Neutral Citation No: [2021] NIQB 108	*Ref:* ROO11675
	ICOS No: 21/39161
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 25/11/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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

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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ROONEY J

Introduction

[1] The applicant is the mother and next of kin of Michelle Downey (deceased). Michelle died on 3 September 2017. The respondent was assigned to hear the inquest into the death of the deceased. The applicant challenges the decision of the respondent not to recuse himself from hearing the inquest.

[2] The applicant alleges actual bias and/or apparent bias, in the form of predetermination, arising out of a communication which the respondent provided to the Legal Services Agency in relation to the inquest expressing, as contended by the applicant, a concluded view on a question arising in the inquest, namely, whether Article 2 ECHR was engaged.

[3] The application for judicial review was lodged on 17 May 2021 on the basis that the impugned decision was made on 19 February 2021, namely the date on which the respondent heard oral submissions in relation to the request by the applicant that he should recuse himself. Following pre-action correspondence dated 16 April 2021, the respondent provided a written decision dated 23 April 2021 declining the recusal application.

[4] On 26 May 2021, Mr Justice Scoffield granted the applicant leave to apply for judicial review of the respondent's decision not to recuse himself from hearing the inquest into the death of the applicant's daughter on the grounds set out in the Order 53 statement. The relevant grounds and the relief sought will be considered in more detail below.

Factual Background

[5] The relevant factual background is taken from the affidavits of both the applicant and the respondent. The applicant is the mother and next of kin of Michelle Downey (deceased) who was sadly found dead in her home on 3 September 2017.

[6] Subsequent to Michelle's death, a Coroner (not the respondent) made a decision not to hold an inquest. It is claimed that the applicant at this time indicated that she did not want an inquest and was content for the death to be registered. Subsequently, the applicant requested the Attorney General ('AG') to reconsider the decision.

[7] In a letter dated 27 August 2019, following his consideration of the relevant materials, the AG directed that an inquest be held into the death of the deceased pursuant to his powers under Section 14(1) of the Coroners Act (Northern Ireland) 1959. The AG's 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."*

[8] The applicant agreed with the AG's view that an Article 2 compliant inquest should be held. The applicant considered that the actions and inactions of the Belfast Trust (hereinafter 'Trust') and the police required further scrutiny and that, if the authorities had taken sufficient action her daughter, who was a very vulnerable individual, may not have completed suicide. The applicant was of the view that important 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. The applicant was legally represented at this review by counsel, Mr David Heraghty BL and McCann and McCann, Solicitors. A draft witness list and draft scope document was circulated after the review hearing. At the hearing, counsel for the next of kin queried whether the police should be added as a Properly Interested Person ('PIP'). The respondent 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 pre-inquest review was on 14 February 2020. At the invitation of the respondent, the Trust confirmed that they wished to become a PIP. The respondent did not invite the police to be added as a PIP because, according to the respondent, there was an insufficient temporal connection between the police actions and how the deceased came by her death.

[11] During the pre-inquest 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, according to the respondent, the word "*how*" in Rule 15 should be interpreted in a much wider sense to mean *"how and in what circumstances"* the deceased came by her death. The respondent indicated his view that an Article 2 Middleton inquest would not be appropriate but that he would revisit the issue on receipt of written submissions from the next of kin.

[12] The next pre-inquest 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 applicant claims that the legal submissions were to be made once exceptional grant funding had been made by the Legal Services Agency ('LSA'). It was also claimed by the applicant that the respondent was aware that such an application for exceptional grant funding had been made. The said application was lodged on 16 December 2019. The applicant understood that the grant of such funding was dependent upon whether the inquest was Article 2 compliant.

[14] On or about 17 June 2020, the office of the AG provided written submissions to the respondent on the applicability of Article 2 to the inquest. The submissions concluded 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."*

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

> "(a) At the last PH 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 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."

[16] At the review on 2 July 2020, the respondent states that there was a discussion with regard to the letter received by him from the AG. The respondent claims 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. The respondent 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 was 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 the coroner as a properly interested person or otherwise.

[17] On 4 August 2020, the respondent received a questionnaire from the LSA by email. He states that he had received the same document on previous occasions with respect to other inquests. The questionnaire asked four questions. The respondent typed his response and returned it to the LSA on 5 August 2020. This particular document is at the centre of this application and will be considered in more detail below.

