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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **21/02/2017**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GERALDINE FINUCANE FOR JUDICIAL REVIEW

GERALDINE FINUCANE

Appellant;

-and-

THE SECRETARY OF STATE FOR NORTHERN IRELAND

Respondent/Cross Appellant.

Before: Gillen LJ, Deeny J and Horner J

GILLEN LJ

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Introduction

[1] In these appeals the appellant seeks to vary the order made by Stephens J whereby he refused to order the Secretary of State for Northern Ireland to hold a public inquiry into the murder of the husband of the appellant Patrick Finucane ("PF") and the respondent seeks to vary the limited declaration made in relation to the State's obligations under article 2 of the European Convention on Fundamental Rights and Freedoms ("the Convention"). Mr Barry McDonald QC SC appeared with Ms Fiona Doherty QC on behalf of the appellant. Mr James Eadie QC appeared on behalf of the respondent with Mr Paul McLaughlin. We are grateful to both sets of counsel for the assiduous care which they have invested in this appeal.

Grounds of Appeal

[2] In essence the grounds of appeal by the appellant were based on the alleged errors of the trial judge in that he –

(1) Concluded that the process adopted to arrive at the impugned decisions included detailed consideration of the impact of the various policy options and was a genuine consideration of all the policy options.

(2) Failed to conclude that the process adopted was a sham process and that the respondent had a closed mind.

(3) Having concluded that there was a promise which was a clear and unambiguous representation devoid of relevant qualifications that a public inquiry into the death of PF would be held, erroneously concluded that -

(i) The respondent had identified the overriding interest or interests on which he relied to justify "the frustration of the expectation".

(ii) That the decision was concerned with macro political issues of policy and that therefore the overall intensity of review is limited.

(iii) The decision to conduct a review was not so unfair as to be a misuse of the respondent's power.

(iv) The frustration of the expectation and the decision to set up a review was not so unfair as to amount to a misuse of the respondent's powers.

(v) The respondent had discharged the onus of justifying the frustration and the expectation.

(5) Failed to conclude that in order to satisfy Article 2 of the ECHR a public inquiry required to be held.

[3] A respondent's Notice of Appeal has also been lodged. In essence the points raised were that the learned Judge erred in concluding that:-

(i) the Government had given an assurance to hold a public inquiry into the death of PF which was clear, unconditional and devoid of relevant qualifications such as to give rise to a substantive legitimate expectation for making an order for costs in favour of the appellant.

(ii) the State owed a procedural duty to the appellant pursuant to Section 6 of the Human Rights Act 1998 combined with Article 2 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") to conduct an effective investigation in to the murder of PF.

(iii) there had been a violation of the duty owed to the appellant under Article 2 of the ECHR.

Background Facts

[4] In the course of his comprehensive 78 page judgment the learned trial Judge set out the factual background to this case between pages 19 and 59. Counsel has indicated that there is no material issue taken with that recitation. Accordingly borrowing from those background facts we can refine the background to some degree and shall refer to the fuller findings of the judge as the need arises during the course of this judgment.

[5] However before commencing the factual recitation, it may be helpful to borrow from the judge's synopsis of the core allegations in relation to the murder of Patrick Finucane found at paragraphs [42]-[45] of that judgment. Where relevant it states:-

> "[42] The core allegation in relation to the murder of Patrick Finucane is that the army, through a branch of army intelligence called the Force Research Unit ('FRU') and one of its agents, Brian Nelson, was deliberately manipulating loyalist paramilitaries to carry out a murder-by-proxy campaign against republican terrorists so that the loyalist terrorist campaign changed its focus from the random killing of Catholics towards the deliberate targeting of suspected republican terrorists who were classified as

legitimate republican terrorist targets. It is suggested that Patrick Finucane, who was not connected to terrorism, was one those targeted in that way leading to his murder on 12 February 1989. That FRU knew of the plan to murder him and either took no action to prevent his death or was complicit in it. Investigation of collusion between FRU, the RUC, the RUC SB and the Security Services on the one hand and loyalist terrorists on the other would be linked in that way to the investigation of the murder of Patrick Finucane.

[43] Evidence of collusion can be found in contact Forms ('CFs') which were filled in by members of FRU in the immediate period prior to Patrick Finucane's murder. The CFs establish that Brian Nelson's handlers 'were clearly very well aware of his efforts to support the UDA towards the targeted assassination of' republican terrorists who were perceived to be 'legitimate republican terrorist targets'. In effect that Brian Nelson was tasked to focus UDA targeting on Provisional IRA activists.

……..

[44] The initial position of the Army in response to the Stevens 1 investigation was that they did not run loyalist agents in Northern Ireland. That was untrue. The Stevens 1 investigation found out about Brian Nelson through fingerprint evidence. FRU's explanation as to Brian Nelson's activities was that he was tasked to focus the UDA targeting on Provisional IRA activists on the basis that such targets would be more difficult for the UDA to attack, as it would take time to locate them, thus making it easier for the security forces to take the necessary counter measures to save lives. However FRU and RUC Special Branch took up separate positions in their attempts to explain why intelligence was not acted on to save lives. FRU maintained that the intelligence provided by Nelson was passed on to RUC SB. RUC SB insisted that the information necessary to prevent attack were not provided to them. Sir Desmond de Silva in his report found the position to be closer to that articulated by FRU.

……

> [45] There have been a number of investigations which have been either directly into the murder of Patrick Finucane or linked to his murder by virtue of being investigations into collusion. It is contended by the respondent that through the investigative and other processes and now through the de Silva Review, the murder of Patrick Finucane and its surrounding circumstances have been the subject of the most detailed and intense investigations, one of the largest, if not the largest, in UK criminal history. It is also contended that the content of those investigations and all of the available evidence that can properly be published have been published in a transparent and comprehensive manner and therefore that a full public account of what occurred has therefore been made available. Accordingly it is submitted by the respondent that the State has discharged any and all obligations of investigation under article 2 ECHR."

[6] Patrick Finucane ("PF") was murdered on 12 February 1989, a murder claimed by the Ulster Freedom Fighters with a gun which transpired to be a UDR weapon stolen from Palace Barracks in 1987 by a UDR Colour Sergeant which was subsequently sold to a man convicted of the murder in 2004.

[7] A police investigation followed but did not examine allegations of collusion in the murder.

[8] An inquest was held into the death of PF on 6 September 1990 but it examined only the immediate circumstances of the murder and again did not consider any of the wider concerns of State collusion.

The Stevens One Investigation

[9] In the wake of growing concerns about the possibility of collusion between the security forces and Loyalist paramilitary criminals, John Stevens (then Deputy Chief Constable of Cambridgeshire) was appointed to carry out an investigation (the "Stevens One" investigation) on 14 September 1989 leading to the presentation of a report to the Chief Constable on 5 April 1990. The summary of his findings and recommendations have never been published although have been available to the subsequent inquiries outlined in this judgment. It did not include in its terms of reference the murder of PF. However it did reveal the existence of a branch of army intelligence called the Force Research Unit ("FRU") which recruited and ran agents in Northern Ireland. It concluded that the FRU and the RUC Special Branch consciously set out to withhold pertinent information from that inquiry.

[10] The Stevens One Inquiry led to the arrest and prosecution of Brian Nelson who had been recruited by the FRU to infiltrate the UDA. He performed a role of providing the UDA with information about suspected Provisional IRA ("PIRA") targets. He also gave extensive statements to Stevens One.

[11] The de Silva report (see paragraph 62 et seq of this judgment) subsequently concluded that the targeting intelligence was passed on by the Force Research Unit ("FRU") to Royal Ulster Constabulary ("RUC") Special Branch ("SB") but frequently was not acted upon. That report concluded that the FRU did not take appropriate steps to meet this situation. On the contrary de Silva concluded that Nelson was extensively targeting individuals for murder without any adverse comment from his FRU handlers.

[12] When Nelson pleaded guilty in January 1992 to charges of conspiracy to murder and other terrorist offences, the commanding officer of FRU, Colonel J, gave evidence on his behalf which was described by the later Cory Inquiry as "at the very least misleading". De Silva concluded that misleading information was provided by the Ministry of Defence to the then Attorney General in order to determine whether Nelson's prosecution was in the public interest and that the information was not acted upon.

[13] On 11 February 1992 the appellant commenced civil proceedings against the Ministry of Defence and Brian Nelson. These proceedings remain outstanding.

The Stevens Two Investigation

[14] On 8 June 1992 the "Stevens Two" Inquiry was set up in the wake of a BBC Panorama program "Dirty War". That program claimed Nelson had been involved in a number of murders, including the targeting of PF and the passing of his photograph to the UDA, for which he had not stood trial. Interim reports from Stevens were submitted to the Director of Public Prosecutions ("DPP") on 25 April 1994 and 18 October 1994, with a final report on 24 January 1995. Once again these investigations were not published at that time.

[15] On 17 February 1995 the DPP issued a direction that there should be no prosecutions arising out of the investigation. This investigation however had not investigated the murder of PF.

[16] During 1999 the British Irish Rights Watch ("BIRW") produced a paper "Deadly Intelligence *State Collusion with Loyalist Violence in Northern Ireland"* to the Secretary of State for Northern Ireland (SOSNI). The report made a number of claims including State collusion in the murder of PF, through Brian Nelson, his handlers and the RUC Special Branch. It outlined how the FRU assisted Nelson to enhance his intelligence story on how his handlers assisted him to target individuals for assassination.

The Langdon Report

[17] Shortly thereafter in 1999 the SOSNI commissioned a Home Office civil servant Anthony Langdon ("the AL report ") to produce an internal report to assist consideration whether any form of new inquiry was required into these allegations of collusion and the murder of PF. His report was not published at that time but has been disclosed in the course of these proceedings. Amongst the conclusions reached in the AL report were the following:

- There were grounds for thinking that one of the Army handlers assisted Nelson in the targeting of one murder victim.
- The same handler knew nothing about the threat to PF before his murder.
- The handler concerned has refused to answer police questions about these matters.
- Colonel J's evidence at Nelson's trial misled the trial judge.
- The FRU did assist Nelson with intelligence information in some instances.
- Nelson's handlers were clearly very well aware of his efforts to support the UDA towards the targeted assassination of republicans.
- There was a probability that Nelson had mentioned something about Finucane to his handler before the murder.

The Stevens Three Investigation

[18] As a further consequence of the BIRW report, the "Stevens Three" inquiry was set up in May 1999. The investigation was related expressly to the murders of PF, Adam Lambert and the broader allegations of collusion.

[19] In June 1999 William Stobie was charged with the murder of PF. His solicitor informed the court that Stobie had given information to police on two occasions before the murder of PF which were not acted upon. When a vital witness against Stobie failed to give evidence the charges were dismissed in November 2001 although he was subsequently murdered by Loyalist paramilitaries on 12 December 2001.

[20] In addition to the prosecution of Stobie, the Stevens Three investigation led to the conviction of Kenneth Barrett for the murder of PF in September 2004. This occurred in the wake of a Panorama programme of 19 June 2002 in which Barrett

was recorded as stating that the police had informed him that PF was "an IRA man" and "he'll have to go".

[21] The Stevens Three Inquiry, inter alia, concluded on 17 April 2003:

- The murder of PF could have been prevented.
- The RUC investigation of PF's murder should have resulted in the early arrest and detection of his killers.
- Informants and agents had been allowed to operate without effective control and to participate in terrorist crimes.
- There was collusion in PF's murder ranging from wilful failure to keep records, absence of accountability, withholding of intelligence and evidence to the extreme of agents being involved in the murder.
- Nelson had contributed materially to the murder of PF.

[22] On 1 July 2003 the judgment of the European Court of Human Rights in Finucane v UK [2003] 37 EHHR 29 determined that there had been a violation of article 2 of the Convention (see paragraph 37 below).

Weston Park

[23] While the Stevens Three investigation was on-going, political talks aimed at saving the peace process and the Good Friday Agreement were held at Weston Park in the summer of 2001. The UK and Irish Governments determined to appoint a judge of international standing to undertake a thorough investigation of allegations of collusion in a number of cases including that of PF. The statement included the following:

> "If the appointed judge considers that in any case this is not provided as sufficient basis on which to establish the facts, he or she can report that this effect with recommendations as to what further action should be taken. In the event that a Public Inquiry is recommended in any case, the relevant Government will implement that recommendation."

The Cory Inquiry

[24] Judge Peter Cory, a retired Justice of the Canadian Supreme Court, was accordingly appointed in June 2002:

- to review all the papers in relation a number of murders including that of PF.

- to interview anyone he felt could assist.

- to submit a report including, if he considered necessary, a recommendation for the holding of a public inquiry. His letter of appointment included an assurance that in the event that a Public Inquiry was recommended, the relevant Government would implement that recommendation.

[25] His report published on 1 April 2004, inter alia, included the following findings relevant to the PF murder:

- A Public Inquiry was required into the murder of PF.

- The weight to be attached to Nelson's statement to the Stevens Inquiry could only be determined at a hearing where the evidence could be tested by examination and cross-examination in a public forum.

- The documentary evidence he had reviewed was contradictory regarding the extent to which FRU had advance knowledge of the targeting of PF and whilst the inference could be drawn that they had advance knowledge of the targeting, these questions could only be answered by a Public Inquiry.

- In 1981 the Security Service had been prepared to forego warning PF he was in imminent and serious danger in order to protect the identity of the agent. Further the failure of the Security Service in June 1985 or in December 1988 to suggest that PF be warned was significant and "might well be sufficient in themselves to warrant a Public Inquiry. In any event they must be taken into account in considering the overall or cumulative effect of all the relevant documents. That cumulative effect leads to a conclusion that a Public Inquiry should be held to examine the issues raised in this case".

- Evidence of the attitude persisting within RUC SB and FRU that they were not bound by the law and were above its reach, the relevance and significance of such matters being left to consideration at a Public Inquiry.

[26] Judge Cory expressed his view about the format which any Public Inquiry should follow including an independent commissioner, powers to compel production of witnesses and documents, the conduct of hearings in public to the extent possible and the publication of a written report containing findings and recommendations.

[27] The judge also acknowledged that decisions would have to be made regarding prosecutions arising out of the on-going Stevens Three investigations and that if it was decided that there should be prosecutions it would be extremely difficult to hold a Public Inquiry at the same time with the result that it would in all probability have to be postponed.

[28] After publication of the four Cory reports into all the murders he was considering, the SOSNI announced the establishment of public inquiries in three of the four and stated that the Government would "set out the way ahead at the conclusion of prosecutions" in the Finucane case.

