the review hearing. At the hearing, counsel for the appellant next of kin queried whether the police should be added as a Properly Interested Person ("PIP"). The Coroner indicated his provisional view that adding the police as a PIP was not appropriate, although he would need time to consider the papers in more detail before making a final decision.

[10] The next review was on 14 February 2020. At the invitation of the Coroner, the Trust confirmed that they wished to become a PIP. The Coroner did not invite the police to be added as a PIP because, in his view, there was an insufficient temporal connection between the police actions and how the deceased came by her death.

[11] During the review on 14 February 2020, counsel for the next of kin submitted that the inquest should be an *"Article 2 Middleton inquest."* In other words, the word "*how*" in rule 15 of the Coroner's (Practice and Procedure) Rules (NI) 1963 should be interpreted in a much wider sense to mean *"how and in what circumstances"* the deceased came by her death. Notwithstanding the Article 2 basis upon which the AG had directed an inquest, the contention of the appellant that Article 2 was engaged, and in the absence of any written submissions and/or oral hearing on this issue, the Coroner expressed his view that an Article 2 Middleton inquest would not be appropriate. However, he indicated that he would revisit the issue on receipt of the written submissions from the next of kin.

[12] The next review was scheduled for 9 June 2020 and an agenda was prepared. The hearing did not proceed due to the pandemic. The agenda for the review recorded that the Article 2 submissions had not been received.

[13] The appellant made it clear that her Article 2 submissions were to be made once an exceptional grant funding application had been determined by the Legal Services Agency ("LSA"). That application had been lodged on 16 December 2019 but remained undetermined. The Guidance on Exceptional Funding issued by the LSA in June 2019 indicates that exceptional funding is available in two categories of cases namely those where Article 2 ECHR is engaged and those where there is a wider public interest in play.

[14] On or about 17 June 2020, the office of the AG provided detailed written submissions, including citation of authorities, to the Coroner on the applicability of Article 2 to the inquest. In his introduction the AG noted that under Article 2 the state's substantive duty to protect life has two distinct elements. First, a general duty on the state to put in place a legislative and administrative framework designed to provide

effective deterrence against threats to the right to life and secondly, the operational duty where there is a real and immediate risk to life.

[15] The AG stated that there were arguable breaches of both the substantive systemic duty and the substantive operational duty in respect of the death of Michelle Downey and that as such, an inquest, which enabled the UK to comply with its duty to investigate her death under Article 2 was required. He noted that the threshold for an arguable breach was low and has been described in the relevant case law as "anything more than fanciful."

[16] The AG then examined in detail the factual context of the deceased's interaction with agencies of the state both in respect of domestic abuse and of her mental health problems. He then explained also in some detail why he considered that there was an arguable breach of the systemic duty and the operational duty. In his conclusion he observed as follows:

> "Michelle's interaction with agencies of the state, both as a person who had been the victim of domestic abuse and as a person with mental health problems gives rise to questions about the extent to which failures of the state contributed to her death. These questions ought to be raised and, so far as possible, answered in an inquest capable of discharging the procedural rights under Article 2 now owned by Michelle's mother."

[17] A review hearing was held on 2 July 2020. With regard to the scope document, the agenda records as follows:

> "(a) At the last PR the NOK raised the possible involvement of Article 2. The coroner indicated that the deceased was not an in-patient or detained patient. There was a discussion about whether it would make any material difference because all inquests are conducted in a manner consistent with Article 2. The NOK were to lodge any written submissions on scope if they wished to take issue with the draft. No submission was received.
>
> (b) Unprompted by the coroner, the AG's office forwarded a submission on scope. The CSNI [Coroners Service] has written to the AG in respect of same.

> (c) The coroner previously set out his provisional view on scope and it remains the operational scope document."

[18] At the date of the July review the appellant had still not received any decision from the LSA in respect of her application for funding. The statement made by the Coroner in the agenda document that the CSNI had written to the AG was, in fact, wrong. It appears that a letter had been written but was never sent to the AG. At this review hearing the Coroner maintained his provisional view that Article 2 was not engaged. This public repetition of his provisional view was made in the same circumstances which had applied when he stated his view in the February review namely (1) the Article 2 basis upon which the inquest had been directed by the AG; (2) the reasons the AG had given at the time of the direction as to why, in his view, Article 2 was engaged; and (3) the fact that the next of kin had not yet made their own written submissions on Article 2 because their application for funding was still outstanding. At the July review an additional factor was also in play namely the submissions in the AG's document of June 2020 setting out in greater detail with reference to relevant jurisprudence why both limbs of Article 2 were, in his view, engaged in the present case.

