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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Finucane's (Geraldine) Application [2015] NIQB 57

STEPHENS J

Part One: Introduction

[1] This is an application by Geraldine Finucane ("the applicant") for judicial review of the decision of the then Secretary of State for Northern Ireland ("SOSNI") to hold "a review into the death of Patrick Finucane (her husband) rather than a public inquiry of the kind recommended by Judge Peter Cory." The applicant challenges both (a) the decision of the SOSNI not to hold a public inquiry of that kind into his death and also (b) the decision to establish an independent review of the circumstances of his death.

[2] The factual background to the application is the murder of Patrick Finucane, a practising solicitor, in his home in North Belfast on the evening of Sunday 12 February 1989. The attack was carried out by gunmen from an illegal loyalist paramilitary group. They entered the family home while the applicant and her husband were having Sunday dinner with their three children. Patrick Finucane was shot 14 times and the applicant was injured by a ricochet bullet that struck her in the ankle. The Ulster Freedom Fighters ("UFF") claimed responsibility for his murder. The applicant was convinced from the beginning that servants or agents of the state were involved in the murder of her husband. The government has accepted that there was state involvement and has apologised for it. It is hard to express in forceful enough terms the appropriate response to the murder, the collusion associated with it, the failure to prevent the murder and the obstruction of some of the investigations into it. Individually and collectively they were abominations which amounted to the most conspicuously bad, glaring and flagrant breach of the obligation of the state to protect the life of its citizen and to ensure the rule of law. There is and can be no attempt at justification. In measured terms Sir Desmond de Silva has stated that "… the ground rules of counter-terrorism strategy

must be that the Army and the security forces conduct all counter-terrorism operations *within the law*." That is the only position that can be adopted.

[3] I summarise the grounds of challenge upon which the applicant relies.

a) **Substantive legitimate expectation**. The applicant relies on a substantive legitimate expectation that a public inquiry would be held into the murder of her husband of the kind recommended by Judge Peter Cory;

b) **Procedural legitimate expectation.** The applicant also relies on a procedural legitimate expectation that she would be consulted in advance about any decision to establish a "review" or any procedure other than a public inquiry. The applicant accepts that she was consulted about the decision as to whether to hold a public inquiry but states that the consultation was deficient in that it did not extend to the question as to whether there should be a review and if so the nature of such a review;

c) **That in deciding not to hold a public inquiry there was a failure to properly take into account the existence of the applicant's legitimate expectation**. The applicant contends that the decision making process as to whether to hold a public inquiry was deficient in that the promise made to her to do so was not properly taken into account.

d) **Sham process and closed mind**. The applicant alleges that the consultation process was a sham in that from the outset the respondent was intent on not having a public inquiry and had no intention of departing from the Government's previously declared policy of "no more open-ended and costly inquiries into the past." Rather all the documents and meetings were generated with a view, amongst other matters, to provide a legal defence to an envisaged judicial review challenge. That the decision was not made on the merits of the case or with an open mind but in compliance with a policy of no more open-ended and costly inquiries into the past and under the influence of those opposed to any further investigation of the role of State agents in the murder. Furthermore that the decision was not in fact made in accordance with the stated process or even in real terms by the person who was supposed to make it, the SOSNI. In this regard the applicant submits that a) While the decision was "primarily" one for the SOSNI, in reality it was driven by the Prime Minister who was determined to abide by his declaration that there would be no more inquiries; b) The application by the SOSNI of his criteria had produced the result whereby two options remained; c) The PM, without any reference to the published process or criteria,

introduced a third option, the option that was ultimately adopted; d) From that point onwards the process was focused on that option and the justification for it was constructed accordingly; e) For those reasons the decision not to hold a public inquiry but instead to hold a review was not the product of a genuine process and the application of the stated criteria.

e) **Wednesbury grounds**. That there was a failure to take into account relevant factors and various irrelevant factors were taken into account so that the decision of the SOSNI was a decision that no reasonable decision maker could have taken. An instance of an irrelevant consideration is that in his announcement of the de Silva review the SOSNI said "The Government accept the clear conclusions of Lord Stevens and Judge Cory that there was collusion." However, Judge Cory did not find that there was collusion rather his findings were "provisional only" and could not be taken to be "final determinations of any matter" though he had found "strong evidence of collusive acts." Accordingly the SOSNI had taken into account an irrelevant consideration and/or acted on a mistake of fact in reaching his conclusion about the best way forward in the Finucane case. A further instance is that the SOSNI erred in considering that a review would be the "most effective way of getting to the truth" it subsequently being demonstrated that it did not in fact get to the truth.

f) **Article 2 ECHR**. The applicant contends that in refusing to establish a public inquiry the respondent has acted in a manner that is incompatible with the applicant's rights pursuant to Article 2 ECHR in that the procedural obligation applies and there has been a failure to comply with it.

[4] I summarise the respondent's case. In relation to substantive legitimate expectation the respondent accepts that representations were made to, amongst others, the applicant but contends that those representations were not devoid of relevant qualifications. Alternatively, that the decision to override the expectation was a proportionate decision taken by the SOSNI that the public interest would be met by a review, rather than a public inquiry. That the intensity of judicial review of the SOSNI's decision is limited by virtue of its macro–political nature. The respondent contends that as a matter of domestic law the procedural obligation under article 2 ECHR does not apply given that the death occurred before the coming into force of the HRA 1998. Alternatively, that there has been compliance with that obligation.

[5] I divide this judgment into distinct parts.

(a) Part one contains this introduction.

(b) Part two, page 4 and following, contains the legal principles which I seek to apply.

(c) Part three, page 19 and following, sets out the factual background, Part four, page 41 and following, a sequence leading to the impugned decisions, and Part five, page 56 and following, a sequence in relation to consideration by the Committee of Ministers.

(d) The other parts deal with the distinct areas of challenge as developed in argument and as set out in the previous paragraphs.

[6] In this judgment I will identify documents by reference to the number of the file in which they are contained, followed if there are dividers, by the divider number or letter, and then by the page number. On some occasions I identify the paragraph number and that will follow the page number.

[7] Mr Macdonald Q.C., S.C. and Ms Fiona Doherty Q.C. appeared on behalf of the applicant. Mr Eadie QC and Mr McLaughlin appeared on behalf of the respondent. I freely and gratefully acknowledge the great debt that I owe to both sets of Counsel together with their supporting solicitors for the meticulous way in which this case has been prepared, and the clarity, economy and impressive command of detail with which the case has been presented in Court.

Part Two: Legal principles

[8] In this part of the judgment I will set out the legal principles which I seek to apply and my factual conclusion in relation to whether the procedural obligation under article 2 ECHR applies as a matter of domestic law.

Legal principles: Substantive legitimate expectation

[9] There are two stages involved in the enforcement of a substantive legitimate expectation by the courts.

[10] The first stage is the establishment as a matter of fact by the applicant of the existence of a promise which is a clear and unambiguous representation devoid of relevant qualifications: see *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569, paragraph 37 of *Paponette and Others v Attorney General of Trinidad and Tobago* [2012] 1 AC 1, *Re Loreto Grammar School's Application for Judicial Review* [2012] NICA 1 at paragraphs [42]-[45], *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2009] AC 453 at paragraph [60] and *R (Davies) v HMRC* [2011] 1 WLR 2625 at paragraphs [49] and [58]. It is not essential that the applicant has relied on the promise to her detriment for it to be enforceable.

[11] However, if the applicant establishes as a matter of fact the existence of such a promise, that is not an end of the matter because Governments must be entitled to change policy. The reasons for this were explained by Laws LJ in *Bhatt Murphy* at paragraph [41]:

> "….Thus 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.* Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. *Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum.* Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel…… This entitlement — in truth, a duty — is ordinarily repugnant to any requirement to bow to another's will, albeit in the name of a substantive legitimate expectation." (emphasis added)

Accordingly every clear and unambiguous representation which on the face of it is devoid of relevant qualifications is subject to the implicit qualification that the public authority, in this case the SOSNI, 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. So legally there must by definition be a stage two to accommodate and to supervise a change or alteration of policy.

[12] The ability to change or alter policy is not dependent on a change of circumstance or the lapse of a particular or a reasonable period of time or as in this case a change of government, though those are factors that might be taken into account when considering the test at stage two. The ability "to balance different, indeed opposing, interests across a wide spectrum" means that there could be a different balance despite the circumstances remaining the same. Accordingly the implicit qualification to every clear and unambiguous representation which on the face of it is devoid of relevant qualifications is, for instance, the implicit qualification that a different balance could be achieved despite the lack of any change of circumstances. So when one is considering whether a promise is devoid of qualification one is considering the existence of a qualification which is greater than that which would ordinarily be implied in every case.

[13] Stage two comes into play if the applicant discharges the burden of establishing a promise which is a clear and unambiguous representation devoid of relevant qualifications. At stage two the onus is on the respondent to justify the frustration of the expectation and it is for the court to decide "whether the consequent frustration of the applicant's expectation is so unfair as to be a misuse of

the (respondent's) powers": see paragraph 82 of *R v North East Devon Health Authority ex parte Coghlan* [2001] QB 213. If the respondent does not place material before the court to justify his frustration of the expectation, he runs the risk that the court will conclude that there is no sufficient public interest and that in consequence his conduct is so unfair as to amount to an abuse of power, see paragraphs [37] and [38] of *Paponette and Others v Attorney General of Trinidad and Tobago* [2012] 1 AC 1.

[14] At the second stage, and in arriving at a decision as to "whether the consequent frustration of the applicant's expectation is so unfair as to be a misuse of the (respondent's) powers," a fair balance has to be struck between the interests of the general community and the interests of the individual. That is a concept which also underlines the whole of the European Convention, see *Brown v Stott* [2003] 1 AC 681 at 704 e-f. Laws LJ at paragraph [68] in *Nadarajah and Another v Secretary of State for the Home Department* [2005] EWCA Civ 1363 stated that:-

> "Accordingly a public body's promise or practice as to future conduct may only be denied, …, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, *a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest*. The principle that good administration requires public authorities to be held to their promises will be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances." (emphasis added)

[15] At the second stage it is for the respondent to identify any overriding interest or interests on which he relies to justify the frustration of the expectation and it will then be a matter for the court to weigh the requirements of fairness against that interest or those interests. When the court is carrying out that exercise of weighing the requirements of fairness against that interest or those interests the degree of intensity of review will vary from case to case depending on the character of the decision. The intensity of review is greater in cases where the facts 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. By contrast the intensity of review by the court is limited in cases falling within the macro-political field, see *R (Patel) v General Medical Council* [2013] 1 WLR 2801 at paragraph [61] and the following passage in the judgment of Laws LJ in *R v Secretary of State for Education and Employment Ex p Begbie* [2000] 1 WLR 1115 at 1130-1131 in which he stated

> "… The facts of the case, viewed always in their statutory context, will steer the court to a more or less intrusive quality of review. In some cases a change of tack by a public authority, though unfair from the applicant's stance, may involve questions of general policy affecting the public at large or a significant section of it (including

interests not represented before the court); here the judges may well be in no position to adjudicate save at most on a bare *Wednesbury* basis, without themselves donning the garb of policy-maker, which they cannot wear. The local government finance cases, such as *R v Secretary of State, Ex p Hammersmith* [1991] 1 AC 521, exemplify this. As Wade & Forsyth observe (Administrative Law, 7th ed (1994), p 404):

'Ministers' decisions on important matters of policy are not on that account sacrosanct against the unreasonableness doctrine, though the court must take special care, for constitutional reasons, not to pass judgment on action which is essentially political.'

In other cases the act or omission complained of may take place on a much smaller stage, with far fewer players. Here, with respect, lies the importance of the fact in *Coughlan* that few individuals were affected by the promise in question. The case's facts may be discrete and limited, having no implications for an innominate class of persons. There may be no wide-ranging issues of general policy, or none with multi-layered effects, upon whose merits the court is asked to embark. The court may be able to envisage clearly and with sufficient certainty what the full consequences will be of any order it makes. In such a case the court's condemnation of what is done as an abuse of power, justifiable (or rather, falling to be relieved of its character as abusive) only if an overriding public interest is shown of which the court is the judge, offers no offence to the claims of democratic power.

There will of course be a multitude of cases falling within these extremes, or sharing the characteristics of one or other. The more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court's supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

That passage as to the intensity of review in the macro-political field was described at paragraph [61] of *Patel* as "particularly illuminating."

[16] In *R (on application of Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 Laws LJ also considered the significance of the distinction between promises involving "wide ranging macro-political issues of policy" and promises made to an individual or specific group . Laws LJ said at paragraph [69]:

> "… Thus where the representation relied on amounts to an unambiguous promise; where there is detrimental reliance; where the promise is made to an individual or specific group; these are instances where denial of the expectation is likely to be harder to justify as a proportionate measure. They are included in Mr Underwood's list of factors, all of which will be material, where they arise, to the assessment of proportionality. *On the other hand where the government decision-maker is concerned to raise wide-ranging or "macro-political" issues of policy, the expectation's enforcement in the courts will encounter a steeper climb.* All these considerations, whatever their direction, are pointers not rules. The balance between an individual's fair treatment in particular circumstances, and the vindication of other ends having a proper claim on the public interest (which is the essential dilemma posed by the law of legitimate expectation) is not precisely calculable, its measurement not exact." (emphasis added)

[17] It is apparent that the less intrusive nature of the court's supervision in relation to macro-political issues is a consequence of a) the constitutional position, b) a recognition of the court's inability to adjudicate in the macro-political field save at most on a bare *Wednesbury* basis and also c) a recognition that true abuse of power is less likely to be found in the macro-political field since as Laws LJ stated within that field "changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy."

[18] The respondent contends that the decision under challenge in this case lies in what Laws LJ called the macro-political field and accordingly that the court's supervision should be less intrusive. The applicant contends that the reason given by the respondent was that the "quickest and most effective way of getting to the truth" was to set up a review rather than a public inquiry. That the question as to whether a review or a public inquiry is either the quickest or the most effective way of getting to the truth lies within the court's competence and is not a macro-political issue. In short that the reasons for a decision are determinative of the question as to whether it is or is not a macro-political issue. I do not consider that the articulated reasons are determinative but rather that they can be considered to be a pointer along with other pointers such as whether general policy issues are engaged affecting the public at large or a significant section of it or whether the decision effects agreements between sovereign states. It may be that some of the characteristics of a decision in the macro-political area are more amenable to scrutiny but that does not alter the essential nature of the decision.

[19] When consideration is being given to overriding a legitimate expectation, the decision maker will need to take account of the existence of the expectation in deciding whether or not there are good reasons for overriding it: see e.g. *R (Bibi) v*

London Borough of Newham [2001] EWCA Civ 607 at [49] – [51] and *Paponette and Others v Attorney General of Trinidad and Tobago* at paragraph [46].

[20] One aspect to be taken into account at the second stage is whether the applicant has relied on the promise to her detriment. The burden of proving that an applicant has relied upon a promise to her detriment rests on the applicant. However, it is not an essential pre-requisite to the enforceability of the expectation that the applicant has so relied upon the promise rather this is a relevant consideration in deciding whether the adoption of a policy in conflict with the promise would be an abuse of power and such a change of policy may be justified in the public interest. "Reliance, once proved … is in principle no more than a factor to be considered in weighing the question whether denial of the expectation is justified … as a proportionate act or measure:" see *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 at 1569, *Nadarajah and Another v Secretary of State for the Home Department* [2005] EWCA Civ 1363 and *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 at paragraph [60].