[29] Following the conviction of Barrett the SOSNI wrote to the appellant enclosing a statement which he would be making to the House of Commons that same afternoon of 23 September 2004. That letter indicated that in any inquiry "the Tribunal would be tasked with uncovering the full facts of what happened and will be given all of the powers and resources necessary to fulfil that task. In order that the inquiry can take place speedily and effectively and in a way that takes into account the public interest, including the requirements of national security, it would be necessary to hold the inquiry on the basis of new legislation which will be introduced shortly".

[30] At this time the only legislative basis for a statutory inquiry was the Tribunals of Inquiry (Evidence) Act 1921 ("the 1921 Act"). The sole mechanism for such an inquiry to deal with national security matters was through Public Interest Immunity Certificates ("PII") issued on a document by document basis. It is the respondent's case that the consequences of such a process would be that the inquiry itself and all of the parties would have been deprived of the information, which in turn would have impaired the ability of the inquiry to fulfil its function. It was considered inevitable that such an inquiry would quickly become embroiled in PII challenges. According to the Government, the proposed new legislation was intended to remove the need for a PII in public inquires and to enable the inquiry to examine the information, subject to restrictions on further publication.

Events after the advent of the Inquiries Act 2005

[31] The Inquires Act 2005 came into force on 7 June 2005.

[32] The applicant and her family objected to the use of the 2005 Act as a vehicle for the inquiry into the murder of PF. This was primarily because Section 19 of the Act allows Ministers to impose restrictions on:

(i) Attendance at an inquiry or any particular part of an inquiry, and

(ii) Disclosure of any evidence or documents given produced or provided to an inquiry.

[33] It is the applicant's case that this was an entirely new procedure and potentially removed control of the public nature of the inquiry and its evidence from the inquiry chair to a Minister.

[34] On 25 June 2007 the Director of Public Prosecutions, having availed of the advice of independent Senior Counsel, issued a statement following his examination of the Stevens Three investigation concluding that the test for prosecution was not met in relation to any other possible prosecution for offences relating to or connecting with the murder of PF other than those of Stobie and Barrett. In particular the available evidence was insufficient to establish that any member of the FRU had agreed with Nelson or anyone else that the murder was to take place, that any RUC officer had agreed with Stobie or Barrett that PF be murdered or that there was misfeasance in public office by members of the FRU in the handling of Nelson as an agent.

[35] Over the ensuing period between the introduction of the 2005 Act and the General Election in May 2010 a series of contacts between the applicant, her representatives and the Northern Ireland Office took place. An impasse clearly developed largely due to the presence of the restriction notice provisions under s.19 of the 2005 Act. In the autumn of 2006 SOSNI instructed officials not to spend more time or resources on preparations for an inquiry on the basis that it was not in the public interest to do so. It is the Government's case that the family's opposition to an inquiry under the 2005 Act was communicated during a meeting with the Prime Minister in November 2004 and subsequent correspondence from Mrs Finucane after the Act came into force. The family wrote to every serving judge in the United Kingdom requesting them not to accept the position of Chairman of the inquiry if invited. A meeting of legal representatives took place on 30 April 2010 when a draft restriction notice was available and discussed. The applicant was invited to respond by letter to the draft but no letter was sent and discussions with the family did not resume until after the general election in May 2010.

The European Court of Human Rights and the Council of Ministers

[36] We pause at this stage to briefly outline the role of the European Court of Human Rights in this matter. The appellant had entered a complaint claiming that there had been no proper or effective investigation into the death of her husband in breach of Article 2 of the European Convention on Human Rights and Fundamental Freedoms ("Art 2").

[37] In Finucane v United Kingdom [2003] 37 E.H.R.R. 29 ("Finucane's case") the court gave its judgment on 1 July 2003. It upheld her complaint because proceedings following the death of PF had failed to provide a prompt and effective investigation into the allegations of collusion by security personnel together with a failure to comply with the procedural obligation imposed by Article 2 of the Convention. It held that the police investigation had lacked independence, the inquest did not satisfy the requirements for an effective investigation, Stevens Three as an

investigation had commenced ten years after the death and did not satisfy the requirement of promptness and the reports from Stevens One and Two had not been published.

[38] The court declined the invitation of the appellant to order that a fresh investigation should be carried out. The court considered that compliance with the decision should be overseen by the Committee of Ministers acting under Article 46 of the Convention.

[39] The appellant made a series of submissions to the Committee of Ministers contending that the inquiry under the 2005 Act would not be effective or comply with Article 2.

[40] The Committee of Ministers through its Secretariat published its assessment of the case on 19 November 2008 and recommended that the requirements of public scrutiny and accessibility of the family had been met, doing so in light of the subsequent publication by the PPS of the detailed statement of reasons for its decision not to prosecute and the lack of challenge to the adequacy of those reasons. It also stated that the Committee of Ministers may consider strongly encouraging the UK authorities to continue discussion with the appellant on the terms of a possible inquiry. That recommendation was accepted by the Committee of Ministers on 17 March 2009 and it decided to close its examination of the individual measures taken by the UK on foot of the decisions of the court in circumstances where the UK was actively working on proposals for establishing a statutory public inquiry. The Committee of Ministers thus closed its consideration of the individual measures in the case relying on the Stevens Three investigation and the DPP's consideration of the product of that investigation. Accordingly it deferred any decision on re-opening supervision of the judgment until this process had been completed.

Events after the 2010 Election

[41] Subsequent to the General Election in May 2010 a new coalition Government was formed. It is pertinent to observe that by this time the Government was manifesting a reluctance to hold more open ended and costly inquiries into the past. Stephens J at paragraph [100] cites the "the definitive statement of those views" was to be found in the Prime Minister's response in Parliament on the report of the Saville Inquiry "which was to the effect that whilst generally against long running and costly inquiries into the past in Northern Ireland that these decisions should be made on a case by case basis ". This view was reiterated by the SOSNI in Parliament on 30 June 2010.

[42] The SOS NI received a number of papers from Brendan Threlfall of the Legacy Unit of the NIO between May 2010 and 3 November 2010. On that date the SOSNI wrote to the Prime Minister making him aware that the process he intended to follow in taking a decision, against the background that the Prime Minister had already publicly stated that there would be no more open-ended and costly

inquiries, albeit each case would be considered on its merits, was that he would consider representations to allow him to consider the public interest in a fair and measured manner, that he was due to meet the Finucane family on 8 November 2010 and would advise him of the process he intended to follow and that thereafter he would lay a written ministerial statement in Parliament noting that he would be formally considering representations from the family and other representations over the following two months before making a decision as to whether to hold a public inquiry. That letter to the Prime Minister referred to the cost of the Billy Wright inquiry under the Inquiries Act 2005 costing over £30m, the Robert Hamill inquiry at £32m so far and the Rosemary Nelson inquiry at £45m to date. The SOSNI envisaged that given the complexity of the Finucane case and the potential of judicial review over issues around disclosure of national security information he might expect a Finucane inquiry to cost more than any of these three inquires.

[43] The Prime Minister met with the SOSNI and the Attorney General on 5 November 2010 to discuss the matter of a public inquiry into the murder of PF. A briefing note was prepared for the Prime Minister by Tom Fletcher the PM's advisor on Northern Ireland and Foreign Policy Issues on 4 November 2010 indicating, inter alia, that "it is imperative that the Government is seen to have given proper consideration to all relevant factors and that no premature decisions are taken without due process". A separate note of Tom Fletcher to the PM on 3 November 2010 recorded, inter alia, as follows:

> "It is probably too soon for you to make a formal intervention on this issue. Better to allow colleagues to chip in with views and – ideally – for Owen to come forward with the conclusion that a further inquiry would be appropriate.
>
> But we need to think carefully with Owen about handling –
>
> - Coalition
> - Dynamics
> - Discussion
> - Adams/McGuinness.
> - the Irish
> - the Americans"

[44] On 11 November 2010 the SOSNI laid a written Ministerial Statement about the process in Parliament. The statement indicated that the process would commence with a two month consultation period in which the views of the family, interested public authorities and the public in general would be sought. In addition the SOSNI proposed to take into account six factors relevant to an assessment of the public interest namely:

- The commitment given in 2004.

- Public concern arising from the reviews and investigations that had occurred.

- The experience of other inquiries established after the Weston Park commitments.

- The delay which has been caused since 2004 announcement and the potential length of the inquiry.

- Political developments that have taken place in Northern Ireland since 2004.

- The potential costs of any inquiry and the current pressure on Government finances.

[45] On 25 January 2011 the SOSNI met with NIO officials on this matter. The former said that one of principles which was important to the Government was to limit time and cost and with this in mind he requested officials to work on possible options and models for further discussions, albeit that it was important that officials made clear that the public interest test had not yet been completed.

[46] Further meetings occurred between the legal representatives of the appellant and the Government including 6 January 2011 and 8 February 2011. It would appear that discussions centred on the format for disclosure of sensitive material during the recent Baha Mousa Inquiry with a copy of that protocol being provided to the family. That provided for disclosure to be decided by the Chairman using the restriction order procedure but did not prevent the use of a Restriction Notice by a Minister. Subsequently representatives of the family indicated that of the various formats for an inquiry the Baha Mousa format "would be the most appropriate" but the respondent contends that no representations were made on the approach of the family to a decision that a Restriction Notice would be necessary.

[47] On 1 April 2011 the Secretary of State received a detailed written briefing from Brendan Threlfall containing, inter alia, an analysis of each of the policy options which were open to the Secretary of State now that the consultation period was over, namely:

- A full open-ended 2005 Act inquiry.

- A limited 2005 Act inquiry.

- A full non-statutory inquiry.

- A non-statutory information recovery process.
- A decision not to commence any process.

[48] That paper advised the SOSNI that once he had considered the public interest and the potential way forward he would wish to consult the Prime Minister and relevant Cabinet colleagues. The Ministerial Code stipulates that the Prime Minister must be consulted in good time about any proposal to establish a major 2005 Act inquiry. It also reminded him of the terms of the Weston Park Agreement, the inquiries that had taken place, the commitment given by the former SOSNI to establish a public inquiry, the representations received during the consultation period, an analysis of the public interest factors identified in the Ministerial statement of 11 November 2010, the extent to which each factor pointed in favour of or against a public inquiry, together with the five options mentioned in the paragraph above. In relation to each of those policy options a further analysis was conducted in relation to the public interest factors which were identified in the Ministerial statement of 11 November 2010. The public interest issues relevant to each option which had been noted in the statement of 11 November 2010 were also discussed in that document with a detailed analysis of the cost implications for each of the policy options together with the measures necessary for controlling the costs and length of time for any 2005 Act inquiry. The combined cost of the four public inquiries (including the Bloody Sunday Inquiry) had been £304m. It reminded him that he had commented a number of times on the serious pressure on public finances which were under exceptional pressure and the policy decisions needed to reflect the financial climate in which the Government was operating. "The Government can consequently legitimately argue that, even though costs issues were already a consideration explicitly raised in Paul Murphy's 2004 statement, the current pressures on the Government finances make it a more significant factor than was previously the case".

[49] Finally, that briefing note recorded:

> "There is also a considerable risk that a documentary review such as this may not be able to produce a definitive account of the case. Cory was clear that some of the documentary evidence was contradictory and that issues would need to be tested in an inquiry. This model would effectively represent a rerun of the Cory investigation but with document release supplementing a final report on the case. Any report that risked raising more questions than it answers would, however, clearly not be sufficient to build wider public confidence."

[50] SOSNI discussed these matters with NIO officials on 8 April 2011. Discussions included the time and cost implications of a potentially expensive open ended public inquiry under the 2005 Act. At the end of that meeting the policy options that were left for consideration were limited to two namely a statutory inquiry with clear time limits and cost controls or a decision not to hold an inquiry.

[51] On 4 May 2011 Simon King, the private secretary to the PM, outlined in a briefing paper to the PM these two options together with a third possibility namely to refuse to hold an inquiry but to apologise for the actions of the security forces. Mr King declared:

> "There is more than enough in the Stevens and Cory reports to support an admission that this was a terrible case which reflects very badly on the actions of the security forces at the time – and apparently few people still around would contradict this conclusion. However this would not satisfy the main campaigners – who are interested in seeking facts about the case which they think that we will be reluctant to release than in securing an apology."

[52] The SOSNI met with the Prime Minister on 5 May 2011 where, given the policy on public inquiries, the latter raised a further option of an apology and possibly also asking an independent person to carrying out a rapid examination of the details of the case i.e a non-statutory review stopping short of a full public inquiry.

[53] On 17 May 2011, following further discussions between Simon King and officials within the NIO, Cabinet and PM's office, a briefing paper was provided to the SOSNI describing an apology and proposing time limited paper based review by an independent person without public hearings as "a Cory II Review but it would be asked to provide a definitive judgment on the case rather than the provisional findings put forward by Cory". The exercise would be essentially a review of the papers available to Cory. That briefing paper described this model being presented as "the quickest means of finding out the truth"

[54] On 8 June 2011 Simon King provided a briefing paper to the PM broadly along these lines. The PM responded with a note stating "Good. Let's give this a try. Pls fix"

[55] On 16 June 2011 Mr Threlfall provided a further paper to the SOSNI summarising the review model and proposing a ministerial meeting chaired by the PM to take a collective decision on this matter. On 8 July 2011 Mr Threlfall prepared a speaking note for the SOSNI which stated, in the context of a full statutory inquiry, that "it could be a lengthy process mired in litigation and disagreements over sensitive information. We could impose time and cost limits (£20m) but in reality these may not hold and we could potentially be facing higher costs (Nelson Inquiry at nearly £50m and six years)".

[56] On 7 July 2011 the Cabinet Office briefed all Ministers in advance of a meeting chaired by the PM with a note indicating the possible options that might be taken.

On 8 July 2011 Brendan Threlfall provided the SOSNI with a briefing paper for the Ministerial meeting to take place on 11 July 2011. These papers included the following points:

- The urgency of the need for a decision in the wake of previous commitments by government.

- The failure to establish an inquiry because of difficulties agreeing the appropriate terms with the appellant.

- The public interest factors contained in the statement of 11 October 2011.

- The representations received during the consultation process.

- The 2005 Act option.

- The option of a review by an independent figure.

- The option not to hold an inquiry.

- Public interest issues surrounding international relations in particular with Ireland and the USA, the wider legacy issues prevailing in Northern Ireland, the views of the opposing parties within Northern Ireland and a number of political developments that have occurred in Northern Ireland.

[57] In addition Ministers were alerted to the following matters:

- The period that had elapsed and doubts about how effective any inquiry might be albeit many of the witnesses were still alive and could be summoned to give evidence adding "However there is no guarantee that they would illuminate the facts further and a number of key witnesses (including Brian Nelson) are now dead".

- A full statutory inquiry could be a lengthy and costly process with the likelihood of judicial review legal challenges causing the inquiry to collapse. Limits on spending may not hold.

- Security sensitivities and the appropriateness of the 2005 Act.