[18] On 5 August 2020, the applicant'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. <u>This is not an Article 2 ECHR inquest</u> 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." (emphasis added).

[19] The applicant states that neither she nor her solicitor was aware that the respondent had provided any advices to the LSA. As requested, the applicant's solicitor provided further submissions in response to the respondent's communication to the LSA.

[20] The next pre-inquest 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 respondent indicated that formal engagement of Article 2 would make little difference to the running of the hearing. The respondent emphasises that, despite the fact that his response to the LSA's questionnaire was known to the next of kin, no issue was taken with his response in the questionnaire and no recusal application was made.

[21] At paragraph 26 of the respondent's affidavit dated 21 September 2021, the respondent avers that at the pre-inquest 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."*

[22] The next pre-inquest 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 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."

[23] On 26 October 2020 the LSA granted the applicant's application for exceptional grant funding.

[24] On 22 December 2020 the applicant's solicitor wrote to the respondent requesting that he recuse himself from hearing the inquest. The said letter referred specifically to the text of the advices given by the respondent to the LSA as detailed above in paragraph [18]. The letter further provided:

"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."

[25] On 19 February 2021 the respondent heard submissions on whether or not he should recuse himself. During the course of the hearing, the respondent stated that he would not be recusing himself from hearing the inquest. He agreed to provide written reasons.

[26] On 16 April 2021, the applicant issued a pre-action protocol letter due to the fact that the respondent had failed to provide written reasons for his decision and the applicant was concerned about the application of the three month time limit with regard to instituting judicial review proceedings.

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

Relief Sought

[28] 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 as follows:

(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 constitutes apparent bias;

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

(b) such further or other relief as this Honourable Court shall deem meet;

(c) all necessary and consequential directions;

(d) costs.

[29] Paragraph 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 respondent clearly and unambiguously communicated a concluded view to the Legal Services Agency for Northern Ireland that Article 2 did not apply. The proposed respondent 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

[30] 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.*
>
> *[39] Findings of "actual bias" on the part of a judge are rare. The more usual issue is whether, having regard to all the material circumstances, a case of apparent bias is made out."*

[31] In this case, the applicant alleges that the respondent exhibited actual bias in that his communication to the Legal Services Agency clearly and unambiguously demonstrates that he had predetermined the question as to whether Article 2 applied to the inquest. For the reasons given at paragraphs [51] and [52] below, I reject the serious allegation that the respondent was guilty of actual bias.

[32] Accordingly, in determining whether on the facts the respondent should have recused himself, it seems to me that the focus should be on the issue of apparent bias and particularly whether the fair minded and informed observer would conclude that there was a real possibility of bias, namely that the respondent had predetermined the Article 2 issue and closed his mind to a balancing and weighing of all the relevant factors.

(b) The Test for "Apparent Bias"

[33] In *R v Gough* [1993] UKHL 1 at [14] the House of Lords set out the test for "apparent bias" as follows:

> *"Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."* (emphasis added)

[34] The "*real danger of bias*" test was considered to be incompatible with the test under Article 6 ECHR which guarantees a "*fair and public hearing within a reasonable time by an independent and impartial tribunal.*" In other words, unlike in *R v Gough,* the impartiality of the decision maker was to be addressed from the point of view of the objective observer. As stated in *Gregory v United Kingdom* [1997] 25 EHRR 577 at [14]:

> *"The court must examine whether in the circumstances there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the jury."*

[35] In *Re Medicaments* [2001] 1 WLR 700, 726 at [83], the Court of Appeal summarised the relevant principles for the test of bias under ECHR jurisprudence as follows -

> *"[83] We would summarise the principles to be derived from this line of cases as follows:*

(1) If a judge is shown to have been influenced by actual bias, his decision must be set aside.

(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."