[21] The respondent contends that even if a decision to depart from a promise is held to be so unfair as to amount to an abuse of power the court should still consider whether or not it is appropriate to exercise its discretion to grant any, and if so what, remedy. As a matter of general principle where grounds for judicial review are established the court retains discretion as to relief. This is apparent from paragraph [19] of the judgment of Schiemann LJ in *R (Bibi) v Newham LBC* in which he stated that

> "In all legitimate expectation cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; *the third is what the court should do*. This formulation of the questions is we think a more helpful way of approaching the problems in this type of case than the fivefold question adopted during argument." (emphasis added)

It is clear that the court has discretion but I consider that it may be more theoretical than real in circumstances where unfairness amounting to a misuse of the respondent's powers has been established otherwise the court in the exercise of discretion would be perpetuating a misuse of power. Furthermore the respondent did not identify any case where there had been a finding of a misuse of power but in which discretion had not been exercised to quash the decision.

The questions for determination under substantive legitimate expectation

[22] This legal analysis of substantive legitimate expectation identifies a number of questions that arise for determination in this case, as follows

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 what Laws LJ called 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.

Two issues under article 2 ECHR

[23] The applicant's husband died on 12 February 1989 some 11 years and 6 months before the Human Rights Act 1998 came into force on 2 October 2000. There have been a number of investigations into the death of Patrick Finucane and it is contended by the respondent that if the procedural obligation under article 2 ECHR applies as a matter of domestic law then that there has been compliance with it. Accordingly two issues arise for determination under article 2 ECHR, namely a) whether as a matter of domestic law the procedural obligation applies to the investigation of a death, where the event which triggers the procedural obligation, namely the death, occurred before the Human Rights Act 1998 came into force on 2 October 2000 and b) if the procedural obligation does apply whether there has been compliance with that obligation given the investigations that have occurred, the decision of the ECHR in *Finucane v UK* (2003) 37 EHRR 29 and the decision of the Council of Ministers under article 46 ECHR.

Legal principles: The nature of the procedural obligation under article 2 ECHR, the legal test for its domestic application and whether factually it applies in this case.

[24] Article 2(1) ECHR provides that

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

That article gives rise to a substantive obligation on the state not to kill people. However this case concerns the procedural obligation on the state to carry out an effective official investigation into the death.

[25] In *Jordan's Applications* [2014] NIQB 11 I considered the decisions of the ECHR in *Jordan v UK* (2003) 37 E.H.R.R. 2 and in *Nachova & others v Bulgaria* (2006) 42 EHRR 43 and then summarised the nature of the procedural obligation in the following terms

(a) The essential purpose of an investigation is "to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility."

(b) The form of such an investigation may vary in different circumstances. The Strasbourg Court did not specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. The aims of fact finding, criminal investigation and prosecution can be carried out or shared between several authorities, as in Northern Ireland, and the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. However the available procedures have to strike the right balance.

(c) Whatever mode of investigation is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

(d) For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. That in order for the investigation to be effective, "the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice" (paragraph 112 of *Nachova*).

(e) The investigation is also to be effective in the sense that it is *capable of leading to a determination* of whether the force used in such cases was or was not justified in the circumstances and 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, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard. (emphasis added)

(f) A requirement of promptness and reasonable expedition is implicit. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

(g) 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.

(h) 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.

[26] For the purposes of this case I would also add that there can be a failure to comply with the procedural obligation if no reasons are given for decisions not to prosecute. In *Finucane v UK* (2003) 37 EHRR 29 the Strasbourg court stated

> "82. … As the Court observed in *Jordan v United Kingdom* the absence of reasons for decisions not to prosecute in controversial cases may in itself not be conducive to public confidence and may deny family of the victim access to information about a matter of crucial importance to them and prevent any legal challenge of the decision.
>
> 83. Notwithstanding the suspicions of collusion however, no reasons were forthcoming at the time for the various decisions not to prosecute and no information was made available either to the applicant or the public which might provide reassurance that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Art.2, unless that information was forthcoming in some other way. This was not the case."

So in considering whether there has been compliance with the article 2 procedural obligation in this case there should be consideration as to whether public reasons were given by the DPP(NI) for prosecutorial decisions following the Stevens 3 investigation, whether the further documents disclosed in the de Silva review along with the de Silva report have been considered by the PSNI and the DPP (NI), whether any prosecutorial decisions have been made on the basis of those documents and whether there has been any public explanation of any decision not to prosecute.

[27] The question as to whether the procedural obligation applies in this case depends on an analysis of the decisions in *Silih v Slovenia* [2009] EHRR 966, *In Re McCaughey* [2012] 1 AC 725, *Janowiec and Others v Russia* [2013] ECHR 55508 and *R (Keyu) & others v Secretary of State Foreign Affairs and Commonwealth Affairs [2014] EWCA Civ 312*. I summarise the principles that I seek to apply.

[28] The procedural obligation is an autonomous freestanding obligation which is detachable from the substantive obligation see *Silih v Slovenia* [2009] EHRR 966 and *In Re McCaughey* [2012] 1 AC 725.

[29] The decisions of the ECHR in *Silih* and in *Janowiec* establishes that in certain circumstances the freestanding procedural obligation applied even where the death itself had occurred before the Member State ratified the Convention.

[30] In its decision in *Silih* the ECHR addressed the question of its temporal jurisdiction at paragraphs [161]-[163]. The test was explained in *McCaughey* and for present purposes the respondent accepts that this case factually falls within paragraph [119] (iii) of the judgment of Lord Kerr in *McCaughey*. As a matter of fact much of the investigation into the death of Patrick Finucane occurred after the critical date (which for domestic purposes is 2 October 2000). As a matter of domestic law applying the mirror principle (paragraphs [59] to [62] of *McCaughey*) the same tests should be applied to the question as to whether the freestanding and procedural obligation would apply even where the death itself had occurred before the Human Rights Act 1998 came into force. Accordingly applying the test set out in paragraph [119] (iii) as the correct test then the procedural obligation applies in this case. The applicant contends that this court is bound by the decision in *McCaughey* and in that respect I was referred to *Kay v Lambeth Borough Council* [2006] 2 AC 465 at paragraph 43. On that basis the applicant contends that as a matter of domestic law the procedural obligation under article 2 ECHR does apply in this case despite the death having occurred prior to 2 October 2000.

[31] However the respondent contends that the ratio of the decision in *McCaughey*, as analysed by the Court of Appeal in *Keyu*, is restricted to the narrow parameter of inquests commenced before, but substantially processed after, 2 October 2000 (see paragraph [96] of *Keyu*). That in determining the question as to whether the procedural obligation applies in this case the respondent contends that this court is only bound by the strict ratio of the decision in *McCaughey*, as explained by the

Court of Appeal in *Keyu*. It is also contended that the reasoning in *McCaughey*, as to the meaning of the temporal test in *Silih*, has now been overtaken by the decision of the Strasbourg court in *Janowiec*.

[32] I consider that this court is bound by the reasoning in *McCaughey* and accordingly on that basis the article 2 ECHR procedural obligation applies to the death of Patrick Finucane. However if I am wrong in that conclusion I set out the conclusions that I have reached as to whether the procedural obligation applies taking into account the decision in *Janowiec*.

[33] In *Janowiec* the ECHR clarified the *Silih* criteria. It stated:

(i) Where the death occurred before the critical date (in this case for domestic purposes 2 October 2000) the court's temporal jurisdiction will extend only to the procedural acts or omission in the period subsequent to that date.

(ii) The procedural obligation will come into effect only if there was a "genuine connection" between the death as the triggering event and the entering into force (in this case for domestic purposes of the HRA 1998).

(iii) 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.

The ECHR then examined each of those elements. In relation to the second element, that is the "genuine" connection test, the respondent contended that there are two criterion both of which have to be satisfied before it can be said that there is a genuine connection. The first is that the "lapse of time between the triggering event" (the death) and the critical date (for domestic purposes 2 October 2000) must remain "*reasonably* short" if it is to comply with the "genuine connection" standard (emphasis added). The judgment went on to state

> "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."

It also stated that

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

The respondent contends that the applicable time limit may in an individual case be shorter than ten years but whatever the position there is an absolute time limit of ten years. Accordingly as the death in this case occurred some 11 years and 6 months prior to 2 October 2000 the procedural obligation does not apply unless the exception to the time limit of the Convention values test is met.

[34] The ten year time factor in this case has been exceeded by one year and six months. However, the ECHR indicated in *Janowiec* that there are no "apparent legal criteria by which the absolute limit on the duration of that period may be defined" before saying "it should not exceed ten years." Accordingly I consider that the ten year time factor referred to in *Janowiec* is not a strict time factor. I note that in the subsequent case of *Mocanu v Romania* (2015) 60 EHRR 19 at paragraph 206 the ECHR referred to "a reasonably short lapse of time that should not *normally* exceed 10 years" (emphasis added). In *Mladenovic 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. I consider that the ten year time factor is not conclusive but rather the test is that the lapse of time must remain reasonably short. I also consider that what is *reasonably* short depends on context. The purpose of a temporal time limit is to draw a line but not necessarily to draw a line in the circumstances where positively those on behalf of the State have obstructed an investigation. In this case the RUC and the Army positively obstructed and thereby initially prevented and ultimately delayed investigations. I consider that the genuine connection test has been met as the period of time between the triggering event and the critical date is reasonably short given the obstruction of the investigation by the RUC and the Army. Accordingly I consider that the genuine connection test has been met and that as a matter of domestic law the article 2 ECHR procedural obligation applies to the death of Patrick Finucane.

[35] If I am wrong in that conclusion I consider that the Convention values test is met. The respondent contends that the Convention values test concentrates only on the triggering event namely the death. That 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. The ECHR in its judgment in *Janowiec* gave examples by stating

> "this would be the case with serious crime 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."

I do not consider those examples to be exhaustive. So concentrating on the triggering event, the death, I consider that it was of a larger dimension than an ordinary criminal offence involving, as it did, both the RUC and the Army in acts of collusion with an illegal terrorist organisation. The most fundamental obligations of a State are not to kill, but to protect its citizens and to ensure the rule of law. I

consider those values to be the very foundations of the Convention. The murder of a solicitor involving collusion by State agencies negates the very foundations of the Convention. It was submitted, and I agree, that the adoption of a regime of "murder by proxy" whereby the murder of individuals within a state's jurisdiction was facilitated by agents of the state does negate the very foundations of the Convention, and indeed of a democratic society. Accordingly I consider that the procedural obligation applies in this case on the basis of the Convention values test.

[36] In the alternative the applicant contends that the article 2 ECHR procedural obligation has been revived after 2 October 2000 and accordingly as a matter of domestic law the procedural obligation applies to the death of Patrick Finucane. In support of that contention the applicant relies on the decision in the case of *Brecknell v UK* [2008] 46 EHRR 42. The principles to be derived from *Brecknell* were considered in *McCaughey* in which case Lord Phillips of Worth Matravers stated:-

> "39. I have drawn attention in para 20 above to the commission's finding in *McDaid v United Kingdom* 85-A DR 134 that the article 2 procedural obligation to hold an investigation was not a continuing obligation. In *Brecknell v United Kingdom* (2007) 46 EHRR 957 the court considered the circumstances in which that obligation might be revived. The applicant was the widow of a man gunned down by loyalist gunmen in 1975. Investigations took place and consideration was given to criminal prosecutions, but these were concluded in 1981. In 1999 and thereafter further evidence came to light suggesting the possibility of RUC and UDR collusion with loyalist paramilitaries. The applicant contended that this revived the procedural obligation. The court upheld this contention. It ruled, at para 70, that if article 2 did not impose the obligation to pursue an investigation into an incident, the fact that the state chose to pursue some form of inquiry did not have the effect of imposing article 2 standards on the proceedings. The court then ruled, at para 71:
>
> > 'With those considerations in mind, the court takes the view 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 the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of

> the source, or of the purported new evidence. The court would further underline that, in light of the primary purpose of any renewed investigative efforts (see para 65 above), the authorities are entitled to take into account the prospects of success of any prosecution. The importance of the right under article 2 does not justify the lodging, willy-nilly, of proceedings'."

Accordingly the test as to whether the procedural obligation is revived is 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 an unlawful killing." That test is not satisfied by any allegation or piece of evidence or item of information. It has to be plausible or credible though given the fundamental importance of article 2 state authorities have to be sensitive to any information or material which had the potential either to undermine the conclusion of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further. In addition the allegation or piece of evidence or item of information has to be relevant. If the test is satisfied it gives rise to an obligation to take further investigative measures but those measures will vary with the facts of the situation so that positive obligations do not impose an impossible or disproportionate burden on the authorities.

[37] The factual question arises as to whether the new documentary material obtained by Sir Desmond de Silva from all of the organisations cited in his terms of reference and a number of Government Departments which material included new and significant information that was not available to Sir John Stevens or Justice Cory (6/716/7) together with the records of his meetings with the 11 named individuals and the written representations of the 12 individuals or bodies (6/746/1.48) amount to plausible, or credible pieces of evidence or items of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing. Sir Desmond has not stated what was contained in the documents but his report contained a number of conclusions including that "employees of the State" actively furthered and facilitated Patrick Finucane's murder, 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. Sir Desmond expressly stated that the further documents contained significant information. He obviously attached significance to the meetings with the 11 individuals one of whom was Colonel J. The record of that meeting would be of particular significance. 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. Accordingly on that ground also I consider that as a matter of domestic law, the

article 2 ECHR procedural obligation, has been revived and applies to the death of Patrick Finucane.

Compliance with the procedural obligations under article 2 ECHR

[38] In relation to the question as to whether there has been compliance with the procedural obligation in this case this court must take into account not only the nature of that obligation but also the decision of the Committee of Ministers, see section 2 HRA 1998.

[39] The obligation to take into account the decisions of the ECHR, as opposed to the Committee of Ministers, was considered by the Supreme Court in *R (On the Application of Chester)* [2014] AC 271. I take the following principles from that case namely:-

> (a) To take into account a decision of the ECHR does not mean that a court is bound to follow a decision as a matter of absolute obligation.
>
> (b) The interpretation of the Convention by the ECHR takes effect in the law of Northern Ireland only by a decision of the courts of Northern Ireland and the Supreme Court.
>
> (c) A decision of the ECHR is more than an opinion about the meaning of the Convention. It is an adjudication by the Tribunal which the UK has by treaty agreed should give definitive rulings on the subject. The courts are therefore bound to treat them as the authoritative expositions of the Convention which the Convention intends them to be, unless it is apparent that it has misunderstood or overlooked some significant feature of English law or practice which may, when properly examined, lead to the decision being reviewed by the Strasbourg Court.
>
> (d) The requirement to "take into account" the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg Court. There will however be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process.
>
> (e) "Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line."

So there has to be a reasoned approached to the decisions of the ECHR which will not be summarily applied but where there is a clear and constant line of decisions

whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle it would be wrong for this court not to follow that line.

[40] An issue arises as to whether the same approach should be adopted to the obligation to take into account the decisions of the Committee of Ministers. I consider that it is equally clear that to take into account a decision of the Committee of Ministers does not mean that a court is bound to follow the decision. The applicant contends that there is every reason to make a distinction given that the decisions of the Committee of Ministers are not adjudications by an independent court but are decisions by politicians. However by treaty the UK has agreed that certain matters should be decided by the Committee of Ministers and I consider that the courts are bound to treat such a decision as authoritative and to be followed unless inconsistent with some fundamental substantive or procedural aspect of our law, or unless the decision appears to overlook or misunderstand some argument or point of principle.