[58] The appellants drew attention to an e-mail from Jeremy Heywood, (now the Cabinet Secretary) of 9 July 2011 which stated:

> "Does the PM seriously think that it is right to renege on the previous Government's clear commitment to hold a full judicial inquiry? This was a dark moment in the country's history – far worse than anything that

> was alleged in Iraq/Afghan. I cannot really think of any argument to defend not having a proper inquiry."

[59] We pause to observe however that further e-mails passing between Mr Heywood and Mr King led to a softening of Mr Heywood's views in later e-mails.

[60] The decision not to hold a public inquiry was taken following a meeting of interested Cabinet Ministers chaired by the PM on 11 July 2011. The note of that meeting records the PM making the following points:

- The primary objective was to find the truth.
- There were strong reasons to conclude the public interest in meeting this objective could be better served by a process other than a potentially lengthy, costly and procedurally difficult public inquiry which might be unworkable in light of national security issues.
- His preference was a speedier paper based review of all existing material by an independent person.
- There would be discussion with Mrs Finucane in advance of any announcement.

[61] The appellants were informed in person by the Prime Minister of the decision not to hold a public inquiry and instead to establish an independent review at a meeting in Downing Street on 11 October 2011. A decision was announced publicly by the Secretary of State the following day in the House of Commons. In the course of that statement the Secretary of State made the following points:

- The government accepted the conclusions of Lord Stevens and Judge Cory that there had been collusion.
- The public now needs to know the extent and nature of that collusion.
- Sir Desmond de Silva the former United Nations War Crimes prosecutor had been asked to conduct an independent review of any state involvement in the murder with unrestricted access to documents and freedom to meet any individuals who could assist his task.
- That this would be the quickest and most effective way of getting to the truth.
- Experience showed public inquiries into events of the Troubles can take many years and be subject to prolonged litigation delaying the truth emerging.

- There were 1 million documents and over 9000 witness statements.

The de Silva Review

[62] Following this decision, Sir Desmond de Silva QC was appointed to conduct a review. His terms of reference included the following:

- To draw from extensive investigations that had already taken place.
- To carry out a non statutory document based review without oral hearings and produce a full account of any involvement by the Army, the RUC, the Security Service or other UK government body in the murder of PF.
- To have a full access to the Stevens archive and all Government papers.
- The work was to be carried out independently of Government.
- He was not being asked, nor did he have power, to hold oral hearings although if he wished to meet people who could assist with the work then that was a matter for him.

[63] The applicant did not meet with Sir Desmond

[64] Despite his terms of reference, Sir Desmond indicated that he had carried out a far more wide-ranging process than a straightforward examination of the available evidence gathered by criminal investigations. He had sought to receive new documentary material from all of the organisations cited in his terms of reference and a number of Government departments. His report stated:

> "That material has included new and significant information that was not available to Sir John Stevens or Justice Cory. This has served to throw a flood of light on certain events that are critical to my findings."

[65] The additional material has not been identified and no explanation given as to why it was not available to Sir John Stevens or Judge Cory.

[66] Sir Desmond also indicated that he had engaged with key individuals who could assist him in producing a full public account. Amongst others he met with individuals who had served in the Army, the RUC and the security forces. He had questioned them about these matters and had received a series of written submissions. He had engaged in this process to receive new information that could assist him and to provide individuals and organisations with an opportunity to

make representations. He provided a list of the 11 individuals he had met and those from whom he had obtained written submissions.

[67] The report of Sir Desmond contained, inter alia, the following determinations:

- All relevant Government departments and agencies had co-operated fully and openly with him. He was given access to all the evidence that he sought including highly sensitive intelligence files.

- There was no adequate framework in Northern Ireland in the 1980s for the running of effective agents. There was a wilful and abject failure by successive Governments to provide a clear policy and legal framework necessary for agent handling operations to take place effectively and within the law.

- Nelson's desire to see Republicans attacked was clearly apparent to the FRU. On occasions Nelson's handlers provided him with information that was subsequently used for targeting purposes.

- Accountability for what went wrong rested with the FRU and its CO together with a failure by the Army to ensure adequate supervision.

- There was a failure on the part of the Security Service to carry out their advisory and co-ordinating duties adequately in relation to Nelson and FRU.

- The most serious issue of all was the failure of the RUC SB to respond to Nelson's intelligence. FRU maintained that the intelligence provided by Nelson was passed on to RUC SB whereas the latter insisted the information was not provided to them. Sir Desmond found the position to be closer to that articulated by FRU.

- The RUC acted with a disproportionate focus upon threatened intelligence related to individuals targeted by Republican paramilitary groups.

- The RUC, Security Service and Secret Intelligence Service failed to warn PF of an imminent threat to his life in 1981 and 1985.

- Security Service propaganda initiatives could have served to legitimise PF as a potential target for Loyalist paramilitaries.

- An RUC officer or officers probably did propose PF as a UDA target on 8/9 December 1988.

- Barrett received intelligence about PF from a police source.
- FRU did not have fore-knowledge of the conspiracy within the UDA to murder PF.

- The Army must bear a degree of responsibility for Nelson's targeting of PF given its knowledge of his activities.

- The proper exploitation ofStobie's information could have prevented the murder of PF.

- Relevant intelligence was withheld from the investigation team.

- Army/RUC/RUC SB/Senior Army officers were involved in obstruction and mendacity during the course of the investigations by Stevens. There was no evidence to suggest that any Government Minister had fore-knowledge of PF's murder nor were they subsequently informed about the intelligence that had existed.

- The threshold for finding collusion was met.

- A series of positive actions by employees of the State actively furthered and facilitated the murder of PF and in the aftermath of the murder there were relentless attempts to defeat the ends of justice.

- There was no doubt that agents of the State were involved in carrying out serious violations of human rights up to and including murder. He made a distinction between employees of the State and agents of the State. The latter was a reference to Nelson and Barrett. There were no prosecutions of the former who had actively furthered and facilitated PF's murder and those who were involved in a relentless attempt to defeat the ends of justice after the murder.

Legitimate Expectation

[68] The first ground of appeal that we have considered in this matter centres on the concept of legitimate expectation. It is the appellant's contention that whilst the learned trial judge correctly concluded that there had been a promise which was a clear and unambiguous representation devoid of relevant qualifications that a public inquiry into the death of PF would be held, thereafter the judge erroneously concluded that:

- the respondent had identified the overriding interest or interests on which he relied to justify the frustration of the expectation.

- the decision was concerned with macro political issues of policy.

- that accordingly the overall intensity of review was limited.
- on the basis of such a limited review the decision was not so unfair as to be a misuse of the respondent's power.

- the frustration of the expectation and decision to set up a review was not so unfair as to amount to misuse of the respondent's powers.

- the respondent had discharged the onus of justifying the frustration of the expectation.

[69] It is the respondent's contention that:

- the commitment given was qualified.

- the learned trial judge incorrectly concluded that the qualifications contended for by the respondent were necessarily implicit in any assurance since it may always be departed from if justified in the public interest.

- the conditions were real and practical bearing directly upon the inherent unenforceability of an assurance to establish a "public inquiry".

- in the absence of any assurances of form and an express qualification that an inquiry would be established under new legislation for which no proposals had been published, the assurances were inherently qualified and unpredictable.

- litigation founded upon the assurance of "a public inquiry" confronts the court with an impossible task.

Principles governing legitimate expectation

[70] Harvested from an array of familiar but powerful authorities cited before this court, and which were common to the arguments of both parties, we can distil a number of well-established principles:

(1) Legitimate expectations derives from a promise that is clear, unambiguous and devoid of relevant conditions, the initial burden to prove this lying on the person so asserting (Re Loreto Grammar School's Application for Judicial Review [2012] NICA 1 at [42] et seq).

(2) A policy, promise or practice may change on rational grounds. A policy with no terminal date or terminating event will continue in effect until rational grounds for cessation arise.

(3) Once the elements of the promise have been proved by the applicant, the onus shifts to the authority to justify the frustration of the legitimate expectation. To depart from the promise would only be unlawful if to do so would be so unfair as to amount to an abuse of power and even then the court would consider whether or not it is

> appropriate to exercise its discretion to grant the remedy. Thus it is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. It will then be a matter for the court to weigh the requirements of fairness against that interest (Paponette v Attorney General of Trinidad and Tobago [2010] 1 AC 1.

[71] Public authorities typically, and central Government par excellence, enjoy a wide discretion when it is their duty to exercise a public interest. (R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ. 755 and R (Coghlin) v North East Devon Health Authority [2001] QB 213.

[72] The rationale for this is clear. A public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Public authorities have to decide the content and the pace of change. Often they must balance different, indeed even opposing, common interests across a wide spectrum. Generally they must be the masters of procedure as well as substance. (Bhatt Murphy at paragraph [41]).

[73] It is not essential that the applicant should have relied on the promise to his detriment but it is a relevant consideration in deciding whether the adoption of a policy is in conflict with the promise and amounts to an abuse of power. The denial of the expectation is less likely to be justified as a proportionate measure where there has been an unambiguous promise, where there is detrimental reliance, and where the promise is made to an individual or specific group. Such considerations are pointers not rules (see R (On the Application of Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ. 1363 at paragraph [69]) and (R v Secretary of State for Education and Employment ex p Begbie [2000] 1 WLR 1115).

[74] When conducting the balancing exercise to establish whether a refusal to honour the promise is an abuse of power, the degree of intensity of review will vary depending upon the character of the decision. The more the decision challenged lies in the macro political field, the less intrusive will be the court's supervision. Here abuse of power is less likely since within it changes of policies, fuelled by broad conceptions of public interests, may more readily be accepted as taking precedence over the interests of the group which enjoyed the expectation generated by the earlier policy.

[75] Judgments on such matters are paradigmatically for the Government to make. It must deal with the extraordinary complexities of domestic and foreign entanglements which make up the patches on a reality that may have shifted over the passing years. In addition there are the crises of the moment to be dealt with. (See Begbie's case at [1130] – [1131] and (Patel) v General Medical Council [2013] 1 WLR 2801 at paragraph [61]).

Discussion

The promise

[76] We are satisfied that the Government made to the appellant a promise to hold a public inquiry that was clear, unambiguous and devoid of relevant condition subject only to the qualification that it required to be recommended by Judge Cory.

[77] Moreover as the learned trial judge correctly pointed out at [164] of his judgment, that promise was made not only to the appellant but also to the Government of the Republic of Ireland, the political parties of the Weston Park Conference and to the general public of both Northern Ireland and the Republic of Ireland as an integral part of the peace process.

[78] Our reasons for so concluding can be briefly stated. First, the Weston Park Agreement, signed by the SOSNI and the Irish Minister for Foreign Affairs, unambiguously stated that in the event that a public inquiry was recommended by the appointed judge, "the relevant Government *will* (**our emphasis**) implement that recommendation".

[79] Secondly, the appointment of Judge Cory again unambiguously asserted that in the event that he was to recommend a public inquiry, the Government "will" implement the recommendation.

[80] Thirdly, the Cory report did recommend a public inquiry. Any qualification therefore was removed by virtue of this.

[81] Fourthly, as the learned trial judge pointed out at paragraph [158] of his judgment, on a number of occasions thereafter both in Parliament and elsewhere, the unflinching assertion was made that the Weston Park Agreement would be implemented.

[82] Self-evidently the promise did not on any occasion indicate that the public inquiry would be in the *format* suggested by Judge Cory. That was not part of his remit and no undertaking was ever given that the suggested format would be followed.

[83] Mr Eadie contended that the promise to establish the inquiry was subject to an assessment of the public interest at the time the decision ultimately fell to be made. It was not a commitment to hold a public inquiry unlimited by time or future circumstance. Moreover it was not a commitment to any particular form or detail of public inquiry.

[84] It is undoubtedly implicit in every promise that is made of this genre, that such a policy, promise or practice may change on rational grounds. As in this instance, any policy with no terminal date or terminating event will continue in effect until rational grounds for cessation arise. At this first stage, as in this instance,

the onus is on the appellant to establish the promise and we are satisfied that she has discharged that onus.

[85] A wholly different second stage arises when the Government seeks to depart from that promise in the public interest. It is at this second stage that the onus shifts to the Government. The public interest argument offered at this first stage by Mr Eadie serves to erroneously conflate the two stages. To do so is to fail to recognise the shifting burden of proof in the two separate stages.

[86] Consequently we are satisfied that the learned trial judge came to a proper conclusion on this first stage.

Identification of an overriding public interest

[87] We turn now to the second stage in the consideration of the concept of legitimate expectation namely whether the respondent, with the onus being on it, has identified any overriding interest to justify the frustration of the expectation and, if so, whether the learned trial judge correctly weighed the requirements of fairness against that interest.

[88] We are satisfied that Stephens J correctly understood the legal principles to be applied. At paragraph [22] of his judgment he identified a number of questions that arose for determination in this context namely:

> "… (a) Whether the applicant has established a promise to hold a public inquiry which promise was a clear and unambiguous representation devoid of relevant qualifications.
>
> (b) If so, then whether the respondent has identified any overriding interest or interests to justify the frustration of the expectation.
>
> (c) If so, then whether the decision in this case lies in … the macro-political field or whether the facts of this case are discrete and limited, having no implications for an innominate class of persons and without wide-ranging issues of general policy, or none with multi-layered effects upon whose merits the court is asked to embark.
>
> (d) In either event, but informed by the degree of intensity of review, whether the consequent frustration of the applicant's expectation is *so* unfair as to be a misuse of the respondent's powers.

(e) If the applicant has successfully established a challenge on this ground then what, in the exercise of discretion, is the appropriate remedy."

[89] We are satisfied that the learned trial judge thereafter correctly applied the principles to the facts of this case for the following reasons.

[90] First, the public interest considerations touching upon the issue were crystallised in the statement to Parliament made by the Secretary of State on 11 November 2010 when he recorded the six following factors set out at paragraph [45] of this judgment.

[91] It was Mr McDonald's contention that for the SOSNI and the learned trial judge to merely rehearse these factors fails to identify the overriding public interest which in the final analysis justified the ultimate decision not to hold a public inquiry. The judge had erroneously conflated the identification and discussion of those factors with their adoption as reasons for the decision taken and has failed to identify the relevant factors in his judgment.

[92] We consider that such contentions are untenable. In the first place, public interest considerations were identified again and again in the course of exchanges with the SOSNI and with the Prime Minister deriving from the various briefing papers and policy documents prepared by officials for them. Contained therein were not only frequent references to the public interest issues but a considered analysis of the pros and cons of permitting them to outweigh the demands of the appellant for a public inquiry. It is idle to speculate that these factors were unconnected to the final decision.