[36] Accordingly, the Court of Appeal in *Re Medicaments* at paragraph [85] modified the test in *R v Gough* to bring it into line with ECHR jurisprudence:

> *"[85] When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude whether there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."*

[37] Following consideration of the decision of the Court of Appeal in *Re Medicaments*, the House of Lords in *Porter v Magill* [2001] UKHL 67 laid down a test for "*apparent bias.*" Lord Hope at paragraph 105 stated 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."*

[38] In *Flaherty v National Greyhound Racing Club* [2005] EWCA Civ. 1117 at paragraph [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."*

[39] 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 paragraph 2:

> *"The observer who is fair-minded is the sort of person who always reserves judgment 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) 201CLR 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. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. 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."*

(c) Predetermination as a form of bias

[40] 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 paragraph [29], Richards J held:

> *"[29] I accept Mr Dinkin's submission that bias, in the sense of a pecuniary or personal interest in the outcome of a decision, is conceptually distinct from predetermination or a closed mind …"*

> *[30] It seems to me, however, that a different approach is required in the light of Porter v. Magill. The relevant question in that case was whether what had been said and done by the district auditor in relation to the publication of his provisional conclusions suggested that he had a closed mind and would not act impartially in reaching his final decision … Thus, it was a case of alleged predetermination rather than one in which the district auditor was alleged to have a disqualifying interest. Yet it was considered within the context of apparent bias, and the decision was based on the application of the test as to apparent bias which I have already set out. There is nothing particularly surprising about this. … 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."(emphasis added).*

[41] 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 as to the possibility of predetermination, Pill LJ stated as follows:

> *"68. Ward and Wall LJJ both agreed with the reasoning of Richards LJ. Richards LJ stated at paragraph 57:*
>
> > *"In the circumstances I feel entitled, indeed required, to reach a decision on the issue as raised in this appeal by forming a fresh assessment of my own by reference to the various circumstances that I have mentioned."*
>
> *The assessment was, in my judgement, essentially the assessment of the court. 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."*

[42] In *Lewis*, Rex LJ agreed with Pill LJ's assessment. His observations are noteworthy as regards the distinction between disposition and predetermination and the applicable test:

> *"88. I agree and gratefully adopt Pill LJ's exposition of the facts and jurisprudence. I have some observations of my own as we are differing from the judge's careful judgment.*
>
> *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. On behalf of the interested party the principal legal submission advanced by Mr Drabble QC is that the applicable rule is not one of apparent bias or predetermination but actual bias or predetermination, a closed mind in fact. On behalf of the claimant, on the other hand, Mr Clayton QC's principal submission is that the test is, as it is now stated generally in the context of questions of bias, one of 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)*

[43] In paragraphs 96 and 97 of *Lewis*, Rex LJ approved the application of the *Porter v Magill* test by Collins J in *R (Island Farm Development Limited) v Bridgend County Borough Council* [2007] LGR 60:

> *"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."*

[44] In *Lewis,* Longmore LJ agreed with Rex LJ and Pill LJ. He stated as follows:

> *"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. That is because it would not be at all surprising that members of a planning authority in controversial and long-running cases will have a preliminary view as to a desirable outcome. …*
>
> *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. That is not to say that some arguments cannot be regarded by any individual member of the planning authority as closed before (perhaps well before) the day of decision, provided that such arguments have been properly considered. But it is important that the minds of members be open to any new argument at all times up to the moment of decision."*

The Legal Principles Applied

[45] Before application of the relevant legal principles to the facts of this matter, I remain cognisant of the warning by the court of appeal in *K (PD) v Western Health Review Tribunal* [2004] EWCA Civ. 3 at paragraph [6], namely, that caution must be

exercised against excessive citation of authority when considering the essential factual questions and circumstances, namely, whether the fair-minded and informed observer would think there is a real possibility that the decision maker was biased. There is a danger that excessive citation of authority could potentially mask rather than clarify matters.

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

[47] In this case, the applicant alleges that the respondent has predetermined the Article 2 ECHR issue and has thereby exhibited actual bias. In the alternative the applicant 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 respondent. I will deal with each ground seriatim.

[48] The thrust of the applicant's arguments is concentrated on the respondent's responses to the questionnaire sent to him by the LSA on 4 August 2020. In essence the applicant alleges that, although at previous pre-hearing reviews the respondent 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 this was not an Article 2 ECHR inquest.

[49] The questionnaire sent by the LSA to the respondent asked four questions. The respondent states in his first affidavit that he has received the same questionnaire from the LSA in relation to other inquests. Due to the significance placed on the questionnaire, it is necessary to set out the four questions and the answers provided by the respondent:

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. This is not an Article 2 ECHR inquest and involves relatively straight forward factual issues.

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.