Part Three: Factual background

[41] In this part of the judgment I set out the core allegation in relation to the murder of Patrick Finucane and then set out a sequence of events in relation to the investigation of the murder and of collusion. It is necessary to do this in some detail, not only to provide the background to the impugned decisions, but also so that consideration can be given to the issue as to whether, as a matter of domestic law, there has been compliance with the procedural obligation under Article 2 ECHR. I will also include in this summary an account of the decision of the Strasbourg court in *Finucane v UK* (2003) 37 EHRR 29.

[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" (8/1687). In effect that Brian Nelson was tasked to focus UDA targeting on Provisional IRA activists. CFs which establish that contain the following:

> (a) *4 August 1988*. "(Nelson's) appointment enables him to make sure that sectarian killings are not carried out but that proper targeting of PIRA members takes place prior to any shooting".
>
> (b) *4 January 1989*. "(Nelson) is in a position to see that correct targeting is carried out and sectarian murders are avoided, …. (Nelson) wants (the UDA) … to concentrate on specific targeting of legitimate Republican terrorist targets".
>
> (c) *8 February 1989*. "(Nelson is trying to) achieve a more professional, respected organisation …. (Nelson) has been more organised and he is currently running an operation against selected Republican personalities". (8/1687)

[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 onto 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 and said:

> "In almost all of the relevant murders or attempted murders that I have reviewed, it was clear that the FRU passed intelligence to the RUC SB prior to the attack indicating that the individual concerned was under threat. Nevertheless, I have also concluded that the FRU should have been aware that the RUC SB were taking no action. … Taken as a whole, an extraordinary state of affairs was created in which both the army and the RUC SB had prior notice of series of planned UDA assassinations yet nothing was done by the RUC to seek to prevent those attacks."

[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.

[46] The investigations started with an investigation by the RUC which commenced immediately after the murder, (2/3/7). The scene was preserved and forensic examinations carried out. Statements were taken from witnesses. Some months after the murder, in July 1989, police searched an address and found one of the two weapons forensically linked to the murder, a Browning 9 mm pistol. Three men, David Anderson, Frank Arbuthnot and William Barr, were convicted of possession of that weapon and membership of the UFF, but could not be linked to the murder. The recovered weapon was one of a number that had been stolen from Palace Barracks, Holywood in 1987 by a member of the Ulster Defence Regiment ("the UDR"). Those weapons had been sold to the UFF. That UDR member was convicted of the theft in 1988 and sentenced to 5 years imprisonment. The ECHR in its judgment delivered on 1 July 2003 (*Finucane v UK* (2003) 37 EHRR 29) held that in so far as the investigation was conducted by RUC officers, they were part of the police force which was suspected of issuing threats against the applicant's husband. They were all under the responsibility of the RUC Chief Constable, who played a role in the process of instituting any disciplinary or criminal proceedings. In the circumstances, there was a lack of independence attaching to this aspect of the investigative procedures, which also raised serious doubts about the thoroughness or effectiveness with which the possibility of collusion was pursued.

[47] On 6 September 1990 an inquest was held into Mr Finucane's murder. Mr Leckey, Coroner, sat alone. The inquest examined only the immediate circumstances of Mr Finucane's murder. Detective Superintendent Alan Simpson made it clear that the police refuted the claim that Patrick Finucane was a member of PIRA confirming that he was just another law-abiding citizen going about his professional duties in a professional manner (2/3/10). When the applicant tried to give evidence at the inquest about the threats made to her husband via his clients the Coroner ruled that evidence to be irrelevant. The Coroner delivered a narrative verdict. The ECHR in its judgment delivered on 1 July 2003 (*Finucane v UK* (2003) 37 EHRR 29) held that the inquest fell short of the requirements of Art.2. It was concerned only with the immediate circumstances surrounding the shooting of Mr Finucane. There was no inquiry into the allegations of collusion by the RUC or other sections of the security forces. The applicant was refused permission to make a statement about the threats made by the police against her husband. As later events showed, however, there were indications that informers working for Special Branch or the security forces knew about or assisted in the attack, which supported suspicions that the authorities

knew about or connived in the murder. The inquest thus failed to address serious and legitimate concerns of the family and the public and could not be regarded as providing an effective investigation into the incident or a means of identifying or leading to the prosecution of those responsible.

[48] On 14 September 1989 John Stevens (then Deputy Chief Constable of Cambridgeshire) was appointed by the Chief Constable of the RUC to conduct an investigation into allegations of collusion between members of the security forces in Northern Ireland and loyalist paramilitaries and to make recommendations (2/4/15). The investigation did not specifically involve an examination of the murder of Patrick Finucane, though it did cover the issue of security force "leaks" to paramilitaries. The terms of reference of DCC Stevens are set out in the subsequent de Silva report (6/1163). There was active and significant obstruction by both the Army and Police (6/1166) of the investigation by DCC Stevens, which subsequently became known as "Stevens 1". The investigation led to the presentation of a report to the Chief Constable on 5 April 1990 and a statement in Parliament by the then SOSNI, Mr Peter Brooke (2/4/15). According to that statement, Stevens 1 resulted in the arrest of 94 persons of whom 59 were charged or reported for offences. DCC Stevens found that the passing of information to and from security forces members to paramilitaries did take place.

[49] The Stevens 1 findings and recommendations have never been published but all the documents generated by that inquiry have been available to the subsequent Stevens 2 & 3 investigation teams, the DPP (NI), independent senior counsel at the Bar of Northern Ireland, Anthony Langdon, Judge Peter Cory, and Sir Desmond de Silva. The Cory report and the de Silva report have been published. The Langdon report is now also public by virtue of these proceedings. The de Silva report consisting of two volumes was published on 12 December 2012. Volume 2 of that report consists of some 1,355 pages of copies of source documents including documents generated by the Stevens 1 investigation, Military Intelligence Source Reports and RUC SB Intelligence documents.

[50] An issue has arisen in these proceedings as to whether the Stevens 1 investigation was into the murder of Patrick Finucane. The terms of reference for the Stevens 1 investigation do not include the murder of Patrick Finucane. The evidence from the applicant is that at a press conference on 28 April 1999 John Stevens stated that "at no time, either in Stevens 2 or in the original Stevens 1 inquiry did I investigate the murder of Patrick Finucane … However, those inquiries through the so-called double agent, Brian Nelson, were linked into the murder of Patrick Finucane" (1/3/17/22). It is apparent that the Stevens 1 investigation was not into the murder of Patrick Finucane but was linked into and provided information that was crucial to, that investigation.

[51] The Stevens 1 investigation revealed the existence of a branch of army intelligence called the Force Research Unit ("FRU"). FRU recruited and ran agents in Northern Ireland. Its recruits included Brian Nelson, a former soldier and loyalist

paramilitary, who infiltrated the UDA, acting as FRU's agent. He became the intelligence officer for that organisation's West Belfast brigade and was involved in the targeting of individuals for assassination by the UFF. His role included the gathering and provision of information about possible targets for assassination by the UDA/UFF. In the gathering of information and in that targeting, he was assisted by his handlers within FRU.

[52] Another important result of the Stevens 1 inquiry was the arrest and prosecution of Brian Nelson. Although the army withheld his role, and many documents relating to it, from the Stevens team, Nelson's fingerprints were found on leaked security force documents and he was eventually arrested. Following his arrest Nelson gave extensive statements to the Stevens team all of which have been available for consideration by Anthony Langdon, Judge Peter Cory and Sir Desmond de Silva. They have been published in volume 2 of the de Silva report (7/1213 and for instance 7/1259). Among other things and in those statements, Nelson spoke at length about the creation, use, and dissemination of what came to be known as "P" cards or "personality cards". These cards served as the primary source material for the UDA. They were used to facilitate the targeting of individuals that were marked for attack. During the period that he was the Senior Intelligence Officer, Nelson collected, augmented and maintained a vast collection of "P" cards which, together with other material, comprised Nelson's "intelligence (or intell) dump". According to Nelson, FRU kept photocopies of his "P" cards, and knew that these documents were being turned over to other members of the UDA. From the CFs it can be seen that Nelson's handlers were well aware of all his activities pertaining to the personality cards. Judge Cory stated that perhaps the most significant obstacle placed in the path of the Stevens team was the concealment of Nelson's "intelligence dump". Judge Cory stated that the evidence indicates that FRU took possession of Nelson's intelligence material as early as September 1989. Yet, this material was not turned over to the Inquiry team until some months later, after Brian Nelson's arrest and interrogation in January 1990. He stated that the terms of reference for the Stevens 1 Inquiry were well known to FRU and RUC SB and the evidentiary significance of Nelson's "P" cards" must have been obvious to all in authority. He went on to state that he had reviewed a document which would appear to lend strong support to the allegation that RUC SB and FRU consciously set out to withhold pertinent information from the Stevens Inquiries. He recounts that the document sets out the minutes of various meetings attended by senior officials, including the former GOC NI (General Officer Commanding, Northern Ireland) which document confirms that the GOC NI had discussed the Stevens 1 Inquiry with the Chief Constable of the RUC before the Inquiry team even arrived in the province. The document states that: "The CC (Chief Constable) had decided that the Stevens Inquiry would have no access to intelligence documents or information, nor the units supplying them". Judge Cory recounts that the document also asserts that, in delaying delivery of Nelson's intelligence dump, the Army was acting "under the instructions of the RUC throughout". Ultimately, in January 1990 following Nelson's arrest, it was determined that it was becoming "increasingly difficult to keep the Stevens Inquiry away from intelligence information". It was only then that the

dump was turned over. I consider that it was obvious that those documents were of vital importance to the matters under investigation in the Stevens 1 investigation, and were clearly of tremendous assistance once they were obtained.

[53] On 22 February 1991 The DPP (NI) had reached a preliminary conclusion in relation to the decision as to whether to prosecute Brian Nelson. He consulted the Attorney General, Sir Patrick Mayhew QC under the Shawcross Convention for his views on whether Nelson's prosecution would be in the public interest. The Attorney General in turn formally consulted Cabinet colleagues for their views. The documents in relation to this decision have been considered in the de Silva review and published in volume 2 of his report, for instance at 7/1446. Sir Desmond considered the representations which were made by the MOD, RUC and Security Service with the aim of preventing a prosecution (6/1180-1194/24.100 and following). He also considered the views of the then Cabinet Secretary, Sir Robin Butler, which appeared to be that Nelson should not be prosecuted (6/1187/24.138 and following). Representations made to the Attorney General included claims that Nelson had saved many lives and that agents were regularly briefed by FRU not to commit crimes. The de Silva report concluded that it was manifestly not the case that Nelson was "regularly reminded" not to commit criminal acts but rather he was in fact extensively targeting individuals for murder without any adverse comment from his FRU handlers (save for actions that could have threatened Nelson's own safety). Sir Desmond also concluded that he found only 3 cases in which the security forces took action on the intelligence he provided to seek to frustrate UDA attacks (6/720/31).

[54] In the event a decision was taken to prosecute Brian Nelson and in January 1992 he pleaded guilty to five charges of conspiracy to murder, two charges of collection of information likely to be useful to terrorists, twelve charges of aiding, abetting, counselling and procuring another to possess or collect information likely to be useful to terrorists and one charge of possession of a firearm with intent. He was sentenced to ten years imprisonment. None of those convictions related to the murder of Patrick Finucane. The criminal proceedings were in public though in a subsequent Panorama programme broadcast on 19 June 2002 Detective Chief Superintendent Laurence Sherwood, a member of the Stevens enquiry 1989 – 1993 stated that as Brian Nelson pleaded guilty then that the court "will have got, and did get a very truncated version of events. There wasn't the examination of evidence that you would have got in a full criminal trial" (2/12/160). However all the documents relating to that prosecution were available to the DPP (NI), to the subsequent Stevens investigations, to Judge Peter Cory, to Anthony Langdon and to Sir Desmond de Silva. They were considered by Sir Desmond in chapter 24 of his report (6/1162 et seq).

[55] The Commanding Officer of FRU, Colonel J, gave evidence on Brian Nelson's behalf during the sentencing hearing as to the lifesaving potential of the work that Brian Nelson had undertaken. Judge Cory described that evidence as having "some

troubling aspects…" (2/29/348) and considered that the evidence given could be described as "at the very least, misleading." He concluded by saying that

> "The evidence given at Nelson's trial by the former CO of FRU, together with his subsequent letter raise troubling questions, not only as to his conduct but as to the likelihood of collusion by FRU. It reflects a pattern of conduct and an attitude that is consistent with acts of collusion taking place. Whether or not acts of collusion did take place can only be determined at a public inquiry. Certainly this is a further basis for holding a public inquiry which may provide answers to these questions." (2/29/351/1.171).

The Langdon report which was commissioned in 1999 concluded that Colonel J's evidence "did, in fact, mislead the trial judge." (8/1682/S10). The Langdon report is now in the public domain. Sir Desmond de Silva also investigated in detail whether this evidence was misleading and whether it actually misled the trial judge (6/1196-1202). He considered that the criticisms made by Justice Cory were not sustainable. Colonel J in his evidence referred "only to the *potential* value of Nelson's intelligence." The trial judge referred only "to the *possibility* that Nelson's information was "*life saving*"." Accordingly Sir Desmond was not satisfied that the trial judge was misled by those aspects of Colonel J's evidence. However he made it clear that the initial claims made by the MoD to the Attorney General in relation to the decision as to whether Nelson should be prosecuted were "utterly wrong." (6/1203).

[56] Subsequent to his conviction and whilst in prison, Brian Nelson compiled a journal setting out his account of his activities. That journal has been available for consideration by the DPP (NI), independent senior counsel at the Bar of Northern Ireland, Anthony Langdon, Judge Peter Cory, and Sir Desmond de Silva. An extract has been published in volume 2 of the de Silva report (7/1258).

[57] In 1991 Kenneth Barrett, a member of the UDA in north Belfast, was recruited as an agent of RUC SB. There is evidence that during his second meeting with RUC SB he made an admission about his involvement in the murder of Patrick Finucane. When asked by a police officer as to who murdered Patrick Finucane he is said to have replied "hypothetically me." This comment was made while sitting in a car which was fitted with a recording device. It was witnessed by two RUC CID officers sitting in the car, however the tape of the meeting has never been found.

[58] On 8 June 1992 BBC Panorama broadcast a programme named "Dirty War" about Brian Nelson's activities. The programme was the result of work by the investigative journalist John Ware, who had access to Brian Nelson's prison journal and, as a result, claimed that Nelson had been involved in a number of murders for which he had not stood trial (including that of Patrick Finucane) and that he had purchased weapons in South Africa for loyalist paramilitaries in Northern Ireland. The programme recounted that Brian Nelson allegedly admitted that, in his capacity

as a UDA intelligence officer, he had himself targeted Patrick Finucane and, in his capacity as a double agent, had told his British Army handlers about the approach at the time. It was also alleged that Nelson had passed a photograph of Patrick Finucane to the UDA before he was killed. John Stevens, by then Chief Constable of Northumbria Police, was asked to investigate the issues arising from that programme ("Stevens 2"). Sir Desmond de Silva did not find a record of any "self-contained Terms of Reference having been given to Sir John Stevens regarding his second investigation" (6/752/1.79).

[59] John Stevens made reports to the DPP which resulted in February 1995 in directions of "no prosecution" to the Chief Constable of the RUC on the ground that there was insufficient evidence to prosecute anyone.

[60] The Stevens 2 investigation report has not been made public but all the documents generated by that investigation have been available to the subsequent Stevens 3 investigation team, the DPP (NI), independent senior counsel at the Bar of Northern Ireland, Judge Peter Cory, and Sir Desmond de Silva. The reports of Judge Peter Cory and Sir Desmond de Silva have been published as has the reasons given by the DPP (NI) in relation to prosecutorial decisions following Stevens 3.