[93] The learned trial judge identified a comprehensive list of such references, a selection of which suffices to make the point as follows:

(i) The cost issue and the need to consider the public interest in a fair and measured manner was discussed on 3 November 2010 in direct correspondence between the SOSNI and the Prime Minister (see paragraph [42] of this judgment). The financial implications of a potentially lengthy open-ended public inquiry were very much the matter that was considered in the public interest.

(ii) On 25 January 2011 when the SOSNI met with NIO officials on this matter, the former said that one of principles which was important to the Government was to limit time and cost (see paragraph [45] of this judgment).

(iii) The Threlfall briefing paper of 1 April 2011, wherein he set out that the Government could legitimately argue the current pressures on the

Government finances make the costs issue a more significant factor than was previously the case (see paragraph [48] of this judgment).

(iv) On 8 April 2011, after the briefing paper had been received, the SOSNI meeting with NIO officials again considered the time and cost implications and noted the SOSNI's concern about reverberations across Whitehall if a decision to hold a potentially expensive inquiry was taken (see paragraph [50] of this judgment).

(v) The meeting of 5 May 2011 involving the SOSNI and the Prime Minister expressly records the Prime Minister indicating that the Government's policy and public inquiries (i.e. the cost) was a clear factor (see paragraph [52] of this judgment).

(vi) The Threlfall speaking note for the SOSNI of 8 July 2011 (see paragraph [55] above) made a similar case.

(vii) The 11 July 2001 Ministerial meeting attended by the Prime Minister recorded him indicating that there were strong reasons to conclude that the public interest in meeting the objective of finding the truth would be better served by a process other than a potentially "lengthy, costly and procedurally difficult public inquiry"(see paragraph [60] above).

[94] Hence to suggest that the Secretary of State, the Prime Minister, and for that matter the learned trial judge, have failed to identify cost as a factor that loomed large in the final decision to deny a public inquiry is self-evidently without foundation.

[95] Secondly, in this context, the experience of other public inquiries established after Weston Park manifestly were considered by the Prime Minister and the SOSNI and fed into this cost issue e.g. the letter of 3 November 2010 from the SOSNI to the Prime Minister (see paragraph [42] of this judgment).

[96] The Threlfall briefing paper of 1 April 2011 revisited this matter (see paragraph [47] of this judgment).

[97] Once again, it is simply unarguable to contend that these express references failed to feed into the public interest discussion on cost that clearly led to the final decision.

[98] Thirdly, the conclusions of previous reviews and investigations and the extent to which they were capable of giving rise to public concern were clearly to the fore of the mind of those discussing the public interest. An example of this is again the briefing paper of Threlfall of 1 April 2011. It summarised the outcomes of those investigations, the terms of the Weston Park Agreement, the appointment of Judge

Cory and his conclusions and the possible model for a fresh review whilst at the same time balancing the potential deficiencies of a "rerun of Cory".

[99] The previous investigations were specifically drawn to the attention of the Prime Minister in the briefing paper of Simon King of 4 November 2011 (see paragraph [51]).

[100] Accordingly in the assessment of public interest issues, the previous reviews and investigations and the concerns which they had thrown up were very much in play in the decision that was made. The learned trial judge was aware of this history and indeed specifically cited these issues on various occasions throughout his judgment.

[101] Fourthly, the delays that have occurred since the 2004 announcement and the potential length of any public inquiry were again concerns that were threaded through the various briefing papers and exchanges. The dangers of a potentially lengthy procedurally difficult public inquiry were referred to in the Ministerial meeting chaired by the Prime Minister on 11 July 2011 and the paper circulated by the Cabinet Office of 7 July 2011 in advance of the meeting to be chaired by the Prime Minister ("it would potentially offer the quickest means of establishing, as far as possible, given the passage of time, the truth of the case and a significantly less resource intensive way than would be possible in an inquiry").

[102] The paper of 17 May 2011 following the meeting of 16 May 2011 between Simon King the Private Secretary to the Prime Minister and other officials recorded:

> "It could be argued that an inquiry would be too lengthy and costly … The model could be presented as representing the quickest means of finding out the truth. "

[103] Finally, it is clear that in coming to a decision about the public interest, developments in Northern Ireland, and indeed elsewhere, played a part in the argument.

[104] One has only to examine the note prepared by Simon King of 4 May 2011 for the PM's meeting with the SOSNI to discuss the Finucane case (see paragraph [51] above) to observe the reference to the main argument for holding an inquiry being "the issue has iconic status as the last great legacy issue on the nationalist side. The Dublin system is (unusually) unanimous that an inquiry is necessary, and this has survived the transition from Fianna Fail to the traditionally less overtly nationalist Fine Gael. Similarly, Washington favours holding an inquiry and lobbying got the issue on to Obama's platform in 2008. This is a big issue for Sinn Fein. In short, the political fallout from not holding an inquiry would be very significant".

[105] Against the inquiry being granted was "the political reaction on the Unionist side if we decided to hold an inquiry would not be as strong as the reaction on the Nationalist side if we decided not to, there would still be criticism about spending a large amount of money and this at a time of cuts to public services in Northern Ireland. … The Security Service have already said they have serious concerns about the implications of an inquiry for the security of their agents and it would be extremely resource intensive at a time when they face other major pressures. …"

[106] We are satisfied that the full range of public interest factors in play were all considered thoroughly and fed into the final decision. Some may have carried more weight than others. Nonetheless the decision made on 11 July 2011 at the Ministerial meeting attended by the Prime Minister, the SOSNI and various other senior Cabinet Ministers was clear, namely that there were strong reasons to conclude that the public interest in meeting the objective of finding the truth would be better served by a process other than a potentially lengthy, costly and procedurally difficult public inquiry which might ultimately prove unworkable given the sorts of national security issues which it would be required to cover. That decision was informed by the preferred route of asking an independent person to carry out a paper based review of all existing material relating to the case with a view to considering what more information could be made public. Ministers were agreed that this would stand a chance of bringing a speedier and satisfactory resolution to the whole case.

[107] We conclude that not only was this reasoning transparent but, based on all the range of public interest factors under consideration, it was a lawful decision by the Government, within its discretion, that it should not be held bound to maintain a policy of instituting a public inquiry in this instance. We are satisfied that these reasons amounted to the identity of overriding interests on which the Government relied to justify the frustration of the expectation.

[108] We also consider that the learned trial judge had identified these factors. Mr McDonald's criticism of the learned trial judge's assessment of this conclusion at paragraph [165](b) is unjustified. Stephens J had visited all of these factors in the course of his comprehensive and lengthy assessment of the factual background and indeed returned to them again in considering the concept of fairness.

The macro political issue

[109] Before turning to the role of the court in weighing the requirements of fairness against the overriding interest relied upon for the change of policy, we must consider whether the learned trial judge correctly answered the question as to whether he was treading in a macro-political field.

[110] Mr McDonald made three points essentially. First, that as this involved a serious breach of the rule of law anxious scrutiny should be invested irrespective of the macro-political element found by the court. Secondly, that the mere fact this

case attained public notoriety and public interest, was not enough to deflect the fact that the commitment had been made personally to the appellant and her family. Thirdly, that the reasons given for this course of action, namely that the matter could be determined in the quickest and most effective way by virtue of a non-statutory inquiry were reasons entirely within the competence of the court to consider.

[111] We conclude that the judge was correct in deciding that this matter did concern macro-political issues of policy. We summarise the reasons for our conclusion as follows.

[112] Throughout this sprawling narrative of briefing papers and exchanges between Ministers on this topic, the design of the discussions and the language deployed are regularly punctuated by the notion of the macro-political element. Some illustrations will suffice to underline this point.

(i) The genesis of the undertaking was the Anglo-Irish political talks at Weston Park in 2001. This was a political and international agreement signed between the United Kingdom and Irish Governments bathed in the broader objective of implementing the Good Friday Agreement and achieving political stability in Northern Ireland. Mr Eadie was correct in asserting that the Government's assessment of the public interest in Northern Ireland at that time lay at the heart of the agreement. What could carry a clearer macro-political element than this?

(ii) We agree with the conclusion of the learned trial judge that whilst the applicant was a crucial person to whom the promise was made, it was also a promise to a wide range of persons and bodies and was part of the complex interlocking political process. "This is a classic case of wide-ranging issues of general policy with multi-layered effect". (See paragraph [167] of the judgment of Stephens J).

(iii) The international concerns raised by the concept of a public inquiry were manifest in the briefing paper of Threlfall of 1 November 2010 referring to both Irish and US political opinion and to coalition considerations of the Liberal Democrats.

(iv) The Fletcher note of 4 November 2010 refers to "coalition dynamics, Adams/McGuinness/the Irish and the Americans".

(v) The Fletcher briefing paper before November 2010 to the Prime Minister speaks of the iconic resonance in northern nationalism, the Republic of Ireland and Irish America.

[113] Cost and expenditure are sources of constant, and at times nourishing, discussion between Government members in the shaping of the policy. Whilst the

matter of cost was doubtless a comfortless issue for the appellant, the refraction of experience as time passes frequently plays an important role in macro-political matters. In a time of economic crisis and public sector austerity, a Government is entitled to weigh up the cost of potentially open-ended or lengthy public inquiries in light of the costs of other inquiries that had occurred. There is an air of grinding familiarity about the number of times that this concept features in the exchanges as set out earlier in this judgment. These are clearly macro-political matters which stretch far beyond the narrow, albeit very important, issue of the undertaking to the appellant.

[114] The learned trial judge also correctly, at paragraph [180], refers to the fact that the context of the impugned decisions included the change in the political situation in Northern Ireland which was pre-eminently a macro-political issue for Government to assess.

[115] Stephens J was justified in rejecting the suggestion that simply because some of the reasons for the decision were within the court's competence – e.g. whether it was a more effective way of getting to the truth to compel witnesses to answer questions at an inquiry rather than a review of documents – this does not render the entire decision outside the macro-political field. The overall context was accurately described by him as being in the macro-political field and accordingly the overall intensity of review was limited to that degree.

Misuse of Power

[116] Finally, we turn to the weighing by the court of the requirements of fairness against the interests upon which the respondent relies to justify that frustration. Was the frustration of the appellant's expectation so unfair as to be a misuse of the respondent's powers?

[117] We have determined that the learned trial judge was fully entitled to conclude that the frustration of the applicant's expectation and the decision to set up the de Silva review was not so unfair as to be a misuse of the respondent's power. We are of this view for the following reasons.

[118] First, we are satisfied that a genuine balancing exercise was carried out. As will be evident from the history which we have rehearsed and the detailed analysis of the learned trial judge, on a number of occasions officials presented to the SOSNI the arguments in favour for and against the granting of a full public inquiry. Examples include the Threlfall briefing paper of 1 April 2011 and the King briefing paper to the Prime Minister of 4 May 2011. The SOSNI engaged in various discussions about the competing issues.

[119] Secondly, the SOSNI and the PM, through the briefing papers, were frequently reminded of the commitment that had been made to grant a public inquiry and to the interest of Governments beyond the United Kingdom e.g. the

Republic of Ireland and USA who were clearly lobbying for such a public inquiry together with certain political parties within Northern Ireland. For example, the briefing paper to the Prime Minister from Simon King of 4 May 2011 described the opposition of the respondent and her family to the refusal to grant a full public inquiry and this was frequently ventilated. Those arguments were clearly taken into account throughout the process.

[120] Thirdly, to that end, the Finucane family and legal representatives were consulted on a large number of occasions over a considerable length of time. The learned trial judge made specific reference to each of these occasions for example at paragraphs [81], [83], [84], [86], [102], [105], [109], [111], [113], and [116]. Moreover the Threlfall paper of 17 May 2010 to the SOSNI specifically suggested that the process should involve writing to the Finucane family. The consultation process manifestly involved the Finucane family in discussions to the extent that not only were there meetings with the SOSNI but also with the Prime Minister.

[121] The appellant was offered a public inquiry under the 2005 Act which in our view would have occurred but for the refusal of the appellant to accept the implications of s19 of that Act. Despite attempts to resolve this, it is clear that the impasse occurred between the Government's legal representatives and the legal representatives of the appellant. Attempts to resolve the problem of the restriction notices under the 2005 Act floundered and proved incapable of resolution.

[122] We found that there is strength in the submission by Mr Eadie that it is appropriate for the court to take into account, in assessing the fairness and the allegation of an abuse of power, the fact that we have found that this commitment was made not only to the Finucanes, but one that had been made to the public at large emanating from the Weston Park Agreement between the two Governments.

[123] The factors of public interest such as cost, speed and efficiency were in play. The court is entitled, as was the Government, to take them into account in weighing up whether or not there had been an abuse of power in this instance.

[124] It is also pertinent to observe, as did the learned trial judge, that this was not a case where there had been an element of reliance by the appellant on the undertaking given. This would have been a factor in favour of granting a public inquiry had some such reliance been invested in the matter by the appellant.

[125] Finally, in considering the fairness of the frustration of the expectation of a public inquiry , the learned trial judge correctly took into account not only the terms of reference of the de Silva review but also the substance of his conclusions. He considered whether or not a review was an effective way of getting to the truth and concluded that this was an issue within the court's competence.

[126] Stephens J carefully analysed the differences between a full public inquiry and the document based de Silva review e.g. witnesses could not be compelled to

attend or to answer questions (as had been the situation in the earlier investigations including that of Judge Cory) and the fact that there were deficiencies in the written documentation which by themselves might not reflect the truth in any event.

[127] On the other hand he properly took into account in this balancing exercise the following matters relevant to the de Silva inquiry:

- He could meet people to assist him with his work and the Government would assist this process.

- He could invite written representations or submissions.

- In the event Sir Desmond did meet with individuals who had served in the Army, the RUC and the Security Service and questioned them.

- He met and received submissions from Colonel J albeit he was not able to meet with A/13 who had been Nelson's former handler due to medical reasons.

- Sir Desmond noted that with the passage of time several additional witnesses were deceased including for example one of Nelson's former handlers, one of Stobie's former handlers and the two agents Nelson and Stobie.

- De Silva recognised that whilst many of the witnesses on the Government side were still alive including from the FRU, RUC, and Security Service and could be summoned to give evidence, there was no guarantee they would illuminate the facts further bearing in mind that a number of key witnesses were dead.

- Moreover with the passage of time there was no guarantee that those summoned would remember events sufficiently clearly to assist the inquiry. Thus for example the learned trial judge concluded that after the elapse of time he considered it unlikely, although not impossible, that Nelson's handler would remember events sufficiently clearly to assist an inquiry or necessarily reveal all that she knew particularly given that Nelson who implicated her was now dead.

- Sir Desmond de Silva was a highly distinguished and entirely independent Chair who has stated that he had received full co-operation from Government. Moreover he published his report. Such a distinguished international lawyer could be depended upon to carry out a rigorous forensic examination.