[19] At the July review there was a discussion with regard to these submissions. The Coroner states that he indicated his view that the AG's involvement in this matter ceased after the latter issued a direction under section 14(1) of the 1959 Act. In his affidavit the Coroner states that a letter was drafted by his office in response to the AG's correspondence, but owing to "administrative oversight", it was never actually sent. In essence, it asserted that the office of the AG should not be directing and/or making legal submissions to the Coroner in inquest proceedings unless directly invited to do so by him as a properly interested person or otherwise. Whatever the rights or wrongs of that position may be, the fact that these detailed submissions were made by the AG and that the next of kin had indicated their support for his views makes it plain that, in July 2020, these parties at least still considered the Article 2 engagement question to be a live issue in the case.

[20] On 4 August 2020, the Coroner received a questionnaire from the LSA by email. The questionnaire asked four questions. The Coroner electronically completed his response and returned it to the LSA on 5 August 2020. This particular document is at the centre of this application. The Coroner did not furnish this response to the next of kin nor invite any representations from them before providing what the LSA characterised as the "advices" it received from the Coroner.

[21] The four questions from the LSA were clearly designed to obtain information from the Coroner to assist the Agency in making a determination as to whether or not the appellant should receive an exceptional funding grant for the inquest.

[22] On 5 August 2020, the appellant's solicitors received the following message from the LSA:

> "I would advise that the following advices have been received from the coroner:
>
> > 'This is not a complex case. The family will be able to effectively participate without legal representation. Legal representation for the family will not be necessary to assist me. This is not an Article 2 ECHR inquest and involves relatively straight forward factual issues. I have instructed coroner's counsel who will be able to assist the next of kin.'
>
> Although they are not determinative, the Agency shall give consideration to the coroner's views when assessing the application for funding. If there are any further points you wish to raise in reply to the coroner's views, please forward them to me at your earliest opportunity." (our emphasis).

[23] The message from the LSA represented the combined answers to the four questions. It did not include the questionnaire nor the portions of the text that were relevant to each of the four questions. It was not until much later that the appellant was furnished with the questions and the answers to each of the questions of which the message from the LSA was a composite.

[24] The appellant only became aware of the "advices" provided by the Coroner to the LSA as a result of the very proper email that she received from the LSA setting out the composite content of the Coroner's response. As requested, the appellant's solicitor provided further submissions in response to the Coroner's communication to the LSA.

[25] The next review was on 28 August 2020. In respect of the Article 2 issue, the agenda referred to the fact that the next of kin had not lodged a detailed submission on scope because of the lack of funding. The document also records that the Coroner indicated his view that formal engagement of Article 2 would make little difference to the running of the hearing.

[26] At para 26 of the Coroner's affidavit dated 21 September 2021, he avers that at the review hearing on 28 August 2021 the following occurred:

> "Mr Heraghty asked if I had considered the AG's submissions. I confirmed that I had, but did not believe the AG had any standing once his direction decision issued.

> Mr Heraghty agreed but said the AG's position on Article 2 reflected the applicant's. I confirmed that I had read and understood the submissions but was not inclined to agree with them. There was also a further discussion on what differences there were in practical terms, if any, between the running of an Article 2 inquest and a non-Article 2 inquest." [our emphasis]

[27] The next review was listed on 13 October 2020. On the issue of scope/Article 2, the agenda provided as follows:

> "(a) A scope document was circulated. The Trust indicated they were content with the scope at the last PH. The NOK [next of kin] indicated they were content, save the issue whether Article 2 is engaged.
>
> (b) The coroner has said that formal engagement of Article 2 will make little difference to the running of the hearing.
>
> (c) The NOK previously indicated they had not lodged a detailed submission on scope because of lack of funding.
>
> (d) The NOK accepted the AG had no standing, but rather their issue was whether the AG's submission should be taken into account by the court when determining the Article 2 issue.
>
> (e) At the last PH the NOK said they were intending to lodge a written submission. This has not been received yet, but the NOK indicated that it was a substantial piece of work and they wished to await funding." [our emphasis]

[28] Notwithstanding the Coroner's "advices", on 26 October 2020 the LSA granted the appellant's application for exceptional grant funding.