[61] In 1999, the applicant presented a paper called "Deadly Intelligence State Collusion with Loyalist Violence in Northern Ireland" to the SOSNI (then Dr Mowlam MP). That paper had been authored by London based NGO British Irish Rights Watch ("BIRW") and its presentation followed a visit to Northern Ireland by the UN's Special Rapporteur on the Independence of Judges and Lawyers in 1997. The BIRW report made a number of claims including that RUC SB had detailed information about the plot to murder Patrick Finucane but did nothing to prevent it or to protect him and that FRU misled the Stevens inquiry by withholding documents from it.

[62] As a result of the BIRW report and the UN Special Rapporteur's comments two examinations of the murder of Patrick Finucane took place. The first by Anthony Langdon and the second by John Stevens.

[63] A Home Office civil servant, Anthony Langdon, was commissioned by the then SOSNI, Mo Mowlam, to produce an internal report "to assist consideration whether any form of new Inquiry is required into the Army's use of Brian Nelson as an agent in the 1980's; alleged collusion between the security forces and loyalist terrorists at that time; and the murder of Patrick Finucane in 1989" (8/H/1681). The Langdon report was delivered to the then SOSNI in 1999 though no details of this review (or the fact that it had been commissioned) were ever released publicly. The existence of the Langdon Report was not known to the applicant prior to the receipt of the affidavit of Mark Larmour in these proceedings. She sought discovery of that report which was ordered as result of the decision in *Finucane's (Geraldine) Application* [2013] NIQB 45 which was the judgment in relation to an application for

discovery in these judicial review proceedings. The report is now publicly available as a result of these proceedings.

[64] In May 1999, following a letter dated 13 May 1999 from the Director of Public Prosecutions (NI) to then then Chief Constable of the RUC, Sir Ronnie Flanagan, John Stevens (by then Deputy Commissioner of the Metropolitan Police) was asked to re-investigate the murder of Patrick Finucane and the allegations of collusion raised by BIRW (2/17/195/1.5 and 6/754/1.88). This investigation is known as Stevens 3.

[65] In June 1999 shortly after "Stevens 3" commenced, William Stobie was arrested and charged with the murder of Patrick Finucane. Through media reports it emerged that Mr Stobie had been a paid police informer. His solicitor told the court that Mr Stobie had given information to police on two occasions before the murder of Patrick Finucane which was not acted upon. He alleged that the Crown had offered no evidence against Mr Stobie in relation firearms charges he faced in 1990 when he threatened to expose what he knew about the murder of Patrick Finucane. The case brought against William Stobie by the Stevens team collapsed on 26 November 2001 through lack of evidence when one of the key prosecution witnesses, a journalist, Neil Mulholland, failed to give evidence on account of his mental state, (3/48/521/14). The prosecution offered no evidence and he was acquitted.

[66] The Stevens 3 Overview report and recommendations stated that William Stobie was the quartermaster of the UDA in West Belfast and was recruited as an agent by the RUC Special Branch in November 1987. The Stevens 3 investigation team and Sir Desmond de Silva in his review report considered the RUC SB documents relating to contact with Stobie in the weeks prior to and subsequent to the murder of Patrick Finucane. In view of the importance of debrief forms to the work of the de Silva review Sir Desmond declassified and published the documents alongside his report. It is clear from those documents that prior to the murder Mr Stobie was informing RUC SB as to the supply by him of a Browning 9 mm pistol to other loyalist paramilitaries and that "they had a hit planned on a top PIRA man." (6/1125/22.3 et seq)

[67] On 12 December 2001, three weeks after his acquittal on 26 November 2001, Mr Stobie was murdered by loyalist paramilitaries.

[68] In July 1999 Kenneth Barrett was arrested by the Stevens 3 team and questioned about the comments which he had made in 1991. He remained silent and was released without charge. He was re-arrested in October 1999 and again remained silent. He was released without charge.

[69] On 17 April 2003 Sir John Stevens published an overview of and recommendations from his investigation into the murder of Patrick Finucane (2/17/193-210). Prior to that overview being published and on 19 June 2002 a

Panorama programme was published entitled "A licence to murder." During that programme John Ware interviewed Sir John Stevens and asked "Was what was done in the name of the state defensible?" He replied "I think if you look at the work we did - and this has been the most extensive criminal enquiry in history – the work we did in discovering the activities of the so called double agent Nelson was involved in, of course that was inexcusable." Detective Sergeant Nicholas Benwell a member of the Stevens Enquiry team 1989-1994, was also interviewed and asked "So let me have a clear answer to this: did … the Stevens enquiry come to the conclusion that military intelligence was colluding with their agent … to ensure that the Loyalists shot the "right" people?" He replied "Yes, that was the conclusion we came to … there was certainly an agreement between his handlers and Nelson that the targeting should concentrate on what they described as the "right" people."

[70] Sir John Stevens in his published overview indicated that he had "…uncovered enough evidence to lead me to believe that the murder...of Patrick Finucane could have been prevented." He also concluded that "…the RUC investigation of Patrick Finucane's murder should have resulted in the early arrest and detection of his killers." He found there had been collusion in the murder and the circumstances surrounding it. He said:

> "…The co-ordination, dissemination and sharing of intelligence were poor. Informants and agents were allowed to operate without effective control and to participate in terrorist crimes. Nationalists were known to be targeted but were not properly warned or protected. Crucial information was withheld from Senior Investigating Officers. Important evidence was neither exploited nor preserved."

His overview included the following:

> "It has now been established that before the murder of Patrick Finucane, Stobie supplied information of a murder being planned. He also provided significant information to his Special Branch handlers in the days after the murder. This principally concerned the collection of a firearm. However this vital information did not reach the original murder enquiry team and remains a significant issue under investigation by my Enquiry team.
>
> My Enquiry team arrested three of the original suspects for the murder of Patrick Finucane and nine other men were arrested for the first time on suspicion of murder. None of those arrested could be linked forensically to the scene of the Finucane murder. No admissible evidence has been obtained to enable any person to be charged. I believe however that all played a significant role in the murder of Patrick Finucane or the events surrounding it. This part of my Enquiry is still ongoing."

[71] A decision in relation to the prosecution of any of those individuals had to await those further investigations. All of the documents generated by those further investigations were available to the DPP (NI), independent senior counsel at the Bar of Northern Ireland and Sir Desmond de Silva.

[72] The Stevens 3 overview revealed that the investigation had looked at the role of Brian Nelson in the murder of Patrick Finucane:

> "…Nelson was aware and contributed materially to the intended attack on Finucane. It is not clear whether his role in the murder extended beyond passing a photograph, which showed Finucane and another person, to one of the other suspects. Nelson was re-arrested and interviewed. There was no new evidence and he was not charged with any further offences.
>
> Nelson's role also raised a number of issues arising from the work of the Force Research Unit (FRU), the Army's agent handling unit in Northern Ireland. My Enquiry team investigated allegations made by several former members of the FRU. They reviewed and analysed all material relating to the FRU's operational activity. Twenty former members of the FRU were interviewed and files seeking legal advice in relation to nine of them have been prepared. New material uncovered since the publication of my last report has shed further light on this matter. These enquiries are still ongoing." (paras 2.12 & 2.13)

[73] On 1 July 2003 in its judgment in *Finucane v UK* (2003) 37 EHRR 29 the ECHR unanimously held that there had been a violation of Art.2. I have set out the findings in relation to the initial police investigation and the inquest. As regards the Stevens inquiries, the court held that the first two inquiries were not concerned with investigating the death of Mr Finucane with a view to bringing prosecutions. In any event, the reports were not made public and the applicant had never been informed of their findings. The necessary elements of public scrutiny and accessibility of the family were therefore missing. The third inquiry, which was concerned with the Finucane murder, began some 10 years after the event and therefore could not comply with the requirement that effective investigations be commenced promptly and conducted with due expedition. It was also not apparent to what extent, if any, the final report will be made public. The court also held that where the police investigation is open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute gives an appearance of independence in his decision-making. The absence of reasons for decisions not to prosecute in controversial cases may not be conducive to public confidence and may deny the victim's family access to information about a matter of crucial importance to them and prevent any legal challenge of the decision. Despite the suspicions of collusion, however, no reasons

were given at the time for the various decisions not to prosecute and no information was made available to the applicant or the public which might provide reassurance that the rule of law had been respected. This was not compatible with Art.2 unless that information was forthcoming some other way, which was not the case. In conclusion the court held that the proceedings for investigating the death of Patrick Finucane failed to provide a prompt and effective investigation into the allegations of collusion by security personnel. The court did not find it necessary to address further allegations of a lack of accessibility of the family to the Stevens 3 investigations and of a lack of independence between that inquiry and the PSNI. The court found that there had been a failure to comply with the procedural obligation imposed by Art.2. However the Court had not previously indicated that a government should hold a fresh investigation in response to a finding of a breach of the procedural obligation under Art.2 and it decided that it was not appropriate to do so in this case. It stated that it cannot be assumed that a future investigation can usefully be carried out or provide any redress, either to the victim's family or by way of providing transparency and accountability to the wider public. The lapse of time, the effect on evidence and the availability of witnesses may inevitably render such an investigation an unsatisfactory or inconclusive exercise. The court stated that it fell to the Committee of Ministers acting under Art.46 to consider what may practicably be required by way of compliance. Accordingly, the Court did not make a declaration to the effect that an Art. 2 investigation should be held.

[74] On 16 September 2004 Kenneth Barrett, a member of the UDA in north Belfast, pleaded to and was convicted of the murder of Patrick Finucane. For a BBC Panorama programme broadcast on 19 June 2002 a covert recording had been made in June 2001 of an interview between the investigative journalist, John Ware and Kenneth Barrett. In those recordings Mr Barrett indicated that police told him that Pat Finucane was "an IRA man" and that he was "a thorn in everybody's side. He'll have to go …." He also stated that Brian Nelson assisted with information on Mr Finucane including a photograph and showing Mr Barrett where he lived. Mr Barrett claimed that "the peelers wanted him whacked, we whacked him and that's the end of the story as far as I am concerned". Further evidence was obtained against Barrett by police covert recordings of admissions to his wife and also admissions to undercover police officers as part of a sting operation.

[75] As the result of the Weston Park agreement and by letter dated June 2002 Mr Justice Peter Cory, a retired judge of the Supreme Court of Canada was appointed to, amongst other matters, review all the relevant papers in relation to the murder of Patrick Finucane, including the records of earlier investigations, interview anyone he thought could assist his examination, establish the facts so far as is practicable and submit a report include any recommendation he decided to make for further action, including, if he consider it necessary, the holding of a Public Inquiry.

[76] On 7 October 2003 Judge Cory presented his report on the murder of Patrick Finucane to the government. On 1 April 2004 his report was published and provided to the applicant. The judge considered that a review of the papers could

not result in final findings of fact or determinations of responsibility. He said that because he "had no power to subpoena witnesses or compel the production of documents" it followed that he could not "make findings of fact based on the examination and cross examination of witnesses" (2/29/301/1.1). His report included an outline of the involvement of Brian Nelson in targeting for the UDA/UFF in or around the time of Patrick Finucane's murder from an analysis of the CFs (Contact forms) and MISRs (Military Intelligence Source Reports). In relation to the targeting of Patrick Finucane, Judge Cory records that the first mention of the murder of the solicitor in FRU documents is dated as the morning after the murder, 13 February 1989 (2/29/331/1.107). Judge Cory also records that other FRU documents indicate that there was a FRU file on Patrick Finucane or a "P" card or both, which no longer appear to exist (2/29/333/1.110). The documents also indicate that FRU associated Patrick Finucane with the Provisional IRA (2/29/333/1.110). CFs prepared after his death also refer to a "P" card on Patrick Finucane (2/29/333/1.110). Judge Cory also reported that the statements made by Brian Nelson to the Stevens team indicate that he had given information about the targeting of Patrick Finucane to FRU before the murder. No documentary record of such information is available. Judge Cory concluded that the weight to be attached to Nelson's statement could only be determined at a hearing where the evidence could be tested by examination and cross-examination in a public forum (2/29/338/1.125) (by the date of the Cory report Nelson had died on 11 April 2003). Judge Cory further concluded that the documentary evidence he had reviewed on the issue was contradictory (2/29/341/1.137) while noting that other information contained in FRU records appears to confirm Nelson's statements that his handlers were aware that Patrick Finucane was being targeted (2/29/341/1.139-1.146). On this issue Judge Cory concluded:

> "In short the documents raise serious and perplexing questions regarding the extent to which FRU had advance knowledge of the targeting of Patrick Finucane. The inference could certainly be drawn from them that they had advance knowledge of the targeting. However these questions can only be answered by a public inquiry. The documentary evidence certainly indicates that such an inquiry should be held." (2/29/343/1.146)

Judge Cory also identified the fact that FRU appeared to countenance the commission of crimes by its agents and that its primary concern was agent security, even to the exclusion of preventing attacks on persons targeted by the UDA (2/29/385/1.260). The Cory report also outlines information available to the Security Service about threats to Patrick Finucane's life, including information from December 1988, a couple of months before the murder and that no action was taken to warn Mr Finucane of these threats (2/29/352/1.172-1.176). His report includes

> "In 1981, the Security Service was apparently prepared to forego warning Patrick Finucane that he was in imminent and serious danger in order to protect the identity of its agent. This is an

> indication that both the Security Service and RUC SB saw agent security as taking precedence over the need to warn a targeted individual that his life was at risk. Further, the apparent failure of the Security Service either in June 1985 or in December 1988 to suggest that Patrick Finucane be warned is, I believe, significant. These are factors that must be taken into account. They are worrisome 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." (2/29/354/1.178).

[77] In relation to the RUC, Judge Cory examined the material available in relation to Special Branch agent William Stobie and the information available to Special Branch from him, particularly in relation to the failure to act before and after the murder of Patrick Finucane. He drew attention to worrying attitudes he found within Special Branch including the fact that there appeared to be a discrepancy in the treatment of information about PIRA and UDA targets, SB perceiving the former to be more deserving of attention. Judge Cory concluded that

> "This discrepancy in the treatment of PIRA and UDA targets may be indicative of a selective, perhaps subconscious, bias on the part of the Special Branch. It may well be that only a portion of the population was receiving effective protection against the threat of terrorist violence." (2/29/382/1.252)

[78] Judge Cory outlined the material he had seen suggesting that RUC SB and FRU deliberately set out to withhold pertinent information from the Stevens team. He says

> "The wilful concealment of pertinent evidence, and the failure to cooperate with the Stevens Inquiry, can be seen as further evidence of the unfortunate attitude that then persisted within RUC SB and FRU. Namely, that they were not bound by the law and were above and beyond its reach. These documents reveal that Government agencies (the Army and RUC) were prepared to participate jointly in collusive acts in order to protect their perceived interests. Ultimately the relevance and significance of this matter should be left for the consideration of those who may be called upon to preside at a public inquiry." (2/29/388/1.270)

[79] At the conclusion of his report Judge Cory set out a summary of "collusive acts" (2/29/391-398/1.282 – 1.292) and stated that he was satisfied that there is a need for a public inquiry into the murder of Patrick Finucane (2/29/399/1.293).

[80] Judge Cory presented reports not only on the murder of Patrick Finucane but also five other cases. All the reports were presented to the relevant governments on 7 October 2003. The four reports delivered to the UK government were published on 1 April 2004. In all four cases Judge Cory recommended the holding of a public inquiry. On publishing the reports the SOSNI, Mr Murphy, announced the establishment of public inquiries in three of the four cases: Nelson, Wright and Hamill. He said that the government would "set out the way ahead at the conclusion of prosecutions" in the Finucane case (3/30/420/12-16). Following the conviction of Ken Barrett in September 2004 the then SOSNI announced the establishment of an inquiry but indicated that it would take place on the basis of new legislation to be announced shortly (3/36/440).