[128] We are satisfied that the learned trial judge meticulously analysed all the relevant factors - both in favour and against that needed to be taken into account in

weighing the requirements of fairness against the interests upon which the respondent now relies to justify the frustration of the expectation. He dealt with these in a fully rational manner and we are satisfied that he came to a proper conclusion. We reject the contention therefore by Mr McDonald that this decision was conspicuously unfair or an abuse of power.

Mala fide /Sham process and failure to follow the stated process

[129] It was the contention of Mr McDonald that:

- The decision not to hold a public inquiry into the murder of PF was pre-determined by the Government's adherence to the stated view of the Prime Minister and of the SOSNI that there would be no more open ended and costly inquiries into the past.

- Moreover the decision was not made in accordance with the stated process or criteria emanating from the SOSNI (see paragraph [44] of the judgment) or even in real terms by the person who was supposed to make it, namely the SOSNI.

- The process was in fact driven by the Prime Minister as illustrated by the fact that when SOSNI, applying the criteria, had come up with two options on 8 April 2011 (see paragraph [50] above), the Prime Minster, without any reference to the criteria, came up with a third option on 5 May 2011 (see paragraph [52] above) which in the event became the focus of all the attention. In short, the case is made by the appellant that the ultimate decision to have a non-statutory inquiry was freighted with the PM's own attitude to the cost of public inquiries and the whole process was one of organised hypocrisy given the unflinching view of the PM.

- From the moment the Prime Minister formed this view, there was an unfolding inevitability about the whole matter.

[130] Finally counsel drew attention to the Fletcher memo of 3 November 2010 (see paragraph [43] above) as evidence of the inauthentic commitment to a fair process and to the Heywood e-mail of 9 June 2011 (see paragraph [58] above) illustrating the logical indefensibility of the Prime Minister's position.

[131] It was, counsel contended, a classic example of mala fide in the decision making process.

Legal Principles governing this issue

[132] The quest to establish bad motive has a relatively elevated threshold. Improper motive is not as a general rule easily proved and is not to be lightly

inferred. An inference on the part of any court or tribunal that a public law power has been misused requires solid and persuasive foundation.

[133] In Re CD's Application [2008] UKHL 33 Lord Carswell said that the proper state of the law was effectively summarised by Richards LJ in R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ. 1605, [2006] 4 All ER 194 at paragraph [62] where he said:

> "Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

(See also [2016] NI Coroner 1.)

[134] We are not satisfied that the appellant has established sufficiently strong or qualitative evidence to prove mala fide in this instance on the balance of probabilities. We are of this view for the following reasons.

(i) We found no evidence of a pre-determined adherence to a view that there would be no more open and costly inquiries into the past which therefore dictated the outcome of this matter. On the contrary, it was clear from the statements made by the Prime Minister, the briefing papers provided to him and the statements made by the SOSNI that, as the learned trial judge pointed out at paragraph [195], the policy was that whilst generally against open-ended, long running and costly public inquiries into the past in Northern Ireland these decisions should be made on a case by case basis. We find that there was not a fixed policy which excluded the possibility of variations on a case by case basis. Such a policy with the flexibility of a case by case consideration is perfectly reasonable for a government to hold particularly in times of austerity. Far from evidencing a closed mind, it displays proper policy making with the opportunity to refine the architecture whenever necessary.

(ii) We do not find evidence that the process was driven by the Prime Minister. The fact of the matter is that the Ministerial Code emanating from the Cabinet Office of May 2010 at paragraph 1.10 makes it clear that the Prime Minister must be consulted in good time about any proposal to set up major public inquiries under the Inquiries Act 2005. Apart from all the accepted conventions of collective Cabinet decisions, it would have been extraordinary if the Prime Minister had not been consulted on this matter. Once he was consulted, it would be contrary to all the promptings of reason and good sense if he was deprived of the right to forthrightly state a view on the outcome of the process or to make a suggestion. He is required neither to adopt a traceless presence nor a state of remote unavailability as the final decision is taken. The officials clearly played an important role in advising both the Prime Minister and the SOSNI as to the various options and indeed to provide advice as to eventual outcomes. We find nothing in the process that was adopted in this instance that offends against what one would expect to find in good government. Such consultations require strategic patience with an accompanying ebb and flow of views and opinions before a final determination is made. We are satisfied that a collective decision was finally made on this matter on 11 July 2011.

(iii) We find the attacks on the bona fide of the PM based upon, for example the Fletcher letter and memorandum of November 2010 to be similarly baseless. This was a civil servant and Cabinet Office policy advisor to the Prime Minister who, in this role, would be expected to suggest a way forward and to draw attention to attendant dangers – both legal and strategic – if due process is to be properly invoked. His memos are not to be construed as a statute where every sentence is nuanced and every observation is to be brought into precise dialogue with all that has preceded it. Those views do not necessarily betray the view of the recipient whether that be the Prime Minister, the SOSNI or indeed other officials who may be advising them. Precisely the same reasoning applies for example to the memoranda emanating from Simon King.

(iv) The process followed was exhaustive with briefing papers and the various options weighing up the pros and cons of a public inquiry over an extremely extended period. As already outlined representations were extensively obtained from the appellant with accompanying attempts to facilitate the objections raised. The period for consultation was extended at the request of the appellant and all the counter arguments against the final solution were probed with objective thoroughness. A contention that this was all part of a lengthy and labour intensive sham process requires a surer foundation than the speculation mounted in this case.

[135] In short we are satisfied that there is neither the necessary strength nor quality in any of the evidence produced to found an allegation that this outcome was pre-determined or that the process followed amounted to a sham.

Considerations under Article 2 of the Convention

[136] As outlined in paragraph [2] of this judgment, the appellant contends that the failure to hold a public inquiry into the murder of PF is incompatible with her Article 2 rights under the Convention and therefore a breach of Section 6 of the Human Rights Act 1998. Whilst she relies on the judge's decision that Article 2 does apply, and his conclusion that at the time of the Committee of Ministers' decision in 2009 there had not been an effective investigation in compliance with Article 2 of the Convention, she contends there is yet to be such an investigation and appeals against the judge's decision that Article 2 of the Convention does not require the holding of a public inquiry in this case.

[137] Relying on:

- the Finucane case decision (see paragraph [37] above).

- the consideration of the matter by the Committee of Ministers to the effect that its decision was to close the case in the circumstances where the UK Government was actively working on proposals for establishing a possible statutory inquiry whilst relying on the Stevens Three investigation and the DPP's consideration of the product of that investigation.

- and a number of international standards which had not been complied with and which the learned trial judge had failed to address,

Mr McDonald made the following points.

(i) Relevant international law standards are used as interpretation tools by the European Court. The court in this instance should have used the relevant international law standards referred to in the European Courts judgment in the Finucane case at paragraph [56] et seq as guidance as to what the requirements of a compliant Article 2 investigation should embrace.

(ii) *The UN Principles for the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1989)* have been breached, inter alia, in the following regards:

- The investigative authority did not have power to obtain all the information necessary for the inquiry.

- Persons conducting the investigation should have at their disposal all the necessary budgetary and technical resources for an effective investigation.

- They should have authority to oblige officials allegedly involved in such executions to appear and testify.

- The same should apply to any witness.

- They should be entitled to issue summonses to witnesses including the officials allegedly involved and to demand the production of evidence.

- The Government should pursue investigations through an Independent Commission of Inquiry or similar procedure. That Commission should have authority to obtain all information necessary to the inquiry and conduct the inquiry under these principles.

- Families of the deceased and their legal representatives should be informed of, and have access to any hearing as well as to all information relevant to the investigation.

(iii) *The Model Protocol for the Investigation of Extra Legal, Summary and Arbitrary Executions (the "Minnesota Protocol")* was breached, inter alia, in the following regards.

- In cases where Government involvement is suspected an objective and impartial investigation may not be possible unless a special commission of inquiry is established.

- A belief that the Government was involved in the execution should trigger the creation of a Special and Impartial Investigation Commission.

- The Commission should have authority to obtain all information necessary to the inquiry for example for determining the cause, manner and time of death including the authority to compel testimony under legal sanction and to order the production of documents including Government and medical records.

- The hearings should be conducted in public.

- The Commission should have the power to compel testimony and production of documents.

- Families of the deceased and their legal representatives should be informed of, and have access to, any hearing and all information

relevant to the investigation and should be entitled to present evidence.

- There should be an opportunity for the effective questioning of witnesses by the Commission. Parties to the inquiry should be allowed to submit putting questions to the Commission.

- The Commission should evaluate oral testimony based upon the demeanour and overall credibility of the witness.

- The report of the Commission should list all witnesses who have testified except for those whose identities are withheld for protection.

[138] Counsel also invoked the concluding observations on the UK's report in August 2015 from the UN's Human Rights Committee which "noted with concern" that "the review relating to the murder of Patrick Finucane i.e. the de Silva review does not appear to satisfy the effective investigations under the Convention". That Committee had indicated that the UK should "consider launching an official inquiry into the murder of Patrick Finucane". In 2013, after the publication of the de Silva review report, the UN Committee Against Torture said that it "is concerned about the State party's decision not to hold a public inquiry into the death of Patrick Finucane" and recommended that one should be established.

[139] Mr McDonald contended that Article 2 takes its meaning and content from these standards and the failure on the part of the Government and the de Silva review to embrace these principles constituted breaches of Article 2 in the absence of a decision to set up a public inquiry.

[140] Mr Eadie on behalf of the respondent contended that:

- The State did not owe a procedural duty to the appellant under the terms of the Convention and in any event there had not been a violation of that duty.

- Reliance on Re McCaughey [2012] 1 AC 725 by Stephens J to the effect that there was a genuine connection between the triggering event (i.e. the death of PF) and the critical date (i.e. the introduction of the Human Rights Act in the year 2000) because much of the investigation into the death occurred after the critical date, was erroneous.

- Reliance on R (Keyu) and Others v Secretary of State for Foreign Affairs and Commonwealth Affairs [2014] EWCA Civ. 312 in the Court of Appeal in England and Wales and Re Hoy (unreported, NICA, 27 May 2016) led to the conclusion that the ratio of McCaughey was to be narrowly interpreted and confined to cases involving decisions to hold an inquest into a pre-incorporation death.

- In any event the instant case, unlike the inquest issue in McCaughey, dealt with a form of review or examination of pre-incorporation death which did not trigger an obligation to meet Article 2 standards.

- The danger of interpreting McCaughey more widely was that any form of "cold case" review of historic deaths could have the result of triggering an Article 2 procedural obligation. The State would be subject to perverse incentives to conduct no review at all. Where the intended purpose of such an examination was to inform a decision about whether to carry out a full Article 2 investigation the process would be self-defeating since the outcome would have been pre-determined from the start and such circularity of outcome would not have been intended by Parliament when enacting the Human Rights Act.

- The principles set out in Silih v Slovenia [2009] ECHR 71463/01 and Janowiec v Russia [2013] ECHR 55508/07 – which defined the circumstances in which the procedural obligation to carry out an effective investigation under Article 2 had evolved into a separate and autonomous duty – were instances of the European Court of Human Rights' own temporal jurisdiction for deaths occurring prior to a State's ratification of the Convention. The extent to which they are applicable in domestic law under the Human Rights Act 1998 is currently undecided as illustrated by the decision of the Supreme Court in R (Keyu) v Secretary of State for Foreign Affairs [2015] UKSC 69 and to so conclude that they were applicable to domestic law would be for this court to step into uncharted territory.

- Insofar as the principles of Silih and Janowiec did apply to domestic law, the "genuine connection test" had not been satisfied because the majority of the investigative steps had not occurred post the introduction of a Human Rights Act and in any event the period of time between the death and incorporation was in excess of ten years.

- Stephens J had been in error in concluding that the facts of this case fell within the proper definition of "Convention values" in that, serious though this matter was, it was not a crime of such magnitude that they should always be investigated irrespective of the passage of time.

- The learned trial judge was correct in finding that even if Article 2 was applicable, the investigative obligations had been satisfied.

- Brecknell v United Kingdom [2007] 46 EHRR 957 did not apply because it is not every piece of new information about a death or its circumstances which will revive Article 2 obligations. The de Silva reference to the availability of fresh information (see paragraph [64] above) was of an unknown nature and lacks sufficient detail to permit the conclusion by Stephens J that without it the Stevens Three investigation may have been ineffective. The appropriate

step would have been for the court to conclude that where new information emerges which may undermine the conclusions of previous investigations, the relevant obligation under Article 2 is revived and that the State should then take appropriate further investigative steps. It does not equate with the ineffectiveness of prior investigations. In any event there is nothing to suggest that the authorities are taking anything other than appropriate steps to investigate this information. This demonstrates compliance with Article 2 and not a breach.

Discussion

Issues to be determined

[141] Four primary issues need to be considered in this context. First, is there a valid claim for a public inquiry under Article 2 of the Convention under the terms of the Strasbourg jurisprudence?

[142] Secondly, even if the answer to question 1 is "yes", does an Article 2 investigative obligation arise under the 1998 Human Rights Act in the instant case? Since the Act only took effect on 2 October 2000, can it be invoked in order to give the court jurisdiction in respect of the murder of PF which occurred before that date?

[143] Thirdly, if both the above are answered "yes", has there been compliance with the Article 2 obligation under the terms of the Strasbourg jurisprudence?

[144] Fourthly, even if the Strasbourg Court would have held that the appellants would have a valid claim for a public inquiry under Article 2, does a UK court have jurisdiction to entertain such a claim? Does the jurisdiction of a UK court to entertain the claim arise not from the Convention but from the 1998 Act and, as that Act only took effect on 2 October 2000, can it be invoked in order to give the court jurisdiction in respect of an event which occurred before that date?

The authorities

[145] Before turning to our conclusion on this matter, a brief tour d'horizon of the relevant cases and authorities, in addition to those cited above, is instructive.

[146] In Re McKerr [2004] 1 WLR 807 the facts concerned the duty to hold an inquiry or inquest into a suspicious death. The court determined that the House of Lords had "decided on a number of occasions that the [1998] Act was not retrospective". At paragraph [67] Lord Hoffmann said:

> "Your Lordships' House has decided on a number of occasions that the Act was not retrospective. So the primary right to life conferred by Article 2 can have had no application to a person who died before the Act came into force."

[147] Silih v Slovenia [2009] ECHR 71463/01 was a case where the Grand Chamber judgment was one of a number of cases where the law was developed. At paragraph [159] of that judgment the court held that the duty to investigate suspicious deaths had "evolved into a separate and autonomous duty" on a State, which was "a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the "date when the Convention was binding on the State". The guidance which the court gave as to how it was to be decided whether that separate and autonomous duty had arisen has been subject to substantial criticism. This Court, in McCaughey and Quinn [2010] NICA 13, declined to follow Silih. A number of passages in the judgment have proved prescient in light of the continued uncertainty about this extended Article 2 obligation albeit the decision was reversed by the Supreme Court in McCaughey op. cit.