[29] On 22 December 2020 the appellant's solicitor wrote to the Coroner requesting that he recuse himself from hearing the inquest. The said letter referred specifically to the text of the advices given by the Coroner to the LSA as detailed above. It is important to note that at the time this letter was sent the appellant had still not seen the questionnaire and the individual responses to each of the questions. They only had the composite referred to above. The letter further stated:

"We draw your attention to the reference to an Article 2 ECHR inquest. As you know and as has been canvassed at a number of preliminary hearings, whilst we are aware that the coroner is minded to convene a non-Article 2 compliant inquest as his preliminary view is that the procedural limb of Article 2 does not apply on the facts of this case, the next of kin is to make submissions in due course that Article 2 does, in fact, apply. Those submissions were due to be provided once the legal aid funding issue had been resolved. … In short, we understood it to be the case that the Article 2 issue had not been decided and would not be decided until the next of kin had the opportunity to make submissions on the issue. The above advices demonstrate that we were clearly wrong about that.

It is clear from the fact that the coroner communicated to the agency that "this is not an Article 2 ECHR inquest" that the relevant decision was already made. The issue has been predetermined at a time prior to when such a determination should have been made. There is absolutely no point in the next of kin making written and/or oral submissions on the Article 2 issue to this coroner, bearing in mind the decision she wishes to be heard on had already been decided.

In summary we submit that:

(i) the relevant decision has clearly been made;

(ii) the coroner's mind is now closed and not open to submissions from the next of kin;

(iii) any consideration of the submissions from the next of kin on the Article 2 issue cannot cure the mischief here; and

(iv) any restating by the coroner, subsequent to receiving submissions from the next of kin, of his decision not to hold an Article 2 inquest would inevitably be quashed by the judicial review court. The only means of remedying the current unsatisfactory situation is for the coroner to recuse himself."

[30] Some time elapsed between the letter of 22 December 2020 and the recusal hearing which did not take place until almost two months later on 19 February 2021 when the Coroner heard submissions on whether or not he should recuse himself. At the time of the recusal hearing the appellant had still not seen the questionnaire and the individual responses to each of the four questions. During the course of the hearing, the Coroner stated that he would not be recusing himself from hearing the inquest. He agreed to provide written reasons. At the recusal hearing the Coroner asserted in effect that the questionnaire was in "tick box" format. This was not, in fact, correct. The document was in expandable Word format.

[31] On 16 April 2021, the appellant issued a pre-action protocol letter due to the fact that the Coroner had failed to provide written reasons for his decision and the appellant was concerned about the application of the three month time limit with regard to instituting judicial review proceedings. In that letter the Coroner was, *inter alia,* invited to reconsider the issue and recuse himself. The appellant also sought a copy of the document which the Coroner provided to the LSA containing his "advices."

[32] No response was received to the pre-action protocol letter and the document containing the advices to the LSA was never furnished by the Coroner.

[33] On 23 April 2021, the Coroner provided his written reasons refusing the application for recusal.

Relief Sought

[34] The statement filed by the applicant pursuant to Order 53, Rule 3(2)(a) of the Rules of the Court of Judicature (Northern Ireland) 1980 specifies the relief sought to include:

(a) Declarations in the following terms:

(i) the proposed respondent has predetermined the Article 2 issue and thereby exhibited actual bias;

(ii) in the alternative, on the overall facts and circumstances of the case, a fair minded observer would conclude that there was a real possibility that the proposed respondent has predetermined the Article 2 issue, which constitute apparent bias;

(iii) in consequence, the proposed respondent should recuse himself from further hearing this matter.

[35] Para 5 of the Order 53 statement identifies the following primary grounds on which the said relief is sought, namely:

(a) ***Actual Bias***

The critical issue which was likely to be determinative in the applicant's Exceptional Grant Funding application was whether Article 2 of the Convention applied. It was in this context that the proposed Coroner clearly and unambiguously communicated a concluded view to the Legal Services Agency for Northern Ireland that Article 2 did not apply. The proposed Coroner has thereby communicated in clear and unambiguous terms that he has predetermined the question of whether Article 2 applies to the inquest. In so doing, he has exhibited actual bias contrary to common law.