[81] On 7 June 2005 the Inquiries Act 2005 came into force. The applicant and her family objected to the use of that Act 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. The objection was that this removed control of the public nature of the inquiry and its evidence from the Inquiry chair to a Minister. There was a difference of view between the applicant and the then SOSNI as to the need for this power but the effect was that the applicant would not participate in such a public inquiry so in the Autumn of 2006, the then SOSNI instructed officials not to spend more time or resource on the preparations for an inquiry on the basis that it was not in the public interest to do so (3/52/533).

[82] On 25 June 2007, some four years after the publication of the Stevens 3 overview and recommendations, the DPP (NI) issued a detailed statement of reasons in relation to decisions as to prosecution arising out of the Stevens 3 investigation (3/48/516-528). The statement explained that the policy of the Public Prosecution Service in relation to the giving of reasons for decisions is to give reasons in the most general terms. However there are exceptional cases, of which this was one, where it will be in the public interest to reassure a concerned public, including the families of victims, that the rule of law has been respected by the provision of a reasonable explanation. The DPP (NI) stated that in deciding whether or not the test for prosecution was met in respect of possible offences arising from the Stevens 3 Investigation the Director had regard to the advices of independent Senior Counsel, a member of the Bar of Northern Ireland and consideration had been given to a substantial part of the documentation produced by the three Stevens investigations, which documentation was in excess of one million pages. The statement referred to the prosecutions of William Stobie and Kenneth Barrett. It referred to the conclusion that the test for prosecution was met in relation to six persons who were prosecuted to conviction for offences relating to the possession of documents containing information likely to be useful to terrorists contrary to section 22 of the Northern Ireland (Emergency Provisions) Act 1978. At paragraph 16 it adverted to the Stevens Investigation team having carried out enquiries into whether the relationship between certain members of FRU and Brian Nelson gave rise to the commission of any criminal offence in connection with the murder of Patrick

Finucane. The Director concluded that the available and admissible evidence was insufficient to meet the test for prosecution in respect of criminal offences against those members of FRU. In particular, the evidence was insufficient to establish that any member of FRU had agreed with Brian Nelson or any other person that Patrick Finucane should be murdered or had knowledge at the relevant time that the murder was to take place. The evidence was also insufficient to establish that any RUC officer agreed with William Stobie or any other person that Patrick Finucane or Brian Adam Lambert should be murdered or had knowledge at the relevant time of William Stobie's alleged involvement in the murders. Consideration was also given to whether there was evidence of the commission by members of FRU of an offence of misfeasance in public office arising from the handling of Brian Nelson as an agent. In considering this offence the Director took into account a number of factors. These included the absence of relevant evidence, including records which are unavailable and witnesses who are now deceased, the use of certain intelligence records as evidence and the inability of the prosecution to prove that the police had not been informed of Nelson's activities. The Director formed the view that there was not a reasonable prospect that the prosecution would be able to establish beyond reasonable doubt the commission of the offence. The statement was to the effect that there would be no further prosecution for offences relating to or connected with the murder of Patrick Finucane.

[83] In February 2008 the correspondence with the applicant, as to a public inquiry, resumed. The Applicant's solicitor invited a meeting between legal representatives. In April 2008, it was also made clear that one of the family's conditions for participating in a public inquiry was an undertaking from the Government not to issue a restriction notice under s.19 of the 2005 Act. It was ultimately agreed that a meeting should take place to discuss a possible draft of the restriction notice. On 22 September 2009, the Applicant's solicitor was advised that the outcome of the discussions would be an important consideration for Ministers in deciding whether it is in the public interest to proceed with an inquiry. In subsequent correspondence, the Applicant's solicitor requested clarification on the process by which the public interest would be determined and also made clear that the Applicant would be in a position to make representations on issues such as national security, location, duration and cost of the inquiry.

[84] A meeting of legal representatives took place on 30 April 2010 during which a draft restriction notice was available and discussed. The Applicant was invited to respond by letter to the draft Restriction Notice, the issues discussed in the meeting and any other issue which was considered to be relevant. No letter was sent on the Applicant's behalf and discussions with the family did not resume again until after the general election in May 2010.

[85] Following the general election in May 2010 a new government took office. The new SOSNI outlined a process he would use to decide what to do about the Finucane case which will be examined in some detail later in this judgment.

[86] On 11 October 2011 the Prime Minister met with the Finucane family to inform them of the decision not to hold a public inquiry and also of the decision to establish an independent review of the circumstances of the murder of Patrick Finucane. He also apologised for the collusion that had taken place. The apology was a general apology accepting that there had been collusion but without bringing definition to the collusion that had taken place.

[87] On 12 October 2011 the decisions not to hold a public inquiry and to establish an independent review were announced by the SOSNI in a statement in the House of Commons.

[88] Sir Desmond de Silva QC was appointed to conduct the review. He is a prominent lawyer with an international reputation being a former United Nations Chief War Crimes Prosecutor in Sierra Leone. His terms of reference were set out in a letter from the SOS (NI) dated 12 October 2011. He was tasked as follows:

> "Drawing from the extensive investigations that have already taken place, *to produce a full public account* of any involvement by the Army, the Royal Ulster Constabulary, the Security Service or other UK Government body in the murder of Patrick Finucane." (emphasis added)

It was stated that he would have full access to all documents as follows:

> "The Review will have full access to the Stevens archive and all Government papers, including any Ministry of Defence, Security Service, Home Office, Cabinet Office or Northern Ireland Office files that you believe are relevant."

The fact that his report would be published was stated in the following terms:

> "The account should be provided to the Secretary of State for Northern Ireland by December 2012, for the purpose of its publication." (3/75/651)

His independence was assured in the following terms:

> "…in carrying out your work you will be entirely independent of Government." (3/75/652)

The nature of the review was described in the following manner:

> "…this is a non-statutory, document-based Review and not a statutory inquiry held under the Inquiries Act 2005….The Review will not establish civil or criminal liability, nor order financial settlement. The Review is not being asked to conduct a fresh

> investigation or a non-statutory inquiry. You are consequently not being asked, nor do you have the power, to hold oral hearings. If you wish to meet people who can assist you with your work then that is a matter for you…" (3/75/652)

[89] By letter dated 24 October 2011 Sir Desmond made contact with the applicant through her solicitor assuring her of his independence and determination to get to the truth and to expose it. He indicated that he would very much welcome her involvement in the review and wished to meet with her (3/78/657). A response on the applicant's behalf asked a number of questions about the establishment of the review (3/78/659-661) which Sir Desmond declined to answer on the basis that they were substantially political in their purpose and nature and as such should be more properly addressed to the politicians who brought the review into being (3/78/662-663 and 3/78/665-667). The correspondence continued but ended with Sir Desmond acknowledging that the applicant did not want to meet with him (3/78/669).

[90] On 12 December 2012 Sir Desmond published his review report.

[91] The wide ranging nature of Sir Desmond's review and the fact that he obtained new documentary material was described by him in the following terms:-

> "…(I) decided at the outset of my Review that it was important to conduct a far more wide-ranging process than a straightforward examination of the available evidence gathered by the criminal investigations. I have, therefore, sought and received *new documentary material* from all of 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." (6/716/7) (emphasis added)

Sir Desmond also referred to the new documentary material and its impact by stating at paragraph 1.37 of his report that there was "… a significant amount of material that was not available to Sir John Stevens and Justice Cory. This has served to throw a flood of light on certain events that are crucial to my findings." Sir Desmond's independence is not in question and the issue as to why that material had not been made available at an earlier stage would have been considered by him. In fact he was content that

> "…all relevant Government Departments and Agencies co-operated fully and openly with my Review. Although I had no statutory powers of compulsion, I was given access to all the evidence that I sought, including highly sensitive intelligence files…" (6/716/10)

The applicant asserts that Sir Desmond was naïve in that assessment given the previous history of obstruction of investigations. I do not accept that assertion. Sir

Desmond clearly recognised that there was a history of "serious obstruction" of previous criminal investigations (6/716/10). He also stated that "…intelligence agents and their handlers have of necessity to deal in deceit, duplicity and subterfuge. In pursuit of the truth reviewers such as myself have to enter a murky world of uncertainty, cover stories and cover-ups, of misinformation and accounts re-formatted….things said, representations made and records kept may well not reflect the truth, and that records not made when one expects them to have been made may speak volumes and undermine an 'official' version of the truth. There are those who may fear the exposure of the truth and who may, for a variety of reasons, engage in dissembling, distorting or embellishing the account of activities in which they were involved." Sir Desmond is entirely independent and has considerable experience. He was alive to the risks of obstruction and deceit. His assessment is clear that he was provided with full and open co-operation.

[92] Sir Desmond did not confine his review to an examination of the documents but also met with or received written submissions from a number of individuals. He has provided a list of the 11 individuals he met with and those from whom he received written submissions (12 individuals or bodies) (6/746/1.48).

[93] Sir Desmond arrived at a number of significant conclusions

(a) He found that there was no adequate framework in Northern Ireland in the late 1980s for the running of effective agents (6/718/21-26). This meant that: "…agent-handlers and their superiors were expected to gather intelligence without clear guidelines as to the extent to which their agents could become involved in criminal activity in order to achieve this objective….there was a wilful and abject failure by successive Governments to provide the clear policy and legal framework necessary for agent-handling operations to take place effectively and within the law." (6/719/25-26)

(b) Brian Nelson played some part in at least four murders and ten attempted murders (6/720/29);

(c) Brian Nelson extensively updated and disseminated targeting material to other loyalist paramilitaries which they subsequently used in their efforts to carry out terrorist attacks and this was with the knowledge and acquiescence of his FRU handlers, (6/720/29);

(d) Brian Nelson was "motivated by a desire to see what he perceived to be 'legitimate' republican targets killed…his actions materially increased the targeting capacity of the UDA and thereby furthered their murderous objectives." (6/720/29)

(e) Brian Nelson was re-infiltrated into the UDA and tasked to focus its targeting on what the FRU's Commanding Officer referred to as 'PIRA [Provisional IRA] activists'. The stated rationale for this tasking was that such

targets would prove 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 in order to save lives." (6/720/30)

(f) Such counter-measures were only very rarely taken in response to intelligence provided by Nelson. In fact they were only taken in three cases where there were specific reasons for doing so (6/720/31); Nelson's desire to see republicans attacked was clearly apparent to the FRU and he is likely to have believed that these objectives were shared by FRU (6/720/32); and on occasions Nelson's FRU handlers provided him with information that was subsequently used for targeting purposes (6/720/33).

[94] Sir Desmond did not find accountability for what went wrong to rest solely with FRU and its CO, rather finding that there was a failure by the Army to ensure adequate supervision in the case (6/721/35). He also concluded that 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 (6/721/37).

[95] Sir Desmond found "the most serious issue of all" in relation to accountability was the failure of the RUC SB to respond to Nelson's intelligence (6/721/38). He noted that FRU and RUC SB took up separate positions in their attempts to explain why intelligence was not acted on (6/721/39). FRU maintained that the intelligence provided by Nelson was passed on to RUC SB. RUC SB insist that the information necessary to prevent attacks was not provided to them. Sir Desmond found (6/722/40) the position to be closer to that articulated by FRU, see paragraph [44] of this judgment.

[96] In common with Judge Cory, Sir Desmond also found that "there was a seriously disproportionate focus by the RUC on acting upon threat intelligence that related to individuals who were being targeted by republican paramilitary groups." (6/722/42) but he concluded that this pattern was not "driven by an inherently sectarian bias" (6/722/43).

[97] In relation to the murder of Patrick Finucane Sir Desmond concluded:

a) The failure of the RUC, Security Service and Secret Intelligence Service to warn Patrick Finucane of an imminent threat to his life in 1981 was wholly inconsistent with the state's obligations to protect the lives of its citizens (6/724/53- 54);

b) There is no evidence that Mr Finucane was ever informed that the Security Service or RUC SB ever warned him of a threat to his safety after receiving intelligence that he was a UDA priority target in 1985 (6/724/55);

c) The RUC SB failed to take action against the West Belfast UDA, such action as was taken was "grossly inadequate" (6/725/58-61);

d) Security Service propaganda initiatives could have served to legitimise Patrick Finucane as a potential target for loyalist paramilitaries (6/726/62-65);

e) There are grounds for believing that the comments made by Mr Douglas Hogg did increase the vulnerability of defence lawyers such as Patrick Finucane (6/726/66-68);

f) The Security Service failed to pursue intelligence received in December 1988 that a meeting of UDA commanders was going to discuss plans to kill three solicitors. It must have been clear that one of those solicitors was Patrick Finucane (6/727/69-70)

g) On the balance of probabilities an RUC officer or officers did propose Patrick Finucane as a UDA target when speaking to a loyalist paramilitary in RUC Castlereagh on 8 or 9 December 1988 (6/728/74);

h) Kenneth Barrett's broad allegations that the UDA received intelligence about Patrick Finucane from a police source are essentially accurate (6/728/75);

i) Brian Nelson downplayed the true extent of his involvement in the conspiracy to murder Patrick Finucane (6/729/79). In fact he targeted Mr Finucane (6/729/80);

j) Nelson is likely to have produced a "P" card on Patrick Finucane (6/729/81) and he also carried out a "recce" on the Finucanes' home (6/729/82). He passed a photograph of Patrick Finucane to L/28 and Kenneth Barret five days before the murder (6/729/83);

k) FRU did not have foreknowledge of the conspiracy within the UDA to murder Patrick Finucane (6/730/84);

l) However, the Army must bear a degree of responsibility for Nelson's targeting of Patrick Finucane given its knowledge of his activities (6/730/85-87);

m) From the evening of 9 February 1989 it was entirely foreseeable to the RUC SB that William Stobie would hand over a weapon for use in an imminent UDA attack. They were aware that L/20 was involved but took no action to disrupt the planned attack (6/731/91);

n) The proper exploitation of William Stobie's information could have prevented the murder of Patrick Finucane (6/731/91);

o) The information supplied by William Stobie after the murder provided the RUC SB with a potential opportunity to recover one of the weapons used and to arrest one of the men responsible for the attack. This was never revealed to the investigation team (6/731/93);

p) Relevant intelligence was withheld from the investigation team (6/731/94);

q) The murder investigation against Kenneth Barrett was effectively dropped when RUC SB decided to recruit him as an agent (6/732/95-97);

r) A tape recording of Barrett's admission to involvement in the murder 'disappeared'. A tape provided to the Stevens 3 team was of a subsequent conversation where no admission was made (6/732/99);

s) Both the Army and the RUC failed to provide the Stevens 1 investigation with important relevant material (6/733/101);

t) Senior army officers deliberately lied to criminal investigators by informing them that they did not run agents in Northern Ireland (6/733/102);

u) RUC SB also obstructed the investigation by withholding significant quantities of information (6/733/103);

v) During the Shawcross exercise about the proposed prosecution of Brian Nelson the Army and Ministry of Defence officials provided the Secretary of State for Defence with highly misleading and, in parts, factually inaccurate advice about the FRU's handling of Brian Nelson (6/734/107);

w) Senior RUC officers provided contradictory and, in parts, highly misleading submissions to the DPP(NI) (6/734/107);

x) There is no evidence to suggest that any Government Minister had foreknowledge of Patrick Finucane's murder, nor that they were subsequently informed about the intelligence that had existed (6/734/108);

y) There is no evidence that any Government Minister had any knowledge of Brian Nelson's targeting activity (6/734/108);

z) The threshold for finding collusion is met in this case (6/735/114).