[148] In Janowiec v Russia [2013] ECHR 55508/07 the court explained that whilst Strasbourg jurisprudence had established the general principle that the Convention is not retrospective, that does not necessarily mean that a State has no duty to investigate a suspicious death simply because it occurred before the crucial date i.e. for the purposes of the instant case that critical date being the introduction of the Human Rights Act 2000. The Grand Chamber set out three relevant applicable requirements:

- First, where the death occurred before the critical date, the court's temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to that date.

- Secondly, the procedural obligation will come into effect only if there was a "genuine connection" between the death as the triggering event and the entry into force of the Convention.

- Thirdly, a connection which is not "genuine" may nonetheless be sufficient to establish the court's jurisdiction if it is needed to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective way.

[149] In short, in the case of a death before the critical date, two criteria must be satisfied before the Article 2 investigation duty can arise, namely:

(i) Relevant "acts or omissions" after the critical date, and

(ii) A "genuine connection" between the death and the critical date. The second criterion may be finessed where it is necessary to underpin "the underlying values of the Convention".

Does a valid article 2 claim arise?

[150] We are satisfied that in the instant case the Strasbourg jurisprudence leads to a conclusion that there would be a valid claim for the imposition of an Article 2 obligation in the circumstances of this murder and an Article 2 investigative obligation would arise notwithstanding that the murder of PF occurred before 2 October 2000 when the Human Rights Act 1998 took effect. This recognises that a procedural obligation now has a life of its own as it is detachable from the substantive Article 2 obligation. Our reasons for so concluding are as follows.

Proceedings capable of leading to the identification and punishment of those responsible for the murder of PF.

[151] This was self-evidently a murder involving state agency collusion. The information that came to light in the Stevens Three Inquiry and the Cory Inquiry produced specific evidence pointing to collusion on the part of State agents in the murder of Patrick Finucane. New material emerged through Stevens Three and Cory which was sufficiently weighty and compelling to warrant further investigation and a new round of discussions about a further review by de Silva. No investigation prior to those findings had either addressed or evidenced this in the case of the murder of PF due in no small part to the obstruction on the part of State agencies to those investigations.

[152] At paragraph [43] of the decision in Janowiec, the court made it clear that the jurisdiction arose only in relation to "procedural" acts which were "undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible … This definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing an historical truth".

[153] We are satisfied that the acts under consideration post the Human Rights Act 2000 in this context, namely Stevens Three, The Cory and de Silva inquiries, were manifestly undertaken in the context of proceedings capable of leading to the identification and punishment of those responsible for the murder of PF. This case therefore falls within the genre delineated in McCaughey.

Genuine Connection

[154] Turning to the criterion of "genuine connection "identified in Janowiec, the Grand Chamber said at paragraph [146]:

> "The lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the 'genuine connection' standard. Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed ten years.

> Even if, in exceptional circumstances, it may be justified to extend the time limits further into the past, it should be done on condition that the requirements of the 'Convention values' test have been met."

[155] Applying this "rule" we consider that an element of flexibility was always intended by Strasbourg. Thus for example in the UK Supreme Court case of Keyu Lord Neuberger, at paragraph [87], said:

> "The 'rule' that one cannot, *at least normally (***our emphasis***)*, go back more than ten years relates to the jurisdiction of the Strasbourg Court."

[156] Whilst it may well be that normally ten years will be the rule, circumstances such as those that pertain in the present case, where there was obstruction on the part of State agents to prevent the truth coming out, should be capable of being invoked to extend the time particularly where it is only one year outside the 10 year hurdle.

[157] Moreover, as Stephens J pointed out in paragraph [34] of his judgment, in Maldenovic v Serbia Application 1099/08 (judgment of 22 May 2012) the court considered it could examine the procedural aspect of Article 2 (and found a violation) in relation to a death that occurred in 1991 when Serbia's ratification of the Convention took place some 13 years later in 2004.

[158] We therefore agree with the conclusion of the learned trial judge that what is "reasonably" short depends on context.

[159] En passant we observe that at paragraph [147] of Janowiec the court recorded as follows:

> "The duration of the time period between the triggering event and the critical date is however not decisive, in itself, for determining whether the connection was a "genuine" one. As the second sentence at paragraph [163] of the Silih judgment indicates, the connection will be established if much of the investigation into the death took place or ought to have taken place in the period following the entry into force of the Convention. This includes the conduct of proceedings for determining the cause of the death and holding those responsible to account as well as the undertaking of a significant proportion of the procedural steps that were decisive for the course of the investigation. This is a corollary of the principle that the court's jurisdiction extends only to the

> procedural acts and omissions occurring after the entry into force. If, however, a major part of the proceedings or the most important procedural steps took place before the entry into force, this may irretrievably undermine the court's ability to make a global assessment of the effectiveness of the investigation from the standpoint of the procedural requirements of art 2 of the Convention."

[160] We note that Lord Kerr in McCaughey's case at paragraph [119(iii)] concluded that where much of the investigation into the death occurs after the critical date, the connection is present. This in turn led Stephens J at paragraph [30] to find that since as a matter of fact much of the investigation into the death of PF occurred after 2 October 2000, the procedural obligation applies in this case.

[161] We consider that insofar as the learned trial judge therefore took the presence of a major part of the investigation being carried out after the critical date as being *on its own* sufficient to establish the genuine connection, he was in error.

[162] Paragraph [148] of Janowiec makes clear that, for a "genuine connection" to be established, *both* criteria must be satisfied: the period of time between the death as the triggering event and the entry into force of the Convention must have been reasonably short, *and* a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force. This assertion is repeated in paragraph [149] of Janowiec.

[163] However, in the event, we consider that both criteria have been satisfied in the instant case, and thus this error does not alter our conclusion that under the Strasbourg jurisprudence the procedural obligation under Article 2 is satisfied.

[164] This conclusion in terms renders it superfluous to determine whether or not the learned trial judge was correct to conclude that both the values "test" and the Brecknell test were satisfied. However for future guidance we make the following comments.

Convention values

[165] The learned trial judge dealt with the Convention values test at paragraph [35]. He correctly set out the law that for this criterion to be satisfied "the death has to be of a larger dimension than an ordinary criminal offence and has to amount to the negation of the very foundations of the Convention".

[166] Paragraph [150] of Janowiec states this would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.

[167] This is an extremely high hurdle to overcome. Stephens J concluded that the obligation of a State not to kill but to protect its citizens and ensure the rule of law was a value at the foundation of the Convention and the murder of a solicitor involving collusion by State agencies negated that foundation. Clearly the facts of this case are unique in this regard and self-evidently would not cover every case where rogue elements in the police or security forces colluded in the murder of a victim. Each case would be fact specific and we do not go so far as to say that the finding of the learned trial judge was necessarily unreasonable in the instant case albeit different conclusions might equally reasonably be reached by other courts.

The Brecknell principle

[168] In Brecknell v United Kingdom [2007] 46 EHRR 957 the Strasbourg Court determined that "where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards for example the location of witnesses and ability of witnesses to recall events reliably".

[169] The learned trial judge correctly set out the law in this matter at paragraph [36] of his judgment. At paragraph [37] he turned to the factual question citing the de Silva assertion that he had uncovered material which "included new and significant information that was not available to Sir John Stevens or Justice Cory". Sir Desmond did not state what was contained in the documents but his report did contain a number of conclusions including one that "employees of the State" actively furthered and facilitated the murder of PF, that "employees of the State" in the aftermath of the murder were involved in "a relentless attempt to defeat the ends of justice" and that agents of the State were involved in carrying out serious violations of human rights up to and including murder.

[170] The learned trial judge attached significance to the meetings that de Silva had with 11 individuals one of whom was Colonel J. He concluded "I consider that for the further information to be significant it has to be relevant to the identification and eventual prosecution or punishment of the perpetrator of an unlawful killing or of those who colluded in it. I consider in the context of this case, involving as it does the most serious allegations, that these pieces of evidence or items of information are sufficient to revive the Article 2 procedural obligation".

[171] I am aware that Deeny J and Horner J formed the majority view of this court that this was a finding within the ambit of the learned trial judge's discretion and affirm its contents. For my own part, I depart from the learned trial judge's conclusion on the basis that he sets the hurdle too low for the Brecknell principles. In brief my reasons are:

- The new and significant information may not necessarily avail the purposes of further criminal investigations. This may not necessarily have been the context in which de Silva raised it. He did not specifically identify it as such.

- To date that new material has been reviewed by the PSNI and as yet it has not afforded any basis for further investigation or prosecution. Where therefore is the material from which it can be deduced that there is a plausible, or credible, allegation, piece of evidence or item of information *relevant to the identification and prosecution of the perpetrators?*

- In short there is insufficient material available to persuade me at this time that this court is in a position to make any meaningful assessment of the value of this information to the overall investigation. This of course might change in the event of this material coming to light.

Has there been compliance with the Article 2 procedural obligation?

[172] Having decided that there is a valid claim that an Article 2 obligation arises under the Strasbourg jurisprudence, the next issue to be determined is whether the Strasbourg jurisprudence leads to a conclusion that there has been compliance with the Article 2 obligation. It is the appellant's case that there has not been compliance with the Article 2 procedural obligation. Mr McDonald contended that a declaration should be made to the effect that the decision to establish a review rather than a public inquiry is incompatible with the applicant's rights pursuant to Article 2 of the Convention. In addition he sought an order of mandamus compelling the immediate establishment of a public inquiry.

The process and form of compliance

[173] The first issue on this matter is to consider the process and form of compliance. There is ample authority for the proposition that the Strasbourg Court has not required that any particular procedure be adopted to examine the circumstances of a killing by State agents nor is it necessary that there be a single unified procedure (per Lord Bingham in R (Amin) v Home Secretary [2004] 1 AC at P. 665H). The choice of method is essentially a matter for a decision by each contracting State within its own domestic legal order.

[174] The principal hallmark of an Article 2 compliant inquiry is that it is "effective". In order to be effective it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. (See Regina (L (A Patient)) v Secretary of State for Justice (Equality and Human Rights Commission Intervening) [2009] AC 588 per Lord Rodger at paragraph [78]).

[175] Secondly, the investigation must be entirely independent of those who may have been implicated in the events. (Re L at paragraph [97]).

[176] Because the investigator is independent, his/her investigation may well be effective, and so fulfil the requirements of Article 2, even though no part of it is conducted in public. (Re L at paragraph [80]). At paragraph [82] of Re L Lord Rodgers said:

> "It is worth stressing that whatever the steps the investigator takes from the time of his appointment until he finishes, they are all part of the single independent investigation which is required by Article 2. That investigation may stop once the initial material is assembled. Alternatively, it may continue with witnesses being heard in private, or in public .. or some in private and some in public, depending on what is needed for an effective investigation …. In reality, whatever its form, if the investigation is independent and effective, it will fulfil the requirements of Article 2."

[177] Mr Eadie correctly drew our attention to paragraph [77] of Re L on the question of resources where Lord Rodgers said:

> "The Secretary of State is concerned about the initial financial implications of having to hold an independent investigation in terms of attempted suicide. His concern is entirely proper, as the European Court has recognised in the judgments cited ... above. His anxieties may have been fuelled, however, by an impression that whenever Article 2 requires an independent investigation be set up, that investigation has to have all the bells and whistles of the full blown public inquiry …. Nothing could be further from the truth."

[178] Thirdly, there is a requirement of promptness and reasonable expedition (see Finucane's case at paragraph [70]).

[179] Fourthly, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case (see Finucane's case at paragraph [71]).

[180] Finally, in all cases the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. (See Finucane's case at paragraph [71]).

The application of international standards

[181] Mr McDonald criticised the learned trial judge for failing to advert to the international standards mentioned at paragraph [134] above (and set out and dealt with at paragraphs [56]-[59] by Finucane v United Kingdom [2003] ECHR 29178/95).

[182] There was some dispute between counsel as to what weight had been placed on these matters before the learned trial judge. Certainly they appeared to have surfaced in the skeleton arguments put before the judge by the appellant but we are in some doubt as to whether or not they were adverted to in the course of the hearing or in closing submissions.

[183] In any event we do not believe that these international standards add anything materially to the principles already outlined. In the first place, none of these standards form part of domestic law and have not been transposed into our legislation.

[184] Secondly, the principles governing Article 2 have been set out clearly in the Strasbourg jurisprudence as already outlined by us in this judgment. Thus for example in Finucane's case the general principles set out between paragraphs [67]-[71] (and which were reflected in the judgment of the learned trial judge at paragraph [25]) do not specifically refer to these international standards although doubtless they were taken into account. In short we consider that the invocation of these international standards, although helpful when crystallising the principles, add nothing to the principles already adumbrated above.

[185] Accordingly we are satisfied that the learned trial judge set out the proper principles to be followed in this area. There was no need for him to advert to the genesis of any of those principles in so far as they were informed by international standards.

[186] We concur with the learned trial judge's decision – and his reasoning between paragraphs [210] and [216] of his judgment - to reject the appellant's contention that the decision to establish a review rather than a public inquiry was incompatible with the applicant's rights for compliance pursuant to Article 2 of the Convention and to refuse the application for mandamus to compel the immediate establishment of a public inquiry. The SOSNI had not acted in a manner incompatible with the procedural obligation under Article 2 in the regard.

[187] We can summarise our views for so concurring in short compass given the factual background we have set out earlier in this judgment. They are as follows:

(i) There has already been a combination of independent investigators and processes set up in the matter which include the Stevens Three investigation, the Cory inquiry and finally the de Silva review which has been published. There is no prescriptive format for such inquiries/investigations as Brecknell makes clear.

(ii) There has been a prosecution and conviction of Barrett. The DPP in June 2007 published a statement giving an explanation as to why no further prosecutions had been directed – a factor noted by the Committee of Ministers.

(iii) The next of kin have been invited to become involved and made detailed representations to the Secretary of State and indeed to the Committee of Ministers.

(iv) Although Finucane v UK resulted in a finding of breaches of Article 2 of the procedural obligation in 2003, that court did not order that a public inquiry should be held.

(v) The Committee of Ministers to whom the matter was referred under Article 46 of the Convention, having received a recommendation of the Secretariat, adopted that recommendation on 19 March 2009. While adverting to "a possible" public inquiry, the Committee accepted that the requirements of public scrutiny and accessibility of the family had been met. In this context we agree entirely with the learned trial judge that he was required to take into account the decision of the Strasbourg Court in Finucane and also the decision of the Committee of Ministers.

(vi) The necessary degree of independence was to be found in Sir Desmond de Silva and, before him, Judge Cory and Sir John Stevens.

(vii) These inquiries were cumulatively effective in uncovering state collusion in this murder albeit as yet no further prosecutions have occurred.