(b) ***Apparent Bias***

In the alternative to ground 5(a) above, a fair minded observer appraised of all the relevant facts and circumstances of this case would conclude that there is a real possibility of bias in the sense that there is a real possibility that the proposed respondent has predetermined the Article 2 issue.

The Legal Principles

(a) Distinction between Actual Bias and Apparent Bias

[36] In *Re Medicaments (No. 2)* [2001] 1WLR 700, 711 at [37] the Court of Appeal held:

> "[37] Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than the other. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or arise from particular circumstances which, for logical reasons, pre-dispose a judge towards a particular view of the evidence or issues before him.
>
> [38] The decided cases draw a distinction between "actual bias" and "apparent bias." The phrase "actual bias" has not been used with great precision and has been applied to the situation (1) where a judge has been influenced by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party. "Apparent bias" describes a

situation where circumstances exist which give rise to a reasonable apprehension that a judge may have been, or may be biased.

(b) The Test for "Apparent Bias"

[37] Later in the same case the court summarised the relevant principles for apparent bias under ECHR jurisprudence as follows -

> "[83] ….
>
> (2) Where actual bias has not been established the personal impartiality of the judge is to be presumed.
>
> (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do, the decision of the judge must be set aside.
>
> (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court.
>
> (5) An important consideration in making an objective appraisal of the facts is the desirability that the public shall remain confident in the administration of justice."

[38] Following consideration of the decision of the Court of Appeal in *Re Medicaments*, the House of Lords in *Porter v Magill* [2001] UKHL 67 elaborated upon the test for *"apparent bias"* as follows:

> "The question is what the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was real possibility of bias." [Lord Hope at para 105]

[39] In *Flaherty v National Greyhound Racing Club* [2005] EWCA Civ 1117 at para [27], the Court of Appeal stated that the test for apparent bias involves a two-stage process:

> "First the court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly, it must ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased … An allegation of apparent bias must

> be decided on the facts and circumstances of the individual case including the nature of the issue to be decided: see Locabail (UK) Limited v Bayfield Properties Limited [2000] 2QB 451, 480 para 25. The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing."

[40] In *Helow v Secretary of State for the Home Department* [2008] UKHL 62, the House of Lords gave further consideration to the "apparent bias" test in *Porter v Magill*. In *Helow*, the appellant was a Palestinian who challenged the involvement of the judge in the case because of the judge's association with pro-Jewish lobby organisations. It was alleged that there was an appearance of bias. Elaborating on the attributes of a fair-minded and informed observer, Lord Hope stated at para 2:

> "The observer who is fair-minded is the sort of person who always reserves judgement on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, paragraph 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. ……. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially." [our emphasis]

(c) Predetermination as a form of bias

[41] The fair-minded and informed observer test set out in *Porter v Magill* has been adopted by the courts to determine whether there is a possibility of bias arising from predetermination. In *Georgiou v Enfield London Borough Council* [2004] EWHC 799 (Admin) at para 30, Richards J held:

> "[30] Predetermination can legitimately be regarded as a form of bias. Cases in which judicial remarks or interventions in the course of the evidence or submissions have been alleged to evidence a closed mind on the part of the court or tribunal have also been considered in terms of

> bias: see e.g. London Borough of Southwark v Jiminez [2003] EWCA Civ 502 at para 25 of the judgment, where the test in Porter v Magill was accepted as common ground and was then applied"(our emphasis.)

[42] In *Lewis v Redcar and Cleveland* [2009] 1WLR 83, the court of appeal provided guidance as to the approach to be adopted in cases involving apparent bias and predetermination as a form of bias. All three members of the court of appeal delivered written judgments. Pill, LJ reviewed a number of the authorities delivered since the decision in *Porter v Magill*. With regard to the *Porter v Magill* test and the correct approach of the court to the possibility of predetermination, Pill LJ stated as follows:

> "68. … Where reference was made to the fair-minded observer, the court was putting itself in the shoes of that observer and making its own assessment of the real possibility of predetermination. That, I respectfully agree, is the appropriate approach in these circumstances. The court with its expertise, must take on responsibility of deciding whether there is a real risk that minds were closed."