[98] Sir Desmond concluded (6/735/115 - 116):

"Overall, I am left in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements

> of the state. The significance is not so much, as Sir John Stevens concluded in 2003, that the murder could have been prevented, though I entirely concur with this finding. The real importance, in my view, is that *a series of positive actions by employees of the State actively furthered and facilitated his murder and that, in the aftermath of the murder, there was a relentless attempt to defeat the ends of justice.*" (emphasis added)

and

> "My Review of the evidence relating to Patrick Finucane's case has left me in *no doubt that agents of the State were involved in carrying out serious violations of human rights up to and including murder…*" (emphasis added)

Sir Desmond was making a distinction between "employees of the State" and "agents of the State." The reference to agents of the State is a reference to for instance Brian Nelson and Kenneth Barrett. However in respect of "employees of the State" there have been no prosecutions of anyone who actively furthered and facilitated Patrick Finucane's murder or of anyone who in the aftermath of the murder, were involved in a relentless attempt to defeat the ends of justice.

[99] The applicant asserts that the de Silva review was inherently unlikely to arrive at the truth because it lacked the power to compel witnesses to answer questions. That an essential method of obtaining the truth is the power to compel the attendance of witnesses combined with an assurance from the Attorney General about the subsequent use of the material obtained. It is submitted that absent this power there was no prospect of arriving at the truth. In particular one person who could provide answers and who has so far refused to answer any questions to the Stevens investigations and who was medically unable to be interviewed by de Silva is Nelson's handler described as A/13 in the de Silva report. Another essential witness who Sir Desmond did meet is Colonel J but the applicant contends that she or her representatives should have been involved in the questioning of that witness.

Part Four: Factual background
A sequence of events leading to the impugned decisions

[100] The sequence starts before the 2010 general election with the policy of the Conservative party in opposition. Mark Larmour, Deputy Director in the NIO in his affidavit sworn on 5 April 2012 states that the SOSNI, Mr Patterson, had consistently made clear in opposition and in Government, his position that there should be no more open-ended and costly inquiries into the past. (1/9/66/32). That affidavit also refers to the views previously expressed in public by the Prime Minister as referred to at paragraph 8 of the affidavit of the Prime Minister's private secretary, Simon King. I consider that the definitive statement of those views is 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 open-ended, long running and costly public inquiries into the past in Northern Ireland that these decisions should be made on a case by case basis (1/8/43/8 and 3/55/567-568). It was not an absolute policy that there should be no more open-ended and costly inquiries but rather each case should be considered on its merits.

[101] The General Election on 6 May 2010 led to a change of government with the formation of the coalition. One of the first issues for consideration by the SOSNI after taking up office was the outstanding issue of a public inquiry into the murder of Patrick Finucane. Eleven days after the General Election and on 17 May 2010 Brendan Threlfall of the Legacy Unit of the NIO presented a paper to the SOSNI in relation to that issue (5/2/4-13). The submission contained in the paper suggested a process which the SOSNI could follow in reaching a decision as to whether it was in the public interest to hold an inquiry in the Finucane case. That process would involve, amongst other matters, writing to the Finucane family, making a Parliamentary statement which would note that he had invited representations and that those representations along with all other representations would be considered before deciding whether it was in the public interest to proceed with an inquiry. The paper recommended that the SOSNI meet with officials to discuss. That he consider the suggested process for taking decisions on the Finucane case and that he consider the suggested text of a Parliamentary statement which was attached.

[102] On 28 June 2010 a letter was written by the SOSNI inviting the Finucane family to meet him (5/3/14) which meeting subsequently took place on 8 November 2010 (3/57/572 and 5/7/43).

[103] On 30 June 2010 the SOSNI referred in Parliament to the policy which I have defined in paragraph [100] of this judgment (3/55/567).

[104] On 1 November 2010 Mr Threlfall presented a further paper to the SOSNI in advance of a meeting with the Finucane family on 8 November 2010. The paper referred to both Irish and US political opinion and to coalition considerations in that the Liberal Democrats were on record in 2004 as supporting public inquiries in cases recommended by Judge Cory. The SOSNI was provided with copies of the Cory Report, the Stevens 3 Report and the DPP's 2007 statement on prosecutions.

[105] On 3 November 2010 the SOSNI wrote to the Prime Minister to make him and Cabinet colleagues aware of the process he intended to follow in taking a decision. He stated that he had inherited a long-running and highly controversial issue. The SOSNI reminded the Prime Minister that he had already publicly stated in his response to the Saville Report that there will be no more open-ended and costly inquiries. That he had also made it clear that each case would be considered on its merits. The SOSNI stated that he had not taken any view on whether or not to hold a public inquiry. He had decided to follow a specific process of considering representations to allow him to consider the public interest in a fair and measured manner. He informed the Prime Minister that he was due to meet the Finucane

family on 8 November 2010 and that he would advise them of the process he intended to follow. That soon after that meeting he would lay a written ministerial statement in Parliament noting that he would be formally considering representations from the family and any other representations he received over the next two months before making a decision in the public interest as to whether to hold a public inquiry. The letter also referred to the cost of the Billy Wright Inquiry which operated under the terms of the Inquiries Act 2005 at over £30 million, the Robert Hamill Inquiry at £32 million so far and the Rosemary Nelson Inquiry at £45 million to date. The SOSNI envisaged that given the complexity of the Finucane case and the potential for judicial review over issues around the disclosure of national security information, he might expect a Finucane Inquiry to cost more than any of those three inquiries.

[106] On 4 November 2010 Tom Fletcher, Cabinet Office Foreign Policy Advisor, made the letter dated 3 November 2010 available to the Prime Minister. The attached memorandum stated:-

> "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 inappropriate.
>
> But we need to think carefully with Owen about handling:
>
> - Coalition dynamics;
> - Cabinet discussion;
> - Adams/Maguinness;
> - The Irish (I will be in Dublin next week for next round of NI talks with Cowen's team).
>   NB Owens counterpart Michael Martin;
> - The Americans."

[107] Also on 4 November 2010 Tom Fletcher provided a briefing paper to the Prime Minister in advance of a meeting between the Prime Minister and the SOSNI on 5 November 2010 primarily on the Finucane case. The briefing paper stated that the SOSNI had sent the Prime Minister a long letter setting out a sensible approach to a difficult long-running issue with iconic resonance in Northern nationalism, the Republic of Ireland and Irish America. The briefing paper went on to state that the key point for the Prime Minister to understand is that whilst the somewhat complex process of lengthy consultation against specified criteria over a period of months may seem elaborate, it is viewed as legally essential. The briefing paper also stated:-

> "Because of the commitment made by the previous Government in 2001 (though not implemented because of the controversy over the 2005 Inquiries Act provisions allowing the Government to withhold sensitive information), the Finucane family are likely to initiate a

> legal challenge in the event the Government does not agree to an inquiry. To that end 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. To that end, there is an element to which this meeting and the SOSNI's letter is a necessary part of the process; as the issue was considered by the previous Prime Ministers it is assumed it is also an issue on which the serving Prime Minister will be consulted." (4/3/9)

[108] On 5 November 2010 the Prime Minister, the SOSNI and the Attorney General met and discussed the Finucane case. The Prime Minister agreed to the course of action set out in the SOSNI's letter dated 3 November 2010 (5/6/42).

[109] On 8 November 2010 the SOSNI met the Finucane family (5/7/43 and 3/57/572).

[110] On 9 November 2010 Mr Threlfall presented a paper to the SOSNI entitled "Next Steps on the Finucane Case". The submission provided the SOSNI with a draft letter for him to send to the applicant and a revised written Ministerial Statement for him to lay in Parliament. (5/7/46)

[111] On 11 November 2010 the SOSNI wrote to the applicant outlining the decision-making process that he would be following. He stated that he had certainly not taken any decision at this stage as to whether or not to hold a public inquiry into Patrick Finucane's death. He stated that the process that he had decided to follow was designed to allow the applicant a fair opportunity to make detailed representations and he was formally inviting her to make representations to him as to whether or not he should establish a public inquiry into the death of Patrick Finucane. (3/58/573-575).

[112] Also on 11 November 2010 the written Ministerial Statement about the process to be followed in forming an assessment as to whether it *was now in the public interest* to hold a public inquiry into the murder of Patrick Finucane was laid in Parliament (3/59/579). 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 account of six specific factors which were relevant to an assessment of the public interest which were described as follows:-

> "In addition to considering representations on the case, I shall also need to take into account a broad range of other factors in determining what the public interest requires. The other factors that I will consider when deciding the public interest will include:
>
> a) The commitment given to this House in 2004;

b) The conclusions of reviews and investigations into the case and the extent to which the case has caused, and is capable of causing, public concern;

c) The experience of other inquiries established after the Weston Park commitments;

d) The delay that has occurred since the 2004 announcement and the potential length of any inquiry;

e) Political developments that have taken place in Northern Ireland since 2004; and

f) The potential cost of any inquiry and the current pressures on the UK Government's finances.

It is my intention to consider the public interest carefully and in detail at the end of the two month period for representations and then to take a decision after such consideration as to whether or not to hold a public inquiry into the death of Patrick Finucane."

[113] On 6 January 2011 a meeting took place between the legal representatives of the applicant and NIO officials (3/60/580-585 and 5/11/60-63). This meeting arose out of a request from the applicant's solicitor. A second meeting also took place on 8 February 2011. One outcome of the meeting on 6 January 2011 was that consideration was to be given to an extension of the two month period during which representations to the Government could be made. In the event on 11 January 2011 the two month period was extended to four months (5/12/64). At the end of the meeting on 6 January 2011 the applicant's representatives were expressly requested to give an indication of what format of inquiry the applicant would be prepared to participate in, with a view to assisting the SOSNI to determine the public interest considerations. Representations were submitted by the applicant on 10 March 2011 indicating that of the various formats for an inquiry which were discussed, the Baha Mousa format "would be the most appropriate."

[114] On 25 January 2011 the SOSNI met with NIO officials and discussed the case of Patrick Finucane. The SOSNI was recorded as continuing to keep an open mind on the issue and wanted to ensure that the family had a full opportunity to provide their views. He was briefed as to contact with the family and as to the meeting with the family's lawyers. The SOSNI said that one of the principles which was important to the Government was to limit time and cost and with this in mind he would like officials to work on possible options and models for further discussions with Ministers. The SOSNI also said that it was important that officials make clear that the public interest test had not yet been taken consequently all options were still on the table (5/13/65). As a consequence of that request officials in the NIO undertook work on a number of possible options and models for an inquiry or

review, which work was subsequently contained in a briefing paper dated 1 April 2011.

[115] On 3 February 2011 Brendan Threlfall briefed the SOSNI with an update on discussions with the applicant's legal advisors. He informed the SOSNI that the legal advisors had been sent a summary of examples of inquiries or non-statutory reviews and that there was to be another meeting with them on Tuesday 8 February 2011. (5/14/66).

[116] On 8 February 2011 a further meeting took place between NIO officials and family representatives and legal representatives. (3/64/593-599 and 5/14/73-74).

[117] In addition to representations from the family, the SOSNI also received consultation responses from a number of individuals, the Ministry of Defence, the Home Office, the Security Service, the Police Service of Northern Ireland and the Northern Ireland Human Rights Commission.

[118] On 1 April 2011 Brendan Threlfall sent a lengthy and detailed briefing paper on the Finucane case to the SOSNI (5/15/75-161). The paper recounted that the consultation period had come to an end and accordingly it now fell to the SOSNI to consider the representations received and the public interest factors before taking a decision on whether or not to hold an inquiry. It stated that the core issues that SOSNI needed to consider were the representations received (particularly from the Finucane family and Cabinet colleagues) and the public interest factors that the SOSNI set out in his written Ministerial Statement. It suggested that he might wish to follow the process of considering the representations received, considering each public interest factor in turn carefully weighing the public interest for and against an inquiry in each case and taking a proportionate overall view on where the balance of public interest lies. In that respect various policy options were provided to him to help inform his public interest considerations. The SOSNI was advised 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 (4/1/3) stipulates, for example, that the Prime Minister must be consulted in good time about any proposal to establish a major 2005 Act inquiry.

[119] In summary the paper contained (a) a description of the murder, a summary of the investigations which had taken place and the outcomes of those investigations; (b) the terms of the Weston Park Agreement, the appointment of Justice Peter Cory and a summary of the conclusions within his report; (c) a summary of relevant public statements about the case and interest from other governments; (d) the commitment given by the former SOSNI to establish a public inquiry; (e) the representations received during the consultation period; (f) an analysis of the public interest factors identified in the Ministerial Statement of 11 November 2010 and the extent to which each factor pointed in favour of or against a public inquiry; (g) an analysis of each of the policy options which were open to the SOSNI, namely: a full open-ended 2005 Act inquiry; a limited 2005 Act inquiry; a full

non-statutory inquiry; a non-statutory information recovery process; and a decision not to commence any process. In relation to each of these 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); (i) an examination of the legal and investigative implications of a decision not to hold an inquiry; (j) a detailed analysis of the costs implications for each of the policy options; and (k) the possibility and enforceability of measures for controlling costs and time for any 2005 Act inquiry.

[120] The paper indicated that the SOSNI in weighing the public factors must consider arguments both in favour and against a public inquiry and decide the overall public interest in a proportionate and fair manner. The paper went on to analyse the potential cost of any inquiry and the current pressures on the UK Government's finances. In considering this factor it stated that the Wright Inquiry cost £30.5 million, the Hamill Inquiry £32.6 million, the Nelson Inquiry £45.8 million and the Blood Sunday Inquiry £191.5 million. The combined cost of the four public inquiries had been £304 million. At paragraph 65 it stated:-

> "The SOSNI has commented a number of times on the serious pressures on the public finances. As the SOSNI's speech to, for example, the British Irish Parliamentary Assembly in November 2010 made clear, 'we are paying debt interest of £120m a day … the Government had no choice but to act quickly and decisively to halt the headlong rush towards financial bankruptcy … of course that means hard choices have to be made and that was reflected in the Chancellor's emergency budget and the recent spending review'. The broad context is consequently that the public finances are under exceptional pressure and policy decisions need to reflect the financial climate in which the Government is 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."

[121] In relation to the non-statutory review and information recovery model the following was stated:-

> "This model could be presented as a mechanism to allay public concern by building on the investigations that have taken place and putting more information into the public domain. It would not, however, represent the public inquiry mechanism that Judge Cory recommended. *There is also a considerable risk that a documentary review such as this may not be able to produce definitive account of the case. Cory was clear that some of the documentary evidence was contradictory and that the issues would need to be tested in an inquiry.*

> *This model would effectively represent a re-run 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." (5/15/117/86) (emphasis added)

This assessment is relevant to issue of lack of compellability of witnesses in a review and the sufficiency of a review.

[122] The purpose of the briefing paper dated 1 April 2011 was to identify the risks and to identify the different potential outcomes. It was to sight the SOSNI with the nature of the advantages and disadvantages of the various policy options. It was not an argument for a particular policy decision, but rather an explanation of advantages and disadvantages of various policy options.