[50] At paragraph 22 of his first affidavit, the respondent makes the following averments with regard to his responses to the questionnaire and whether he had predetermined the Article 2 issue:

> *"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 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)."*

[51] The first ground upon which relief is sought in this review is that the respondent exhibited actual bias in that he predetermined the Article 2 issue. It is alleged that, in his responses to the LSA, the respondent communicated in clear and unambiguous terms that he had predetermined the question as to whether Article 2 applied to the inquest and, in so doing, exhibited actual bias contrary to common

law. I unreservedly reject this argument. As stated by Kerr, J. in *Re Foster* [2004] NI248, 265 at paragraph [66]:

> *"[66] The charge made by the applicant, although not articulated as such, appears to be one of actual bias. This is an extremely serious allegation and one that should be made only when supported by the clearest evidence."*

[52] I am not satisfied, on the basis of the material before me that there is any evidence to sustain an allegation of actual bias.

[53] Accordingly, whether on the facts the respondent should have recused himself, the court's view is that the focus should be on the issue of apparent bias and particularly whether the fair-minded and informed observer, appraised of all the relevant facts and circumstances, would conclude that there was a real possibility of bias to the extent that the respondent had predetermined the Article 2 issue and closed his mind to a consideration of all competing arguments.

[54] Applying the *Porter v Magill* apparent bias test, Mr Heraghty BL, counsel for the applicant, highlights the following relevant facts and circumstances which he submits would inevitably lead a fair-minded informed observer to conclude that there was a real possibility of bias.

[55] Mr Heraghty BL. urges the court, in the shoes of the fair-minded and informed observer, to take into consideration the following material observations.

[56] Firstly, the main thrust of the applicant's submissions relate to the respondent's response to the LSA questionnaire that *"this is not an Article 2 ECHR inquest."* Mr Heraghty BL submits that contrary to what the respondent stated at the recusal hearing on 19 February 2021 and in his written ruling on the issue dated 23 April 2021, the questionnaire does not specifically ask the respondent for his view on whether Article 2 ECHR applied to the inquest. Rather, the said response from the respondent was to volunteer his opinion that this was not an Article 2 ECHR inquest. According to Mr Heraghty BL this response reinforces his argument that the respondent had already closed his mind and demonstrated predetermination of the issue.

[57] I place little weight on the fact that the questionnaire does not specifically request the respondent to specify whether the inquest will engage Article 2 ECHR. The respondent has indicated that he had completed questionnaires of this nature on previous occasions. The questionnaire specifically requests the respondent, if he so wishes, to give his views on a number of questions relevant to the decision as to whether funding would be recommended. The respondent would have been aware of the guidance on exceptional funding issued by LSA. Paragraph 4 of the guidance, which was opened to me at the hearing, 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.

Nevertheless, the question still remains as to whether the assertion made by the respondent in the questionnaire is evidence of predetermination.

[58] Mr Heraghty BL further submits that, contrary to the respondent's assertion at the 19 February recusal hearing, the questionnaire is not in a 'tick box' form. He states that the questionnaire is in an expandable 'Word' format document which did not limit the length of answers to the questions. The argument is made that it was always open to the respondent to respond that he did not consider Article 2 to be engaged, but that he has left the matter open under review subject to submissions. In this regard reference is made to the exchange between Mr Heraghty BL and the respondent at page 3 of the 19 February recusal hearing.

[59] Of course, it goes without saying that if the respondent had included the response as suggested by Mr Heraghty BL, it would be extremely difficult for the applicant to argue that the respondent had predetermined the issue. Consequently, I am not persuaded by this argument.

[60] Mr Heraghty BL further argues that the respondent, when he completed the questionnaire, never anticipated that his responses would be forwarded to the applicant. With regard to this submission, no evidence has been provided to this court that the respondent believed that his responses in the questionnaire were confidential and were unlikely to be disclosed to the applicant or any other PIP. In addition, the respondent makes the observation at paragraph 25 of his first affidavit that, despite the applicant's knowledge of the respondent's response in the LSA questionnaire on 5 August 2020, no issue was taken with the response at the pre-inquest review on 20 August 2020. More particularly, no application was made for recusal of the respondent at this review. The respondent states that if concern had been raised by the applicant at the review on 20 August 2020, the respondent would have been in a position to confirm that the response in the questionnaire reflected his provisional view and was subject to further submissions. Clearly, it is the view of this court that these are matters that the fair-minded and informed observer would take into consideration.