[43] In *Lewis*, Rex LJ agreed with Pill LJ's assessment. He also considered the distinction between disposition and predetermination and considered the test to be applied for distinguishing between the two:

> "89. It is common ground that in the present planning context a distinction has to be made between mere disposition, which is legitimate, and the predetermination which comes with a closed mind which is illegitimate. However, there is a dispute between the parties as to the appropriate test to be applied for finding the illegitimate closed mind."

[44] The competing tests were (1) actual bias or predetermination:- 'a closed mind in fact' and (2) a test based on 'the appearance of things. (In other words, the *Porter v Magill* test): would it appear to the fair-minded and informed observer that there is a serious possibility of the relevant bias, viz predetermination?" [emphasis added]. Rex LJ favoured the latter - the test based on the appearance of things:

> "96. So, the test would be whether there is an appearance of predetermination in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards the planning proposal would not for these purposes by itself amount to an appearance of the real possibility of

> predetermination or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined closed mind in the decision making itself. I think that Collins J put it well in R (Island Farm Development Limited) v Bridgend County Borough Council [2007] LGR 60 when he said at paragraphs 31-32:
>
> > "31. The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material conditions and be prepared to change their views if persuaded that they should … unless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will be suffice to persuade a court to quash the decision.
> >
> > 32. It may be that, assuming the Porter v Magill test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that councillors can be assumed to be aware of their obligations."(emphasis added).
>
> 97. In context, I interpret Collins J's reference to "positive evidence to show that there was indeed a closed mind" as referring to such evidence as would suggest to a fair-minded and informed observer the real possibility that the councillor in question had abandoned his obligations, as so understood. Of course, the assessment has to be made by the court, assisted by evidence on both sides, but the test is put in terms of the observer to emphasise the view point that the court is required to adopt. It need hardly be said that the view point is not that of the complainant."

[45] On this distinction between 'predisposition' and 'predetermination', Longmore LJ stated:

> "106. It is clear from the authorities that the fact that members of a local planning authority are "predisposed" towards a particular outcome is not objectionable see e.g.

> R v Amber Valley District Council, Ex Parte Jackson [1985] 1 WLR 298. …..
>
> 107. What is objectionable, however, is "predetermination" in the sense I have already stated, namely that a relevant decision-maker made up his or her mind finally at too early a stage."

[46] It is axiomatic, following a review of the authorities, that actual or apparent bias or predetermination on the part of the decision maker renders his decision unlawful.

The Parties' Arguments.

[47] In this case, the appellant contends that the Coroner has predetermined the Article 2 ECHR issue and has thereby exhibited actual bias. In the alternative she alleges that a consideration of the overall facts and circumstances would inevitably lead the fair-minded and informed observer to conclude that there was a real possibility of apparent bias arising from predetermination on the part of the Coroner.

[48] The thrust of her argument is concentrated on the Coroner's responses to the questionnaire sent to him by the LSA on 4 August 2020 and on the manner in which the Coroner dealt with the submissions of the AG which the applicant adopted. In relation to the first point she contends that, although at previous pre-hearing reviews the Coroner had intimated that he would consider submissions on whether this was an Article 2 ECHR inquest, in effect his responses in the questionnaire clearly demonstrated that his mind was closed and that he already determined that issue.

[49] Due to the significance placed on the questionnaire, we have set out below the four questions and the answers provided by the Coroner:

1. Q. What is the likely duration of the inquest?

   A. One day.

2. Q. Should you wish to comment on the following, your views will be taken into account when deciding whether or not to recommend funding:

   (a) Is this a serious or complex case?

   A. No, this is not a complex case. Every death is treated as being serious.

   (b) Will the family be able to participate effectively without legal representation?

   A. Yes, the family will be able to effectively participate without legal representation.

(c) Is legal representation of the bereaved family necessary to assist you to investigate the facts effectively and establish the facts?

A. No, legal representation for the family will not be necessary to assist me. **<u>This is not an Article 2 ECHR inquest</u>** and involves relatively straight forward factual issues (our emphasis).

3. Q. At what level are other interested parties represented, if known?

A. I have instructed Coroners Counsel who will be able to assist the next of kin.

4. Q. The likely date of hearing?

A. Late 2020.

[We note that the Coroner did not answer the question posed in Q3. At the time the Coroner completed the Questionnaire he had already granted the Trust PIP status, and was represented before the inquest by solicitor only at that point in time (as counsel to the Trust as notice party pointed out during the hearing Before Rooney J].