[123] On 8 April 2011, and a week after the briefing paper had been received, the SOSNI held a lengthy two hour meeting with NIO officials to discuss the Finucane case (5/16/162). At the outset the SOSNI was keen to emphasise that he still had an open mind on whether or not to hold an inquiry. Taking into account the family's position as set out in their written representation it was agreed that any non-statutory option would be excluded from further debate. The time and cost implications were considered and the SOSNI was concerned about reverberations across Whitehall if a decision to hold a potentially expensive inquiry was taken. Based on the rationale of inestimable expense to the public purse for an open-ended inquiry under the 2005 Act (along with wider considerations of, for example, the family's desire for a prompt inquiry) this option was dropped from further consideration. At the end of the meeting the policy options that were left for consideration were a limited 2005 Act inquiry or no inquiry at all. The next step was that the SOSNI asked his officials to do more work to summarise the pros and cons of the two remaining policy options and clarify the costs involved and the means of controlling the time and cost of the (limited) 2005 Act inquiry option. That meeting was followed by a briefing note (5/17/164) which is undated and which indicates that having considered the representations received and public interest consideration it is clear there were only two viable potential ways forward namely:-

(a) Statutory inquiry with clear time limits and cost controls.

(b) A decision not to hold an inquiry.

[124] In advance of a meeting with the SOSNI on 5 May 2011 and on 4 May 2011 the Prime Minister was provided with a briefing paper (4/7/26) by Simon King, his Private Secretary. In that paper the Prime Minister was informed that the SOSNI feels that there are only two viable options namely:-

(i) To hold a statutory inquiry with clear time and cost controls.

(ii) Not to hold an inquiry.

The briefing paper goes on to state that:-

> "Cabinet Office colleagues advise that there is also a third option of refusing to hold an inquiry, but apologising for the actions of the security forces. 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 more interested in seeking facts about the case which they think that we will be reluctant to release, than in securing an apology. They would certainly challenge any decision not to hold an inquiry – so, while the Cabinet Office option might satisfy some moderate people, it will be unlikely to be the end of the matter."

The paper then went on to outline pros and cons of holding an inquiry.

[125] On 5 May 2011 the SOSNI and the Minister of State for Northern Ireland met with the Prime Minister to discuss the Finucane case (5/20/174). The Prime Minister is recorded as stating that he understood that this was a difficult case and that there was pressure for a public inquiry. However, given the Government's policy on public inquiries, he asked that further consideration be given before a final decision is made to the option of making a statement saying what we knew about what happened, apologising for actions which we thought were wrong – and possibly also seeking an independent person to carry out a rapid examination of the details of the case (including consideration on what more information about the case could be made public) but stopping short of a full public inquiry. In effect the SOSNI, who had an obligation to consult with the Prime Minister, was being asked by the Prime Minister to consider the option of a public apology possibly together with a non-statutory review by an independent person stopping short of a full public inquiry. After that meeting the SOSNI requested his officials to give further consideration to non-statutory options (5/19/173).

[126] On 16 May 2011 a meeting took place between Simon King, the Private Secretary to the Prime Minister, and officials within the NIO, Cabinet Office and the Prime Minister's Office. The meeting was chaired by Simon King. The purpose of the meeting was to discuss the implications of the range of possible decisions on the Finucane case and begin to co-ordinate what responses and advance preparations would be required within the various departments in the event of a decision on any one of the options. Following the meeting an official from the NIO sent a paper dated 17 May 2011 outlining a draft of a possible model for a review option (1/8/45/13). In the event after work and consideration this was the option adopted on 11 July 2011.

[127] The review model option was outlined in the paper dated 17 May 2011 to assist policy development. The model was described as follows:-

(a) Independent figure asked to conduct a private paper based review.

(b) No public hearings but there would be an option to conduct occasional private interviews with relevant individuals where necessary.

(c) Assurances from Government and the PSNI on access to documents and, where necessary, serving State employees.

(d) Published final report. Normal arrangements for publishing such a report would apply (HMG receives 24 hours in advance).

(e) The question of whether to release a small number of select key documents alongside the report would be left to the discretion of the independent reviewer.

(f) The normal official level Article 2/national security checking process on the report.

(g) Asked to report within 12 months.

(h) Statement to Parliament publishing and responding to the report potentially including an apology.

(i) Review likely to be significantly less costly than a statutory inquiry (further work required but likely to be less than £2m).

The briefing paper went on to state that this is effectively a "Cory II" review but it would be asked to provide a definitive final judgment in the case, rather than the provisional findings put forward by Cory. The paper also states that:-

> "For both policy and legal reasons we would need a robust argument as to why a statutory public inquiry was not required. It could be argued that an inquiry would too lengthy and costly and would be restricted in what information it could disclose because of national security. This model could be presented as representing the quickest means of finding out the truth. We would need a narrative to meet criticism from the family and wider nationalism that this model lacked the power to compel any evidence. We could emphasise that the review was independent and would have full access to all State papers including the one million pages of the Stevens archive. If the statement establishing the review also accepted some form of wrong doing in a general sense, then we could argue that this mitigated against the need for a full inquiry

> because the State did not intend to publicly contest the findings of Stevens, on which this review would be based (in any public inquiry the MOD and others would employ counsel to strongly dispute any allegations of wrongdoing)."

Again consideration was being given to the lack of any power to compel evidence in a review.

[128] On 8 June 2011 the SOSNI met with NIO officials. In relation to alternative policy options he asked his officials to develop the draft review model for further discussion (5/24/189).

[129] On 8 June 2011 Simon King provided a briefing paper (4/10/40) to the Prime Minister indicating that he had been working with the NIO, the Cabinet Office, MI5, the Home Office, MOD and Attorney General's Office on the possibility of not holding a full public inquiry into this case but instead making a statement saying what we know about what happened, apologising for actions which we think are wrong – and possibly also asking an independent person to carry out a rapid examination of the details of the case. The paper ended by stating that if the Prime Minister was still interested in pursuing the review option the next step will be to meet formally with Owen Patterson, the Deputy Prime Minister, the Defence Secretary, the Attorney General, Jonathan Evans (Head of the Security Services) and others. Simon King enquired whether the Prime Minister would like him to get this set up. The response from the Prime Minister was

> "Good. Let's give this a try. Pls fix. DC 9.6.11."(4/10/47)

The reference to please fix is a reference to fixing a meeting. I do not consider that this was an indication of a decision having been taken but rather progress towards having a meeting at which the various interests would be taken into account.

[130] On 16 June 2011 Brendan Threlfall provided a further paper (5/25/190) to the SOSNI. That paper included an updated summary of the review model. Under the heading "Next Steps" it stated:-

> "Number 10 and the Cabinet Office are setting up a ministerial meeting, chaired by the Prime Minister, to take a collective decision on this issue. Our understanding is that this is likely to take place next week (week commencing 20 June). As is normal practice for these meetings, the Cabinet Secretariat will produce a paper summarising the options for Ministers. The paper will be based on the options already presented in detail to you (a limited 2005 Act inquiry, a documentary review, or a decision not to hold an inquiry or review). As the lead Cabinet Minister on this issue you are likely to be expected to lead the collective discussion of the issue and indicate your preferred option to Cabinet colleagues."

[131] On 7 July 2011 the Cabinet Office circulated in advance of a meeting to be chaired by the Prime Minister in Downing Street on Monday 11 July 2011 supporting papers and annexes for that meeting (4/12/51). The paper identified the issue as being the murder of Patrick Finucane one of the most long running and totemic cases arising from the Northern Ireland Troubles. A decision on whether or not to proceed with a public inquiry into the case needs to be made as soon as possible so that accusations of undue delay are to be avoided. The paper stated that the need for a decision arises from the previous Government's commitments to an inquiry in 2004 following the Anglo-Irish political talks at Weston Park in 2001 and a review of the case by Judge Cory in 2004. The inquiry was never established because of a failure to agree appropriate terms with the Finucane family. The paper went on to state that the issue has now landed on this Government's desk and the decision point has been reached following a consultation process launched by the present SOSNI. A detailed background paper was also attached.

[132] At paragraph 6 of the paper it is stated that a second aspect of the allegations was that the killing was sanctioned at the highest levels of Government but that there does not appear, to officials knowledge, to be corroborating evidence around the high level direction of the murder:-

> "It is, however, assessed that material does exist that could give rise to concerns that more senior figures were aware of informant handling/control issues more generally (including the wider activities of Nelson). In all of this of course, we must have regard for what was an extremely difficult and often chaotic operating environment in Northern Ireland at that time, and *trying to establish definitively who knew what, when and at what level either about the Finucane murder, or agent handling issues more generally will be extremely difficult.*" (emphasis added)

[133] The detailed background paper then set out the public interest factors and in relation to the advantage that at an inquiry witnesses could be compelled to give evidence it stated:-

> "The prospects of an inquiry being able to discover new reliable evidence is by no means certain. It is possible that the cross-examination of witnesses could reveal more about what happened in this case. *As far as we are aware many of the witnesses on the Government side are still alive (including from the FRU, RUC and Security Service) and could be summoned to give evidence. However, there is no guarantee that they would illuminate the facts further and a number of other key witnesses in the case (including Brian Nelson) are now dead.*" (4/12/62) (emphasis added)

This issue as to cross examination of witnesses was also considered in relation to a review model. It was stated:-

> "A review would not be a fresh investigation but could still satisfy the public requirement to know more whilst demonstrating the Government has no interest in hiding the truth. *It would potentially offer the quickest means of establishing, as far as is possible given the passage of time, the truth of the case* in a significantly less resource intensive way than would be possible in an inquiry. *While there would be no cross-examination of witnesses in this model there is no guarantee in any case that those witnesses still alive would remember events sufficiently clearly to assist an inquiry, or necessarily reveal all that they know.* A documentary review will also provide assurance on the protection of sensitive security information, though the involvement of an independent figure would, rightly, still test the boundaries of what could be safely disclosed." (4/12/64) (emphasis added)

[134] On 8 July 2011 Brendan Threlfall provided the SOSNI with a briefing for the ministerial meeting which was to take place on Monday 11 July. The briefing paper attached a draft speaking note reflecting the SOSNI's preferred option of the review model. The speaking note indicated the key points to make, which included:-

> "We need to decide whether an inquiry is in the public interest. If we decided it isn't, then we need to consider whether there is anything else we can do to meet the public interest in finding out what happened. We have three options in practice:
>
> > Decide an inquiry is in the public interest and hold a statutory 2005 Act inquiry.
> >
> > If we decide an inquiry is not in the public interest we could establish an independent review to publish the full story what happened.
> >
> > Or we could decide an inquiry is not in the public interest and offer no further process."

[135] The speaking note recorded that the Finucane family have said that the only option they would accept is a fully statutory inquiry. It indicated that this "*could be a lengthy process marred 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 in six years)*" (emphasis added). It indicated that there were no guarantees that an inquiry would provide satisfaction particularly given that some important witnesses are deceased. It indicated that on balance the SOSNI favoured the option of asking the independent

figure to use the material collated by the Stevens investigation to produce a full public account of any State involvement that this would enable the Government to be clear that it did not want a costly and open ended inquiry but that it supported the full truth emerging. The speaking note stated:-

> "I believe this option is the best way of balancing the public interest: it establishes a process that is capable of revealing the truth whilst avoiding a lengthy and costly inquiry." (5/27/198-203)

[136] On 8 July 2011 a "Finucane Case: Meeting Brief" was made available to the Prime Minister (4/12/73-75). This set out three options as follows:

(a) One is to agree to the demands for a full judicial inquiry under the 2005 Inquiries Act.

(b) The second option is to say "no" and tough it out.

(c) The third option is the one we worked up based on your previous steer, which was that if the State got this case wrong, we should say so, apologise and seek to put as much information into the public domain through an administrative review process.

[137] On 11 July 2011 a ministerial meeting took place attended by the Prime Minister, the Deputy Prime Minister, the Defence, Home and Justice Secretaries, the SOSNI for Northern Ireland and the Attorney General (5/28/204-206). It was at this meeting and on a collective basis that the decision was taken. The Prime Minister opened the meeting by noting that the supporting papers set out fully the complexities and difficulties of the case and the options for proceeding. He stated that the primary objective must be to find the truth. There were strong reasons to conclude that the public interest in meeting this objective would be better served by a process other than a potentially lengthy, costly and procedurally difficult public inquiry which may ultimately prove unworkable given the sorts of national security issues which it would be required to cover. The Prime Minister's preferred route was therefore to ask an independent person to carry out a paper based review of all existing material relating to the case, including that held by Government departments, with a view to considering what more information could be made public. The Government had, following the response to the Saville Inquiry, a reputation for facing up to the past where things had gone wrong. This alternative, while – like all the other options – extremely difficult, did, in the Prime Minister's view, stand a chance of bringing a speedier and satisfactory resolution to this case. Ministers agreed with this assessment, and were broadly supportive of the view that the alternative proposal should be given every chance. Summing up the Prime Minister said that it was clear that the review proposal had the support of Ministers, although the risks were clearly understood. It was important to be clear about a number of fundamental points. First and foremost, there must be no attempt to hide the truth. The Government was not embarrassed about being embarrassed – if

something had gone wrong, we must face up to it. Second, this meant that the tone of any announcement had to reflect that we already knew that something had gone wrong with this case – the review would be looking at how and why things had gone wrong, not whether. Third, the Government was rightly committed to discussion with Mrs Finucane in advance of any announcement. Her reaction and that of her family would be crucial. The Prime Minister would be prepared, with the SOSNI, to meet Mrs Finucane to explain why he thought the process being suggested was the best way to meet her understandable demand to know what had happened to her husband. The SOSNI should make the initial announcement to Parliament and the Prime Minister would make the concluding statement after the review.

[138] On 11 October 2011 the Finucane family met with the Prime Minister and the SOSNI at Downing Street where the decision to hold a review was communicated to them.

[139] On 12 October 2011 the SOSNI announced the review in Parliament (3/73/634). He indicated that the Prime Minister had invited the family to Downing Street on 11 October 2011 so that he could apologise to them in person and on behalf of the Government for State collusion in the murder of Patrick Finucane. That the Government accepted the clear conclusions of Lord Stevens and Judge Cory that there was collusion. He stated:-

> "*I have committed to establishing a further process to ensure that the truth is revealed. Accepting collusion is not sufficient in itself. The public now need to know the extent and nature of that collusion.* I have, therefore, asked the distinguished former United Nations War Crimes Prosecutor Sir Desmond de Silva QC to conduct an independent review to produce a full public account of any State involvement in the murder." (emphasis added)

He stressed amongst other matters that Sir Desmond de Silva was being given unrestricted access to documents. That he would be free to meet any individuals who can assist him in his task and that it is open to him to invite or consider submissions as he sees fit. He also stated that the review would have the full support and co-operation of all Government departments and agencies in carrying out its work. The SOSNI stated that he strongly believed that

> "this would be *the quickest and most effective way of getting to the truth.*" (emphasis added)

He indicated that experience has shown that public inquiries into the events of the Troubles takes many years and can be subject to prolonged litigation, *which delays the truth emerging*. He posed the question as to how do we get to the truth. He indicated that

'as we have made clear in the build-up to this statement, we firmly believe that costly open-ended inquiries are not necessarily the best way to get to the truth. Speed is also an issue. Past inquiries have taken a long time. … We have made a full apology, and we now have an opportunity to put in place a new process. *There are 1 million documents and there will be more than 9,000 witness statements. That is where the truth lies and we want to get the truth out.*" (emphasis added)

He repeated that the huge archive of data

"*is where the truth lies - we know the truth is in there - and we now all have an interest in getting to the truth.*" (emphasis added)

[140] It can be seen that a strong part of the SOSNI's reasoning in arriving at his decision was that the review process would reveal the truth.

Part Five: Factual background.
Consideration by the Council of Ministers

[141] In July 2003 the Strasbourg court found that there had been a violation of Article 2. However, it declined to order a fresh investigation and also declined to order that the UK was obliged to establish a public inquiry. It decided that the Committee of Ministers should "address the issues as to what may be required in practical terms by way of compliance in each case." The court's findings can be summarised as follows

(a) A lack of independence relating to the initial police investigation which had been carried out by the RUC. This finding did not relate to the subsequent Stevens investigations which were undertaken by an independent police force.