(viii) There has been an adequate level of public scrutiny of the investigations with publication of the Cory and de Silva reports.

[188] Finally in this context, we turn to the decision of the learned trial judge that notwithstanding his refusal to find that a public inquiry was necessary to comply with Article 2, nonetheless as at March 2009, an effective investigation in compliance with Article 2 of the Convention had not been completed to a standard which complies with Article 2 of the Convention. The terms of the declaration merit citation.

> "As of 17 March 2009 an effective investigation into the murder of Patrick Finucane on 12 February 1989 has not been completed to a standard which complies with Article 2 of the European Convention on Human Rights and Fundamental Freedoms."

[189] The judge's reasons for so concluding were:

- The decision of the Committee of Ministers had been made without knowledge of the fact that there was documentary material received by de Silva which had not been available to the earlier investigators. Sir Desmond had described the new documentary material as including new and significant information. Hence this had not been seen by the DPP prior to making prosecutorial decisions.

- The documents had not been received by independent senior counsel prior to those decisions being made.

- Whilst the learned trial judge was bound to take into account the decision of the Committee of Ministers he was not bound by it.

- There is an on-going police investigation and the de Silva report together with this new documentary material is being considered by the police.

- If a decision is made not to prosecute, then the DPP (NI) will have an obligation to publicly make known his reasons for that decision.

- The procedural obligation under Article 2 will be met if -

    1. the de Silva report,
    2. the documents disclosed to Sir Desmond, and
    3. the documents generated by Sir Desmond are all considered by the PSNI and by the DPP with the assistance of independent senior counsel, and
    4. reasons are publicly given if there is no prosecution.

[190] Hence, the learned trial judge concluded that the fact that "new and significant information" uncovered by de Silva had not been seen by Sir John Stevens, Judge Cory, the PSNI, the DPP or independent counsel in circumstances where those documents were in the possession of the government departments or could have been obtained by the PSNI meant that there was not as at March 2009 an effective investigation in compliance with Article 2 of the Convention. In short there was a continuing procedural obligation on the State to investigate the murder of PF. He made a limited declaration to this effect.

[191] We consider that the learned trial judge fell into error in coming to these conclusions and in making this declaration for the following reasons.

[192] First, the information, albeit substantial, referred to by the de Silva report is something of an unknown quantity. There is no evidence that it constitutes an Article 2 violation as yet. It is worth considering the precise terms in which Sir Desmond de Silva cited this finding:

> "I have .. sought and received new documentary material from all the organisations cited in my terms of reference and a number of Government departments. That material has included new and significant information that was not available to Sir John Stevens or Justice Cory."

[193] We consider that Mr Eadie is correct to assert that this material may not necessarily have been significant for the purposes of further criminal investigations. We must await the outcome of the continuing investigations.

[194] Secondly, following the publication of the de Silva report, the Assistant Chief Constable requested the Historical Enquiries Team to consider the report and underlying materials in order to ascertain whether there are any further investigative opportunities that might be available. In an interim report to the Public Prosecution Service in February 2015 it was concluded by PSNI that the material did not reveal any further opportunities. An affidavit from Superintendent Murphy – who has now made two affidavits dated February 2015 and 31 October 2016 – reveals that more work is still underway in relation to Chapters 21-25 of the report.

[195] That work remains on-going. When it is completed a report will be forwarded to the Public Prosecution Service who are aware of the on-going work. In the absence of some more positive information as to the basis upon which the de Silva conclusions are made, we do not find it possible at this stage to form a conclusion that necessarily constitutes a breach of the Article 2 obligations as earlier set out.

[196] Mr Eadie has indicated to us, presumably on instructions, that it is likely that the report will be finished "within weeks" and hence concerns about the delay that has occurred in dealing with this matter should soon be resolved.

[197] Thirdly, we consider there is some weight in the submission by Mr Eadie that where, following the Brecknell principles, new information emerges which may undermine the conclusions of previous investigations or give rise to new opportunities, the relevant obligation under Article 2 is revived and then the State should take appropriate further investigative steps. Revival of an investigative obligation or the need to take further steps to complete an earlier investigation

based on new information should not be equated necessarily with the ineffectiveness of prior investigations. The steps which are currently underway - an investigation by the PSNI with the need for a further reference to the PPS who can then decide whether a formal review of its 2007 decision is required - are precisely the steps that one would expect to be taken in compliance with or to complete the duties under Article 2. We question therefore the necessity for or benefit of such a declaration *at this time* given that the conventional steps are currently being taken to complete the investigations. Different considerations would of course have arisen if no such investigation had been precipitated by this new material in order to complete any outstanding obligation under Article 2. Indeed different concerns may soon arise if this investigation is not carried out with the promptness and efficiency which the occasion clearly demands.

[198] In summary therefore, we have come to the conclusion that whilst under the Strasbourg jurisprudence, the domestic law Article 2 procedural obligation does apply to the murder of PF, we are equally satisfied that to date there has been compliance by the State with the obligations arising thereunder. We therefore reverse the decision of Stephens J to make a declaration.

Is there an Article 2 investigative obligation arising under the Human Rights Act 1998

[199] Given our conclusions, the question as to whether a UK court has jurisdiction to entertain such a claim under Article 2 of the Convention in the circumstances of this case becomes academic and unnecessary to be answered by this court. The issue raised by Mr Eadie was based on the proposition that the jurisdiction of a UK court to entertain the claim arises not from the Convention but from the 1998 Act and, as that Act only took effect on 2 October 2000, it cannot be invoked in order to give the court jurisdiction in respect of an event which occurred before that date.

[200] Nonetheless, in deference to the length of the arguments that have been addressed before us on this issue we consider that we should at least crystallise the issue.

[201] The learned trial judge did not have the benefit of the judgments of the UK Supreme Court in Regina (Keyu and Others) v Secretary of State for Foreign and Commonwealth Affairs and Another [2015] UKSC 69.

[202] The relevant facts of Keyu arose out of a shooting in December 1948 by a Scots Guards patrol of 26 unarmed civilians in Selangor. At that time Selangor was a British protected State in the Federation of Malaysia. The issue was whether the respondents were required to hold a public inquiry (or other similar investigation). The decision under challenge was the refusal to hold such an inquiry pursuant to the Inquiries Act 2005. The official version that 26 bandits had been shot and killed whilst attempting a mass escape was not universally accepted. In 1969 one of the patrol provided a sworn statement to a newspaper to the effect that the men had been massacred in cold blood. In 1970 the DPP halted an investigation on the basis

that criminal proceedings would not be justified on the evidence so far gathered. A BBC documentary in 1992 revived the controversy. In 1993 the Crown Prosecution Service decided it was pointless to re-open the investigation. In 2008 a campaign group picked up the mantle calling for a public inquiry on behalf of family members and when the respondents declined to do so, an application for judicial review was lodged.

[203] The question for determination was whether the respondents were required to hold a public inquiry (or other similar investigation). The decision under challenge was the refusal to hold such an inquiry pursuant to the Inquiries Act 2005. One of the grounds upon which the review was sought was that a public inquiry was required under Article 2 of the Convention. The claim was dismissed by the administrative court and the Court of Appeal. A majority of the Supreme Court (Lady Hale dissenting) dismissed the appeal.

[204] The relevance to the instant case is found in those parts of the judgment dealing with the contention that the jurisdiction of a UK court to entertain a claim arises not (at least directly) from the Convention, but from the 1998 Act and, as the Act only took effect on 2 October 2000, it cannot be invoked in order to give the court jurisdiction in respect of an event which occurred before that date.

[205] The court outlined the principles set out in McKerr (see paragraph [145] of this judgment).

[206] The court also cited Re McCaughey (Northern Ireland Human Rights Commission Intervening) [2012] 1 AC 725 where there had been a decision to hold an inquest into a death which had occurred before 2 October 2000. That court held that the 1998 Act could be invoked to require the inquest to comply in all procedural aspects with the requirements of the Convention. Significantly Lord Neuberger at paragraph [94] of Keyu added:

> "And I can see no reason why the same reasoning would not apply where the decision was to hold an inquiry into a death which had occurred before 2 October 2000."

[207] However the sequence of uncertainty that has emerged in the wake of McKerr followed by McCaughey is well illustrated by citing Lord Neuberger's analysis of McCaughey between paragraphs [95] and [98] as follows:

> "95. However, Lord Phillips … went a little further in McCaughey at paras [61]-[63], where he indicated that, if in a particular case the Strasbourg Court would hold that there was, after 1 October 2000 an Article 2 obligation to investigate a suspicious death before that date, then contrary to the conclusion in

McKerr, he would have been inclined to hold that that obligation would also arise in domestic law under the 1998 Act. While he found the reasoning in Silih difficult to understand …, he seems to have formed the opinion that it would probably justify departing from McKerr, although he did not express a concluded view. Lord Kerr … and Lord Dyson … both appear to have concluded that the effect of the … reasoning in Silih was that the conclusion reached in McKerr was no longer sound, and that, if the Strasbourg Court would hold that the UK had an Article 2 duty after 1 October 2000 to investigate a death before that date, then that duty would also arise domestically under the 1998 Act. …

96. Lord Hope … took a different view and … said that he saw 'no reason to disagree' with the views expressed in McKerr. He explained in the following paragraphs that it was only because there had been a decision to have an inquest in that case that the requirements of Article 2 could be invoked. Lord Rodger … who dissented, certainly favoured following McKerr. Given that the issue did not need to be determined, neither Baroness Hale nor Lord Browne .. addressed the question whether the reasoning in McKerr remained good law, although they proceeded on the assumption that it did.

97. In light of this rather unsatisfactory state of affairs, there would be much to be said for our deciding the issue of whether McKerr remains good law on this point. However, given that it is unnecessary to resolve that issue in order to determine this appeal, we ought not to decide it unless we have reached a clear and unanimous position on it. We have not. On the one hand, the respondents' case is supported by the unanimous decision of a five judge court in McKerr, whose ratio is clear and simple to apply, but it could lead to undesirable conflicts between domestic and Strasbourg jurisprudence. On the other hand, the appellants' case derives significant support from two, and arguably three, of the judgments in the subsequent seven judge court in McCaughey, and, while it involves applying Strasbourg jurisprudence which is being criticised for lack of clarity, it would

> ensure that domestic and Strasbourg jurisprudence march together.
>
> 98. Accordingly I would leave open the question of whether, if the Strasbourg Court would have held that the appellants were entitled to seek an investigation into the killings under Article 2, a UK court would have been bound to order an inquiry pursuant to the 1998 Act."

[208] As a result of this decision, the Supreme Court has left undecided the important question as to whether, if the Strasbourg Court would have held the appellants were entitled to an investigation under Article 2, a UK court would have been bound to order an inquiry pursuant to the 1998 Act. The decision in McKerr to the effect that the 1998 Act is not retrospective remains good law at present. The question as to how that decision has been modified by the subsequent case in McCaughey was therefore left open for another day.

[209] In truth the instant case is not on all fours with McCaughey. That was a case of an inquest formally commenced before October 2000 but with a majority of it being processed after that date. In contrast in the instant case, no public inquiry has ever been instituted and a decision has been made that there will be no such public inquiry. Thus for example the Cory and de Silva reviews have been carefully referenced to exclude a public inquiry.

[210] The significance of this distinction is well illustrated in the Court of Appeal decision in Keyu and Others v Secretary of State for Foreign and Commonwealth Affairs and Another [2014] 4 All ER 99 where at paragraphs [99] and [100] Kay LJ said:

> "[99] We return to Mr Fordham's essential submission, using the language of his skeleton argument, namely that, whilst Re McKerr had constructed a roadblock, Re McCaughey has removed it. It is a bold submission. In our judgment it is wrong because it seeks to derive from Re McCaughey more than it has placed on offer. We do not consider that the Supreme Court was addressing the question whether a post-Human Rights Act decision whether or not to commence an investigation or inquest into pre-Human Rights Act historic deaths is constrained by the procedural obligation under Article 2. Re McCaughey was a clear case of an inquest formally commenced before 1 October 2000 but with the major part of it being processed after that date.

> [100] What they (appellants) have been seeking in recent years is a new public inquiry, embracing an inquiry into the inadequacy of previous investigations. In our view, the domestic law in relation to reliance on Article 2 in these circumstances is still that expounded in *Re McKerr*, by which we remain bound. We do not accept that a majority of the Supreme Court overruled Re McKerr on this point or intended to do so. … Any attempt to move in that direction would now be a matter for the Supreme Court rather than for us."

[211] This court does not intend to rush in where the Supreme Court to date has feared to tread in circumstances where we have already determined that the appellant would be unlikely to have succeeded in an application to the ECtHR for a failure to comply with the Article 2 procedural obligation. Other than to highlight and crystallise the issue, we intend to take the matter no further and leave resolution for another day in the Supreme Court.

Conclusion

[212] Accordingly, we have determined that the appeal in this case should be dismissed and that we should accede to the cross appeal of the respondent and to set aside the declaration made by Stephens J. We understand that the parties have agreed that the court will allow the appeal on costs and to make no order as to costs on the appeal and accordingly we do so.

Deeny J (Reference DEE10208)

[1] I have had the opportunity of reading in draft and addressing the comprehensive judgment of Gillen LJ. I concur with it save to the very limited extent set out in this judgment regarding the revival of an Article 2 obligation.

[2] I agree with him that the Government of the United Kingdom had made a clear and unambiguous representation that a public inquiry would take place but that in all the circumstances set out by Stephens J and examined by Gillen LJ the Government was lawfully entitled to depart from the representation of the previous Government and opt for the review by Sir Desmond de Silva QC instead. The Government was entitled, indeed obliged, to take into account the factors set out by Gillen LJ including the cost, length and procedural difficulties involved in commencing a public inquiry in 2011.

[3] I would add this with regard to a departure by Government from a legitimate expectation created by a previous Government. Under the constitution, albeit 'unwritten', of the United Kingdom, Parliament is at liberty to repeal or amend

previous acts of Parliament. Until an Act of Parliament has been repealed or amended it remains the law.

[4] By analogy a legitimate expectation created by the Government should be followed until it has been fulfilled, unless it is lawfully revoked or amended by the same or a subsequent Government. Most such expectations will have been fulfilled before a change of Government occurs. Just as the membership of Parliament changes with each General Election in this democratic society so does the constitution of the Government, reliant as it is on securing a majority in the House of Commons. It seems to me, that as a general rule, it would be unconstitutional for the courts to say that a new Government cannot depart from a representation given by a previous Government, unless an individual or defined group had acted to their detriment on foot of a clear and unambiguous representation. Such a detriment is analogous to consideration in the law of contract, necessary to make an agreement, not under seal, binding in law. In the absence of such detriment the courts should be very slow, I suggest, to find that the withdrawal of or a change in policy or representation of intention following a change in Government amounted to an abuse of power. The new Government may well have been elected on a platform, inter alia, to change such a policy.