[50] The respondent's argument is that he had formed a 'provisional view' about the applicability of Article 2 which he openly expressed throughout the case but he was always open to receiving submissions on the question and had not reached a concluded decision about it. The Coroner stated as follows in his first affidavit:

> "22. I acknowledge that the wording of my response to the LSA in Part 2(c) could be read as though my mind was made up on the Article 2 issue because it contains no qualification, however that was not the case. It was a poor choice of words on my behalf. However, the NOK were aware from previous PIR hearings that this was a provisional view and that I had agreed to consider, and had patiently waited on, their written submissions.
>
> 23. I had been transparent with all of those involved about my provisional view. However, I had not closed my mind to the possibility that it might be an Article 2 inquest and I was prepared to consider the applicant's submissions on this issue. If that had not been the case, I would not have repeatedly allowed more time for her lawyers to lodge those submissions. In contrast to how other issues were dealt with, I explicitly left this issue open. I believed it was helpful for the PIPs to know what my provisional view was and the reasons leading me to it, but I was also clear that I was

> prepared to consider any representations made before going beyond a provisional view (albeit it would be open to me to change my view at any stage up to the close of proceedings if something occurred which warranted such change)."

Consideration

[51] The first ground upon which relief is sought is that the Coroner exhibited actual bias in that he predetermined the Article 2 issue. It is alleged that, in his responses to the LSA, the Coroner communicated in clear and unambiguous terms that he had predetermined the question whether Article 2 applied to the inquest and, in so doing, exhibited actual bias contrary to common law. In considering this ground we bear in mind the comments of Kerr, J (as he then was) in *Re Foster* [2004] NI248, 265 at para [66] in relation to claims of actual bias:

> "[66] ... This is an extremely serious allegation and one that should be made only when supported by the clearest evidence."

[52] Actual bias arises where a decision-maker has been influenced by partiality or prejudice in reaching his decision thereby depriving the litigant of his right to an impartial tribunal. Such allegations are rarely advanced for a variety of reasons which include:

- Judges are rarely actually biased.

- Such allegations are difficult to prove, and the law does not generally permit questioning of decision-makers about the possible existence of such bias.

- "…it is far easier to challenge a decision on the ground of apparent bias and therefore there is usually little or no advantage in alleging actual bias" [see Judicial Review, Principles and Procedures by Auburn, Moffett and Sharland ,OUP, at para 8.18].

[53] We consider that the appropriate prism through which to analyse this case is by reference to the appearance of predetermination which is the second ground relied upon by the appellant.

[54] As is clear from the authorities the test applied by the courts in the context of predetermination and the appearance of predetermination is: would a fair-minded and informed observer, knowing the facts, think that there was a real possibility that the decision-maker had predetermined the matter to be decided [see para 8.90 of Auburn, Moffett and Sharland].

[55] As the authorities make plain the steps in the requisite analysis are that the court (i) must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased and (ii) it must ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.

[56] The circumstances relied upon by the appellant in support of the suggestion of the appearance of predetermination include the Coroners unqualified statement on the LSA questionnaire that "this is not an Article 2 ECHR inquest" and his behaviour in relation to the submissions made by the AG on the Article 2 issue.

[57] The respondent is a Coroner who, in the course of his work, was asked to complete a questionnaire for the LSA which was intended to inform that Agency's response to the appellant's funding application in connection with the inquest directed by the AG. As Rooney J noted in his judgment:

> "The Coroner would have been aware of the guidance on exceptional funding issued by LSA. Para 4 of the guidance… provides that exceptional funding for representation at an inquest is available in two categories of cases, namely, (a) on the basis of ECHR or enforceable EU rights, or (b) on the basis of wider public interest."