[61] Mr Heraghty BL also submits that the respondent's response to the LSA questionnaire is not the sole evidential focus of the challenge. It is further submitted that the respondent received written submissions from the office of the AG for Northern Ireland indicating his view that Article 2 ECHR applied to this inquest. The significance and relevance of the AG's submissions were considered at the pre-inquest review on 27 August 2020. At paragraph 26 of the respondent's affidavit the following is stated -

> *"26. During the August PIR Mr Heraghty explained the Article 2 submission was a substantial piece of work and they needed to wait for funding to be put in place before it was undertaken. I was concerned that Legal Aid should not hold up the inquest, but at that time no new listing dates were available because of the pandemic and the inquest could not be listed in*

any event. 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 direct 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."

[62] The applicant obtained a transcript of the pre-inquest review on 27 August 2020. The relevant details are contained in the third affidavit of the applicant dated 20 September 2021. At around 16.45, the following relevant exchanges took place -

"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 would be difficult for her to make those submissions without legal assistance and I mean no disrespect to her in saying that. But in any event 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. Article 2 is not engaged is my preliminary view in this inquest, in that sense. No state agents are involved in this lady's death. That's what Article 2 is there to guarantee an effective investigation where state agents are involved [inaudible] that's not the case here …"*

[63] It is noted that the parties agreed that the AG had no standing to make submissions. As highlighted above, at paragraph 26 of his first affidavit, the respondent stated that he had read and understood the submissions, *"but was not inclined to agree with them."* The actual recording of the pre-inquest review confirms

that the respondent disagreed with the AG's submission. However, he went further to state that it was his "*preliminary view*" that Article 2 was not engaged.

[64] It is clear from the authorities that decision makers are entitled to be predisposed to particular views. The fair-minded and informed observer must appreciate that predisposition is not predetermination. The critical questions are, despite his/her preliminary view, did the decision maker take into consideration all the relevant factors and viewpoints and conduct a balancing exercise prior to reaching his/her decision? Did the decision maker keep his/her mind open to all arguments up until the decision?

Decision

[65] The basic legal test applicable in this case is not in issue. The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the judge was biased. The fair-minded and informed test set out in *Porter v Magill* has also been used to determine whether there is a possibility of bias arising from predetermination. Predetermination can legitimately be regarded as a form of bias.

[66] The characteristics of the fair-minded and impartial observer have been considered in the authorities cited above. It is worthwhile repeating the description provided by Lord Hope in *Helow v Home Secretary* [2008] 1 WLR 2416, 2418 at paragraph 2:

> "*The observer who is fair-minded is the sort of person who always reserves judgment 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 Johnston v Johnston [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 a measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. 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.*"

[67] Applying the applicable test to the relevant facts as detailed above, it is my view that the fair-minded and informed observer would not conclude that there existed a real possibility the respondent was biased by reason of the alleged predetermination of the Article 2 ECHR issue. For the reasons given, I am not persuaded that there is positive evidence of actual or apparent basis.

[68] As considered by the authorities, decision makers are entitled to be predisposed to preliminary views. In this case, the respondent openly and legitimately expressed his preliminary view that this was not an Article 2 inquest. At the pre-inquest reviews the respondent stated that his preliminary view on the Article 2 ECHR issue was subject to receiving written submissions on behalf of the applicant. As stated by Rex LJ in *Lewis* (op cit at paragraph 42):

> *"a distinction has to be made between mere disposition, which is legitimate, and the predetermination which comes with a closed mind which is illegitimate."*

[69] Predetermination encompasses approaching the decision with a closed mind and without impartial consideration of the relevant and competing issues. The predetermined mind excludes any other possibility beyond its predisposed view, with the effect that the potentially relevant factors have not been fully and properly considered. As stated by the court in *Bovis Homes Limited v New Forest District Council* [2012] EWHC 483 at paragraph [112]:

> *"the decision-making process will not then have proceeded from reasoning to decision, but in the reverse order."*

[70] A decision maker may legitimately have a predisposition or a preliminary view to a certain matter or course of action, provided all the relevant factors and viewpoints are considered, they are subjected to a balancing exercise and the mind of the decision maker remains open and receptive to all arguments up until the decision.