[5] In considering both the decision not to hold a public inquiry but to refer the matter to Sir Desmond de Silva and the lawfulness of that decision, the court, in discharging its duty of close review in this context, can legitimately take into account what advantages, if any, would arise from a public inquiry in preference to a de Silva inquiry. The Government expressly records at some points that it wished to "find the truth". In 2011 more than 20 years from the murder of Mr Finucane the memories of persons called to such an inquiry would inevitably be impaired. Some would be dead. Some would be unfit through age or illness; even more if an inquiry was ordered now six years on. Some will be living abroad and unlikely to voluntarily return for such a hearing. While it is true that the inquiry would have powers to require persons to attend, the number of persons within the jurisdiction still fit and well enough to do so is likely to be very small. Some of them are likely to be among the persons who willingly spoke to Sir Desmond. Even if some persons not previously interviewed were required to and did attend is there a realistic chance of them making some significant admission against themselves? They could not be obliged to do so by law. Are they likely to make some significant revelation about some colleague or superior? That is possible but one has to say that it is only a slight possibility which a decision-maker would be entitled to conclude did not justify the cost, length and complexity of a full blown inquiry. Al- Saadoon v Secretary of State for Defence [2016] EWHC 773 (Admin.) (para. 113) is an example of such a conclusion by a court.

[6] It also seems to me that a decision-maker (and a court reviewing such a decision) is entitled to take into account that Mrs Finucane has an extant civil action in considering whether Article 2 required, or requires, a full public inquiry in addition to the previous investigations and prosecutions. There is support, at least

implicit, for the relevance of civil proceedings, in the judgment of the Strasburg court in Janowiec v Russia [2013] ECHR 55508/07 at paragraphs 142, 143.

[7] A writ was issued many years ago and no attempt has been made to strike out the action despite an absence of activity. When asked why it was not being pursued Mr Macdonald said that the applicant's case was not about money. It is indeed fortunate for Mrs Finucane if she is in a position not to require financial compensation for the loss of her husband and breadwinner, over and above any criminal injury claim she may have brought. But in case there is any misunderstanding any implication in counsel's reply that it is in some way less than admirable for a widow to seek such compensation by pursuing an action would, of course, be wholly misplaced. Seeking monetary compensation for a breach of one's civil rights is a centuries old right in our law and protected also by Article 6 of the Convention. It is a perfectly honourable course to take and not in any way morally inferior to seeking a public inquiry.

[8] In any event, an action of this kind could attract not only compensatory damages but aggravated and exemplary damages to mark the view of the court, if appropriate, of the conduct of any defendants. In Rookes v Barnard [1964] 1129 the House of Lords expressly preserved the power to award exemplary damages for "oppressive, arbitrary or unconstitutional action by the servants of the government"; see p.1226, per Lord Devlin, with whom the other members of the House agreed, as did, on this issue, the House of Lords in Broome v Cassell [1972] A.C. 1027. It is puzzling that the applicant has not availed of this. In seeking to prove such a case, on liability or damages, the plaintiff would be entitled to subpoena witnesses to attend, much as the Chairman of an inquiry might do. Furthermore she would have a right to seek discovery of any documents relevant to the issues in the action, including the justification for an award of exemplary damages and the extent of the same. It seems to me that the concentration on the possible remedy of a public inquiry, so fashionable in recent years, overlooks this very substantial remedy existing at law and available to the applicant.

[9] Stephens J found (citing in support In Re Wright [2006] NIQB 90) that the Government was not obliged to establish a public inquiry of the kind recommended by Judge Peter Cory; that had never been promised. But he did grant the applicant a Declaration against which the Respondent appeals. Gillen LJ has given reasons against the granting of the declaration with which I respectfully agree. I would just add some observations of my own.

[10] I am troubled by the wording of the Declaration, made 8 September 2015, as follows: "as of 17 March 2009 an effective investigation into the murder of Patrick Finucane on 12 February 1989 has not been completed …." (Authorial emphasis throughout). This seems to me an historical statement rather than a declaration of law. Judges are not historians. A declaration is normally a statement of what is the correct position in law on established facts for the benefit of the parties at the time of the declaration. For example, if a declaration is granted that a present policy by a

public decision-maker is unlawful the decision-maker is expected to revisit that policy. I have some difficulty in seeing the point of making an historical finding of this kind in a judicial review application. It may sound in costs but the court has a wide discretion with regard to costs in any event.

[11] In any event I think it was wrong to do so in substance because as of 2009 HM Government had offered an inquiry under the Inquiries Act of 2005 and the applicant and her family had declined it. She did so because of concerns about the provision of information to the inquiry in the light of Section 19 of the Act. Those concerns have since been resolved. The Committee of Ministers of the Council of Europe took into account in finding that the United Kingdom was not in breach of the European Convention in 2008 the very fact that the Government was willing to hold an inquiry. I do not see how one could find that the Government was in breach of Article 2 at a time when it was offering the very public inquiry that the applicant now seeks, particularly when the body responsible for the Convention did not take that view.

[12] I now turn to the single narrow issue on which I differ from Lord Justice Gillen. At paragraphs [169] to [171] of his judgment he disapproves of the conclusion of Stephens J that the Article 2 obligation on the State to investigate was revived by the findings of Sir Desmond de Silva. I consider that Stephens J was justified, and indeed, correct in coming to that conclusion in his judgment at paragraphs [36] and [37]. To address this I will briefly refer to the report of Sir Desmond, to Brecknell v The United Kingdom [2007] EHCR 32457/04 and to what was actually done by the Police Service of Northern Ireland on behalf of the State.

[13] The reason for dealing with the matter with brevity is as follows.

[14] As appears from the concluding paragraphs of his judgment at [217] and [218] the trial judge was open to allowing the applicant to amend her application to plead that the State was in breach of its Article 2 obligations since the publication of the de Silva report. See paragraphs [213]-[218]. But it is apparent from a subsequent skeleton argument lodged on behalf of the applicant and an absence of amendment that her advisors declined this opportunity. See Applicant's Post Judgment Submissions, 30 July 2015, paras. 1 & 10, trial bundle pages 1912 to 1916. In the course of the hearing I raised amendment as a possibility again with Mr Macdonald but, again, he firmly declined to seek any such amendment of the Order 53 application. These observations therefore are, for that reason, obiter as no relief under this heading has been sought by the applicant.

[15] Firstly, at paragraph 7 of his report Sir Desmond stated that the enormous volume of material already collated was added to by new documentary material from a number of organisations in Government departments which "included new and significant information that was not available to Sir John Stevens or Justice Cory". He had met with a number of individuals involved in this matter who had not been interviewed before. He described an extraordinary state of affairs "in

which both the Army and the RUC Special Branch had prior notice of a series of planned UDA assassinations, yet nothing was done by the RUC to seek to prevent these attacks". He noted, at paragraph 49, that the Security Service assessed that 85% of UDA "intelligence" originated from sources within the security forces and that this would have been true at the time of Patrick Finucane's murder. He found that the decision was taken by RUC Special Branch not to warn or otherwise protect Mr Finucane despite the information they had. He concluded that two then agents of the State and one who was to become an agent were involved in the murder. He was of the view that "employees of the State" actively furthered and facilitated the murder of Mr Finucane.

[16] In the light of those extracts from de Silva I turn to the decision of the European Court of Human Rights in Brecknell op cit. It is convenient to do that by quoting from the headnote.

> "… It might be that sometime later, information purportedly casting new light on the circumstances of the death came into the public domain. The issue would then arise as to whether and in what form, the procedural obligation to investigate was revived. There was also little ground to be overly prescriptive as regards to the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators was firmly recognised, particularly in the context of war crimes and crimes against humanity. However, it could not be the case that any assertion or allegation could trigger a fresh investigative obligation under Article 2. Nonetheless, given the fundamental importance of the article State authorities had to be sensitive to any information or material which had the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further. It was salutary to remember that the Convention provided for minimum standards, not for the best possible practice. Moreover, bearing in mind the difficulties involved in policing modern societies and the choices which had to be made in terms of priorities and resources, positive obligations had to be interpreted in a way which did not impose an impossible or disproportionate burden on the authorities. Having regard to those considerations, where there was a plausible or credible, allegation, piece of evidence or item of information relevant to the identification, and

> eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities were under an obligation to take further investigative measures. The steps that it would be reasonable to take would vary considerably with the facts of the situation. The authorities were entitled to take into account the prospects of success or of prosecution."

[17] Sir Desmond is a distinguished lawyer and public servant. It is apparent from his painstaking report that he had access to individuals and documents that had not been previously seen by other investigations. His conclusions, especially that servants of the State were involved in furthering this murder, do, it seems to me, constitute "plausible or credible" allegations which might lead to the apprehension of perpetrators of this unlawful killing, at least by encouraging or assisting in the murder. His opinion arises from the information he received but is in itself a freestanding conclusion on all he had found and ought to be taken into account. One does not know whether the grounds for his opinion will lead to prosecution and conviction until one investigates and assesses the allegations and information. It seems to me therefore that Stephens J was correct in holding that his report revived the Article 2 obligation on the State to investigate.

[18] Indeed it seems to me that the State itself accepted that the obligation was revived as the appropriate manifestation of the State i.e. the Chief Constable of the Police Service of Northern Ireland, in December 2012 commissioned the Historic Enquiries Team to examine the information described by Sir Desmond as "new and significant" to establish whether it provided any opportunities to progress the investigation into Mr Finucane's murder.

[19] Having reached that view, which I understand to be shared by Horner J, it is appropriate to say something as to the way in which that obligation has been discharged. The court has had the benefit of two affidavits from Superintendent Jason Murphy of PSNI, dated 2 June 2016 and 31 October 2016.

[20] In the first affidavit the Superintendent deposes that he is currently the Deputy Head of the PSNI Legacy Investigation Branch. He was formerly with the Historic Enquiries Team. He said that following the Chief Constable's request referred to above a former police officer from a different force was appointed to this task. It is concerning to note that the contract under which he was employed was terminated on 31 December 2014. No doubt there were some resources issue involved but not only is that regrettable but it is of equal concern that despite the passage of two years from December 2012 this former officer had produced no written report in relation to his researches.

[21] Furthermore, as appears not in the first but in the second affidavit of Superintendent Murphy a final report from him, as opposed to earlier interim

reports on the de Silva report, was only submitted to his senior officers in November 2015 almost three years after the publication of the report.

[22] At paragraph 7 of his first affidavit of 2 June 2016 the Superintendent avers as follows:

> "The materials which have been reviewed to date are not collated or prepared in a way which distinguishes new materials from those which had previously been considered by Lord Stevens or Justice Cory. As a result, it has not been possible to identify with precision which are the new ones referred to in the de Silva report. It was therefore decided that the best means by which to do so was to obtain access to the working papers and the materials generated by the de Silva review itself. This archive is held by Cabinet Office. Access has recently been granted to PSNI to review this material and the process will commence in the coming weeks. A meeting has been arranged with the solicitor to the review, who it is hoped can assist that process."

[23] It seems to me quite discreditable that after the Government had entrusted this weighty matter to Sir Desmond and he had reported on 12 December 2012 that the police, three and a half years later, still did not know what the "new and significant information" which he had found was. It is most unfortunate that access to the working papers had only been granted "recently" i.e. three years after the report and that a meeting with the solicitor to the review is only being arranged after such a passage of time. Why was such access and such a meeting not sought earlier?

[24] The efficacy of such steps, which might have seemed obvious from the beginning, is confirmed at paragraph 2 of the second affidavit of the Superintendent dated 31 October 2016 when he confirms that having met with that solicitor he was now satisfied that he had identified the material which was "new and significant".

[25] The deponent records that he has been in touch with the PPS. In September 2016 at a review of this case the Court of Appeal asked to be assured that the DPP was aware of and agreed the affidavits of Superintendent Murphy. This was confirmed to the court and is asserted by him in his second affidavit. The DPP does not, therefore, seem to have complained of the delay in getting a final report to him. The second affidavit records that even by that date, 31 October 2016, no concluded report had been sent to the PPS to allow it to ascertain whether any further prosecution should be commenced.

[26] It also emerged in the second affidavit that the Chief Constable has now referred a number of matters that have arisen from the report to the Police

Ombudsman pursuant to Section 55(4) of the Police (NI) Act 1958 but no further information on that is available to the court as to when that was done or what has resulted from the referral.

[27] There has been such delay following the publication of the de Silva report that it may have led, in my view, to a finding that the PSNI or the State, pursuant to a revived Article 2 obligation, had not taken effective steps to investigate the new material referred to by Sir Desmond in his conclusions and bring any other perpetrators to justice, constituting a fresh breach of Article 2. As, however, there has been no amendment with regard to this matter and, therefore, no submissions from the respondent, it is not appropriate to put the matter any further.

HORNER J (HOR10216)

[1] I have had the opportunity of reading the judgment of Gillen LJ. I agree with his conclusions save for those matters highlighted in paragraph [171] of his judgment. I have also considered Deeny J's comments on the issue of whether or not the Article 2 procedural obligation was revived by the de Silva report. I agree with his observations on this issue.

[2] It is clear that there is no obligation on the authorities to instigate fresh investigations simply because some further information relating to a violent or suspicious death has come to light. That would impose too heavy a burden on the authorities. However, where new information becomes available which sheds light on the circumstances of the death, then the issue arises whether, and in what form, the procedural obligation to investigate under Article 2 is revived: see Brecknell v UK [2007] ECHR [66].

[3] In Brecknell at para [68] the court observed that the nature and extent of the subsequent investigation "would inevitably depend entirely on the circumstances of each particular case and might well differ from that to be expected immediately after a suspicious or violent death has occurred."

[4] Further the court noted at para [70]:

> "It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation … (N)onetheless … the State authorities must be sensitive to any information or material which has the potential either to undermine an earlier investigation or to allow an earlier inconclusive investigation to be pursued further."

[5] The test must be whether there is a "plausible or credible allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment, of the perpetrator of the unlawful killing:" see para [71].

[6] I agree with Deeny J that the conclusions of Sir Desmond de Silva QC, whose judgment can be relied upon, do revive the Article 2 obligation on the State. That does not mean that the State is obliged necessarily to hold a public inquiry to fulfil those obligations. Such a requirement would impose an "impossible or disproportionate burden(s) on the authorities".

[7] I recognise that promptness will not come into play in the same way in a subsequent investigation as the initial one because, for example, "there may be no urgency as regards the securing of a scene of the crime from contamination or in obtaining statements while recollections are sharp:" see para [72]. There has been what appears to be unreasonable delay. I therefore support Deeny J when he criticises the time taken to bring this further investigation to a conclusion.