[58] It can therefore be assumed, that the Coroner, a trained lawyer working in the field of inquests, would have understood the potential effects of his questionnaire responses on the LSA's decision on the critical issue of funding for this appellant. This context reinforces the reality that the proper completion of this document is plainly an important task. This is especially so in the context of an inquest in which Article 2 ECHR may be engaged. This is reflected in the LSA guidance quoted above that exceptional funding for representation at an inquest is available in two categories of cases one of which is " …on the basis of ECHR…rights." We have made it clear at the outset that we are not determining and do not have to determine whether this inquest is in fact an Article 2 inquest. But the context of the application for funding was to enable the appellant to make written submissions in support of the contention that this was an Article 2 inquest. Funding to make Article 2 submissions was all the more important because although the AG John Larkin QC had exercised his statutory powers to direct an inquest on the basis that he considered Article 2 was engaged and had advanced weighty reasons for that direction, the coroner nonetheless expressed his view at the review on 14 February that an Article 2 inquest would not be appropriate. He expressed this opinion in the absence of any written submissions and/or oral hearing on this issue. Interestingly, he said he would revisit the issue on receipt of the submissions from the next of kin. The next of kin's counsel had however made it plain prior to the Coroner's response to the LSA questionnaire that their ability to make such submissions was dependent on LSA funding. Counsel for the appellant explained

during the August review that the Article 2 submission it was intended to make was a substantial piece of work and that they needed to wait for funding to be put in place before the work was undertaken. The next of kin were unsighted as to the nature of the response on the questionnaire. The appellant only became aware of the highly contentious and unqualified response when the LSA put them on notice of the composite response albeit without the questions.

[59] Completing the responses to the 4 questions in the questionnaire required mindful application to the demands of the task and levels of care appropriate to the potential consequences that may flow from it. Given this context anyone scrutinising the output from the Coroner might legitimately expect that he 'said what he meant and he meant what he said.' What he said was "this is not an Article 2 ECHR inquest." This is an unequivocal sentence presented as if it was a statement of fact - at least in the mind of the Coroner. Question 2 (c) is set out at para [49] above. The question asked was "is legal representation of the bereaved family necessary to assist you to investigate the facts effectively and establish the facts". The question did not mention the ECHR at all. The coroner knew that the appellant sought to contend that Article 2 was engaged. The next of kin had also made clear to the Coroner that they wouldn't be in a position to make their written submissions until the issue of funding had been decided. Despite this the Coroner took the uninvited and unnecessary step of expressing in absolute and unqualified terms that "this is not an Article 2 ECHR inquest" even though he knew that this was a critical matter in dispute, upon which he had yet to receive submissions from the next of kin and in respect of which there had yet to be a hearing to determine the point. In expressing himself in this unqualified manner he must have appreciated that might lead to a refusal of funding and, in that event, a consequential inability on the part of the next of kin to participate or furnish written submissions on the Article 2 issue. It is a concern to us that the Coroner gave such a definitive and materially incomplete response to another public authority particularly given the importance of what was at stake.

[60] Contrary to the impression created by the Coroner's exchanges with counsel at the 19 February recusal hearing, but not repeated on affidavit, the questionnaire was in not a 'tick box' form with yes/no answers and limited space. The form was in fact an expandable 'Word' format document which did not limit the length of answers to the questions. Counsel for the appellant argued that it was always open to the Coroner to enter a caveat to his response to Q2(c). There was no word limit or other physical restriction preventing him from doing that, but he elected not to do it. This, the argument goes, adds weight to the assumption that he had said what he believed on the form and felt no reason to qualify it, or, to put it the opposite way, his actual response reflected his true position and any qualification would only have misrepresented that position.

[61] We are reminded of the layman's test for how to recognise a duck: 'if it looks like a duck and it quacks like a duck….' the inevitable conclusion must follow. In the

present case the Coroner's response does look like a concluded view, as he has acknowledged on affidavit, and is certainly expressed as such. And of course, if legal aid funding had in fact been refused, the Coroner was unlikely to be troubled by the substantial Article 2 submissions on behalf of the appellant which counsel had indicated depended on funding.

[62] The Coroner acknowledges at para 22 of his affidavit that his response could be read as though he had his mind made up on the Article 2 issue because it contains no qualification. He avers that "it was a poor choice of words." The form did not, as already noted, restrict the ability of the Coroner to qualify his remarks. Therefore, there was no practical reason which would have precluded an appropriate qualification. We entertain considerable concerns about the unqualified way in which he expressed himself to the LSA.

[63] Undoubtedly, there are occasions when the Coroner at reviews expressed his views as provisional; he deferred dealing with the Article 2 issue because he had not yet received the applicant's written submissions and he allowed more time for her lawyers to lodge those submissions – submissions it has to be said that were unlikely to see the light of day if the LSA had followed his lead in the questionnaire response.