[71] The respondent stated at a number of the pre-inquest reviews that his preliminary view was that the inquest did not engage Article 2 ECHR. The respondent is an experienced coroner and has been closely involved in many Article 2 and non-Article 2 inquests. It cannot be doubted that his vast experience allows him to form a legitimate and impartial preliminary view. The respondent articulated clearly and openly at an early stage not only his preliminary view that Article 2 was not engaged, but also that he would make a final ruling upon receipt of the applicant's written submissions.

[72] At the pre-inquest review on 27 August 2020 the respondent correctly informed the applicant that he had received legal submissions from the AG. The respondent indicated that he had read and considered the AG's submissions, but disagreed with them. The respondent was entitled to adopt this stance. He emphasised that the AG had no standing to make the submission. More significantly, the respondent stated that it remained his *"preliminary view"* that Article 2 was not engaged in this inquest. Consequently, based on the above analysis, it is the view of this court that there is positive evidence to show that the respondent had not closed his mind.

[73] The respondent's response to the LSA questionnaire, without qualification, that *"this is not an Article 2 ECHR inquest"* clearly raises a real possibility of bias in the

form of predetermination on the part of the respondent. The applicant and her legal advisers were justifiably entitled to take this view. The respondent himself acknowledged that "*the wording in [his] response to the LSA at Part 2(c) could be read as though [his] mind was made up on the Article 2 issue*" The respondent's said response plainly raises pertinent questions as to the critical issue, namely whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the respondent was biased, in that he had already closed his mind on the Article 2 issue.

[74] The respondent has provided an explanation, stating that his response was a poor choice of words which should have been qualified. He states that he had not closed his mind and had certainly not predetermined the issue.

[75] This court is entitled to take into consideration any explanation given by the decision maker, although the court is not necessarily bound to accept any such explanation or statement at face value made by the decision maker (see *Helo*w *v Home Secretary* [2008] 1WLR 2416, 2425 at paragraph 39 per Lord Mance).

[76] In *Balakumar v Imperial College of Healthcare NHS Trust* [2008] 9WLUK 443, the first instance judge mistakenly accused the appellant's counsel of misleading the court in respect of the reason for an adjournment. The judge accepted she had misunderstood what had happened and the error was acknowledged. The appellant made a recusal application, which was refused. The appellant court noted the error was quickly acknowledged and concluded that a fair-minded and informed observer would not conclude that there was a real possibility of bias.

[77] I take into consideration that the fair-minded observer should also not shrink from reaching a conclusion, provided it is justified, that the decision maker must be and must be seen to be, unbiased. The "*real possibility*" test requires that there is a measure of detachment on the part of the fair-minded observer. The assumptions made by the applicant in this case, although plainly understandable, are not to be attributed to the impartial observer unless they can be justified objectively.

[78] The fair-minded and informed observer is also entitled to take into consideration the fact that the respondent is a professional judge with years of relevant training and experience (see *O'Neill v HM Advocate (No. 2)* [2013] 1992, 2011 at paragraph 52). Of course, the taking of a judicial oath or affirmation does not, of itself, guarantee impartiality. As stated by McCloskey, J. in *Re Hawthorne and White's Application* [2018] NIQB 5 at paragraph 149:

> *"It may be said that while the oath, or affirmation, has several identifiable components that which shines brightest is the solemn undertaking of judicial impartiality. While the statutory oath (or affirmation) is not determinative of recusal issues, I consider that it must, nonetheless, rank as a factor of some potency, though not a complete answer. This was acknowledged in Davidson v Scottish Ministers [2004] UKHL 34 at paragraph 57."*

[79] This has not been a straightforward decision. From my initial appraisal of the documentation, I admit to having significant concerns that the respondent had predetermined the issue and should have recused himself. However, following a consideration of the authorities detailed by counsel in their excellent submissions and thereafter an application of the relevant principles, it is my view that the fair-minded and informed observer, appraised of all the relevant facts and circumstances, would not conclude that there was a real possibility of bias to the extent that the respondent had predetermined the Article 2 issue and closed his mind to a consideration of all competing arguments. I am not persuaded that there is positive evidence of actual or apparent basis. Accordingly, I dismiss the application.