[64] The Coroner notes that no issue was taken about predetermination at the pre-inquest review on 20 August 2020 despite the fact that, by then, the appellant had received the LSA's summary of his responses (but not the actual questions) including his unequivocal statement that Article 2 did not apply. He says that if concerns about this statement had been raised at the review on 20 August 2020, he would have confirmed that the response in the reflected his 'provisional' view and that he was still waiting for the appellant's submissions before coming to a concluded decision.

[65] The Coroner's responses to the questionnaire were not the only occasion when he expressed himself more trenchantly than was warranted on Article 2 issues and at a time when he had not even received written submissions on the issue from the next of kin. The repetition by a tribunal of a view adverse to one of the interested parties on a central issue yet to be decided by the tribunal, even if expressed sometimes as provisional, can be problematic.

[66] We recall the adverse attitude displayed by the Coroner as early as the February review to the Article 2 reasons underpinning the AG's decision to direct an inquest. These are set out at para [11] above.

[67] We turn now to look at how the Coroner dealt with the AG's June submissions on Article 2 - submissions which were in favour of the views espoused by the appellant and her legal team and which they sought to adopt. These submissions were considered at the review held on 27 August 2020. The discussion around them is reported as follows in the Coroner's affidavit:

> "26. Mr Heraghty asked if I had considered the AG's submissions. I confirmed that I had, but did not believe the AG had any standing once his direction decision issued. Mr Heraghty agreed but said that the AG's position on Article 2 reflected the applicant's. I confirmed I had read and understood the submissions, but was not inclined to agree with them. There was also a further discussion on what differences there were in practical terms, if any, between the running of an Article 2 inquest and a non-Article 2 inquest."

[68] The appellant argues that during the August review the Coroner had expressed much stronger views in relation to the AG's submission than his affidavit would lead one to believe, views that were more consistent with predetermination or at least the appearance of predetermination. The transcript of the pre-inquest review on 27 August 2020 include the following:

> "Coroner: I don't intend to take any account of those submissions at all because the Attorney General has absolutely no standing to make submissions at all [inaudible].
>
> David Heraghty: Yes. That simply underlines the importance of the next of kin's role in this inquest, because she wishes to make those submissions through us…. it does underline the importance of those submissions being received from some source on her behalf.
>
> Coroner: Mr Heraghty, I understand the submissions that have been made. I read the Attorney's submissions, I disagree with his view. I understand Article 2, perhaps more than anyone in terms of inquests."

The Coroner in the next sentence then states 'Article 2 is not engaged is my preliminary view'

[69] We are surprised by the Coroner's expression of his belief in his superior expertise. Such a belief by any judicial figure runs the risk of dismissing contrary views too lightly. Expressed in public sittings in a sensitive inquest it is at least unwise and

unlikely to instil confidence. When you believe that you know it all you may be blinded to the possibility that others with contrary views may have something valuable to say.

[70] We turn now to whether the fair-minded and informed observer, appraised of all the relevant facts and circumstances, would conclude that there was a real possibility that the decision-maker had predetermined the Article 2 issue.

[71] We have reviewed the relevant facts and circumstances described above and unanimously consider that they are sufficient to persuade a fair minded observer that there was such a real possibility . The Coroner's unequivocal statement to the LSA that "this is not an Article 2 ECHR inquest" is perfectly clear and unqualified. The Coroner himself acknowledges that the response could be read as though his mind had been made up. It was his choice of words. He chose not to include the appropriate qualification in a very important document which he knew or ought to have known could have profound effects. Contrary to the impression that was created during the February recusal application we now know that the there was no impediment to the Coroner inserting the appropriate caveat or qualification in the form which was in expandable Word format. The apparently concluded view was not circulated for comment to the other parties involved in the case before its dispatch. It only came to the attention of the applicant when the composite responses were sent by the LSA to the appellant. We unanimously conclude and **Declare** that the fair-minded and informed observer, appraised of all the relevant facts and circumstances, would conclude that there was a real possibility that the decision-maker had predetermined the Article 2 issue.

Decision

[72] This court finds that the respondent ought to have recused himself from this case when asked to do so on the grounds of apparent bias. Accordingly, the appeal is allowed. We understand that following our ruling at the conclusion of the hearing the Coroner recused himself. The only relief now sought is a declaration which we grant in the terms set out above.