(b) A lack of promptness in relation to the Stevens 3 investigation. This is not a matter which can subsequently be remedied. The court did propose to make a monetary award by way of just satisfaction, but the applicant withdrew this request.

(c) The inquest was not a *Middleton* inquest. However, an inquest is not the only means by which the Article 2 obligation can be discharged. The court made no finding to the effect that a further inquest or a public inquiry was required in order to comply with article 2.

(d) The requirements for public scrutiny and accessibility of the family which had not been met fell to be addressed by the Committee of Ministers.

[142] The Applicant made a series of submissions to the Committee of Ministers arising out of the statement of the SOSNI on 23 September 2004, in which he made reference to the inquiry being conducted under new legislation. It was contended by the Applicant that such an inquiry would not be effective and would not comply with Article 2. Those submissions are dated 10 December 2004, 22 March 2005, 25 May 2005 and 30 May 2005 (2/20-30). The Government provided the Committee of Ministers with further information and materials on the 2005 Act in June 2005 (3/46/494 – 504).

[143] On 15 September 2005, the Secretariat of the Committee of Ministers provided its assessment of the measures which had been taken by the Government in a number of cases involving the security forces in Northern Ireland, including the Finucane case. (2/24/277–281). It acknowledged the detailed information and submissions which had been made, particularly in relation to the proposal to hold an inquiry under the 2005 Act (2/24/278/172-194). It was considered that some questions still remained (2/24/281-194). On 23 November 2005, the Committee of Ministers requested further information regarding the conduct of an inquiry under the 2005 Act, in particular the use of restriction notices and the publication of material and findings by the inquiry (2/24/284/under heading "individual measures"). Further submissions were made by both the Applicant (2/26/286) and the Government (3/46/505).

[144] Following its meeting in December 2007, the Committee of Ministers reviewed the position in this case. It noted the position of the Government that its obligations under Article 2 had been discharged by means of the police investigations and that the possibility of a public inquiry should not be considered to be a requirement arising from the decision of the ECtHR (2/26/292c-292d).

[145] The Secretariat published its assessment of the case on 19 November 2008. It referred to the possibility of holding a new inquiry which initiative it welcomed and proposed that the Committee of Ministers consider strongly encouraging the UK authorities to continue discussions with the applicant on the terms of a possible inquiry. The secretariat did not make an assessment at that stage on the compatibility of the Inquiries Act 2005 with the requirements of the Convention. It found that the Stevens investigations, considered alone, could not constitute compliance with Article 2, on the ground of a lack of publicity, since a full report on his investigations had not been made available to the public. It was unable to reach a conclusion as to whether or not the applicant would have been involved in the Stevens 3 investigation to the extent that was necessary to safeguard her legitimate interests, had she engaged with the Stevens team. However, it went on to make a recommendation to the Committee of Ministers that the requirements of public scrutiny and accessibility of the family had been met. It did so, in light of the subsequent publication by the DPP (NI) 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 Minsters may consider strongly encouraging the UK authorities to continue discussion with the applicant on the terms of a possible

inquiry. The recommendation that the requirements of public scrutiny and accessibility of the family had been met was not dependent on a public inquiry being held (3/PM1/680-681).

[146] This recommendation was accepted by the Committee of Ministers on 17 March 2009 (3/PM1/684). The Committee of Ministers noted, amongst other matters, (a) that the evidence and information gathered in the course of the Stevens 3 investigation has been the subject of an examination by the Public Prosecution Service of Northern Ireland who concluded in June 2007 that no further prosecutions should be brought against any individual because the test for prosecution as set out in the Code of Prosecutors was not met and (b) with satisfaction that the DPP (NI) issued a public statement giving reasons for the abovementioned decisions in compliance with the general measures taken by the UK in this respect and (c) that no application for a judicial review was made on the basis of a failure to give detailed reasons for the decision not to prosecute although Northern Ireland law now allows for such review following the measures taken by the UK authorities. The Committee of Ministers strongly encouraged the UK authorities to continue discussions with the applicant on the terms of a *possible* statutory inquiry (emphasis added). It decided to close its examination of the individual measures taken by the UK on foot of the decision of the Court.

[147] I consider that that decision was based upon the additional steps which had been taken by the DPP NI to review the findings of the Stevens investigation and to make a public statement of his reasons not to prosecute. That the steps taken to the date of the decision were sufficient and while an inquiry was strongly encouraged this was not a necessary requirement before deciding that the requirements of public scrutiny and accessibility of the family had been met. The decision was *not* based upon the future conduct of a public inquiry. The wording of the Committee's decision was clear in recognising that an inquiry had not taken place and may not do so.

[148] On 12 December 2012 and subsequent to the decision of the Committee of Ministers the de Silva report was published and upon its publication the Chief Constable of the PSNI made a statement in which, amongst other matters, it was asserted that the report and its findings would be considered in detail and that there would be consultation with the DPP(NI) (7A/17/1606(43-45)). Nearly two years later and on 27 August 2014 the applicant's representatives wrote to the DPP(NI) requesting information on the contact between the DPP(NI) and the PSNI (7A/17/1606(43-45)). On 17 September 2014 the DPP(NI) replied stating, amongst other matters, that he had been informed that the Chief Constable had directed the Historical Enquiries Team (HET) to consider the de Silva report and advise whether further investigations were required by the PSNI in respect of the cases considered within the report. The letter also stated that a member of the HET had agreed to provide the PPS in *due course* with a report detailing any new material identified by the de Silva report and indicating whether or not it impacted on prosecutorial

decisions taken or disclosed any new line of enquiry for police investigation (7A/17/1606(47-48)).

[149] As a part of these proceedings I requested information as to (a) whether both the de Silva report and also the additional material considered by de Silva, which additional material was not seen by Judge Cory or by Sir John Stevens, had been considered by the DPP(NI) and if, so (b) whether any decisions have been reached and if so (c) whether there has been any public explanation as to the reasons for those decisions. By letter dated 11 June 2015 the DPP (NI) stated:

> "(a) It was not considered by the PPS that the de Silva Report, on the face of it, provided any new material upon which further consideration could be given to prosecutions. I was informed by the then Assistant Chief Constable Drew Harris OBE of PSNI on 28 January 2013 that the Chief Constable had referred the matter to HET within which a special unit had been established to examine the report against the original material with a view to reporting back to the Chief Constable. Subsequently, further correspondence was received from Assistant Chief Constable Will Kerr, who succeeded Drew Harris as Head of Crime Operations, indicating *that the review had been compromised by budgetary constraints and the final report would be delayed*. The most recent communication from Assistant Chief Constable Will Kerr is dated 2 February 2015 enclosing an interim report. Assistant Chief Constable Will Kerr indicated that the previously unseen material had provided no further evidential opportunities. However, the letter advises that further work is to be carried out on chapters 21-25 and that once finalised, all recommendations will be further considered and actioned accordingly." (emphasis added)

In relation to (b) and (c) the reply was

> "It would therefore follow that no prosecutorial decisions have been reached or any public explanations given."

[150] The evidence is that there is an on-going police investigation which is considering the de Silva report and documents and that the PSNI and the DPP (NI) are both aware of and are pursuing the procedural obligations under article 2.

Part Six: Substantive legitimate expectation

[151] I will consider in turn the various questions that I have identified in paragraph [22] of this judgment.

a) Has the applicant established a promise to hold a public inquiry which promise was a clear and unambiguous representation devoid of relevant qualifications.

[152] In July 2001 discussions took place at Weston Park, Staffordshire, involving the governments of the United Kingdom and Ireland and the Northern Ireland political parties. The discussions encompassed four outstanding issues in the implementation of the Good Friday Agreement, namely policing, normalisation, the stability of the institutions and decommissioning. On 1 August 2001 John Reid, the then SOSNI and Brian Cowen, the then Minister for Foreign Affairs of Ireland set out the elements of a package, which they believed, would help deliver the full and early implementation of the Good Friday Agreement. The Weston Park proposals (which were signed jointly by the SOSNI and the Irish Minister for Foreign Affairs) included under the heading "Proposals on normalisation" a number of proposals including at paragraphs 18 and 19 the following:

> "18. Both Governments want the new policing arrangements now being established to focus on the future. *But they also accept that certain cases from the past remain a source of grave public concern, particularly those giving rise to serious allegations of collusion by the security forces in each of our jurisdictions. Both Governments will therefore appoint a judge of international standing from outside both jurisdictions to undertake a thorough investigation of allegations of collusion in the cases, of* the murders of Chief Superintendent Harry Breen and Superintendent Bob Buchanan, *Pat Finucane*, Lord Justice and Lady Gibson, Robert Hamill, Rosemary Nelson and Billy Wright.
>
> 19. The investigation of each individual case will begin no later than April 2002 unless this is clearly prejudicial to a forthcoming prosecution at that time. Detailed terms of reference will be published but the appointed judge will be asked to review all the papers, interview anyone who can help, establish the facts and report with recommendations for any further action. Arrangements will be made to hear the views of the victims' families and keep them informed of progress. *If the appointed judge considers that in any case this has not provided a sufficient basis on which to establish the facts, he or she can report to 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."* (emphasis added)

The applicant states that if the appointed judge recommended a public inquiry then this was a clear and unambiguous representation devoid of relevant qualifications that a public inquiry would be held.

[153] The appointment of the judge of International standing followed by letter dated June 2002. That letter was signed jointly by the then SOSNI and the then Irish Minister for Foreign Affairs. It appointed Mr Justice Peter Cory, a retired judge of

the Supreme Court of Canada. The letter of appointment stated, inter alia, that his task would be to a) review all the relevant papers in each case, including the records of earlier investigations; b) interview anyone (he) thought could assist (his) examination; c) establish the facts so far as is practicable and subject to the law of the respective jurisdictions; d) keep, in reasonable manner, the relevant government informed of progress; e) submit reports as soon as practicable, including in circumstances where there was not a sufficient basis to establish the facts in a particular case; (his) reports will include any recommendation(s) (he) decide to make for further action, including, if (he) consider it necessary, the holding of a Public Inquiry. The letter of appointment went on to state that

> "*In the event that a Public Inquiry is recommended in any case the relevant Government will implement that recommendation*." (emphasis added)

The applicant states that this is again a clear and unambiguous representation devoid of relevant qualifications that a public inquiry would be held if recommended by Judge Cory.

[154] On 1 April 2004 Judge Cory's report on the murder of, amongst others, Patrick Finucane, was published and provided to the applicant. The judge considered that a review of the papers could not result in final findings of fact or determinations of responsibility in relation to the murder of Patrick Finucane. He said that because he "had no power to subpoena witnesses or compel the production of documents" it followed that he could not "make findings of fact based on the examination and cross examination of witnesses". He concluded that a public inquiry should be held in five of the six cases he examined, including the murder of Patrick Finucane.

[155] In addition to holding that a public inquiry should be held and at paragraph 1.294 of his report and under the heading "The basic requirements for a public inquiry" Judge Cory set out what he considered was the kind of public inquiry. He stated that when he spoke of a public inquiry he took that term to encompass certain essential characteristics. Those characteristics would include

> a) An independent commissioner or panel of commissioners.
>
> b) The tribunal should have full power to subpoena witnesses and documents together with all the powers usually exercised by a commissioner in a public inquiry
>
> c) The tribunal should select its own counsel who should have all the powers usually associated with counsel appointed to act for a commission or tribunal of public inquiry.
>
> d) The tribunal should also be empowered to engage investigators who might be police officers or retired police officers to carry out

such investigative or other tasks as may be deemed essential to the work of the tribunal.

e) The hearings, to the extent possible, should be held in public.

f) The findings and recommendations of the Commissioners should be in writing and made public.

Accordingly when the applicant asserts that she had received a clear and unambiguous representation devoid of relevant qualifications that a public inquiry would be established if recommended by Judge Cory then it is a public inquiry of a kind that complies with these essential characteristics.

[156] In each of the cases where Judge Cory recommended a public inquiry should be held such an inquiry was established, save for the case of Patrick Finucane.

[157] The applicant contends that given that the Weston Park proposals contained a promise by the then SOSNI that if the appointed judge recommended a public inquiry that the United Kingdom Government would implement that recommendation, which promise was repeated in the letter of appointment to Judge Cory and given his recommendation that a public inquiry be established that there was now a legitimate expectation that a public inquiry into the death of her husband would be established.

[158] The applicant goes further stating that the clear and unambiguous representation devoid of relevant qualifications that a public inquiry would be established was repeated over the years both in public commitments such as statements in Parliament and to the applicant personally, in various ways including the following:

a) "I stand by the commitments of Weston Park..." (The Prime Minister, Hansard 3 March 2004 2/27/293)

b) "The Government stands by the commitment we made at Weston Park" (SOSNI Statement to Parliament 1 April 2004 attached to personal letter to applicant from SOSNI of the same date 3/30/420/12)

c) "The Government has consistently made clear that in the case of the murder of Patrick Finucane…it stands by the commitment made at Weston Park (SOSNI statement to Parliament 23 September 2004 attached to personal letter to applicant from SOSNI of the same date 3/36/440)

d) "…we [the Government] believe it is important that the inquiry into Patrick Finucane's death should have powers of compulsion at its disposal, like the Bloody Sunday Inquiry and the other three statutory inquiries that are being established….the inquiry into his death must be given all the powers

necessary to uncover the full facts of what happened." (Letter from SOSNI to Peter Madden 9 November 2004)

e) "…we [the United Kingdom authorities] are committed to an inquiry which will be tasked with uncovering the full facts of what happened and which will, in accordance with Judge Cory's recommendations, be both independent and, to the extent possible, held in public.." (Letter from UK Permanent Representative to the Council of Europe 5 July 2005 3/46/499);

f) "…One option…would have been a non-statutory inquiry. However we are clear that the Finucane inquiry should and will have statutory powers to compel the attendance of witnesses and the disclosure of evidence…"(Letter from UK Permanent Representative to the Council of Europe 5 July 2005 3/46/500);

g) "…the UK Government intends that the inquiry should provide a thorough, effective and independent investigation into the circumstances surrounding Patrick Finucane's death, to the extent possible bearing in mind the passage of time. The inquiry will be held in public, to the extent possible, and will offer the opportunity for the family to participate, subject to the need to protect national security and the lives of others such as informants…" (Letter from UK Permanent Representative to the Council of Europe 5 July 2005 3/46/504);

h) "I am committed to establishing an independent, statutory inquiry, with full powers to require the production of all the relevant documents and, most importantly, to compel witnesses to attend. The inquiry must also, as Judge Cory recommended, be 'public to the extent possible'" (Letter from SOSNI to the applicant 20 February 2006 3/46/481)

i) "I remain committed to establishing the truth of what happened to your husband, and it is my strong belief that an inquiry is the only way to do this." (Letter from SOSNI to the applicant 20 February 2006 3/46/487)

j) "I have consistently made clear the key features which I consider to be essential to the Inquiry's ability to get at the full facts and expose any wrongdoing: the Inquiry will have an independent chair who sees all the evidence; it will have full statutory powers to compel any evidence that could be compelled by a court; it will be public to the extent possible; and its conclusions will be made public." (Letter from SOSNI to the applicant 10 April 2006 3/46/492);

[159] The respondent accepts that these statements were made but contends that it was not a commitment to hold a public inquiry unlimited by time or future circumstance; and cannot reasonably have been understood as such. It is contended that it was a real possibility, if the international judge concluded that there were

serious allegations of collusion requiring investigation that the appropriate course would be for those investigations to be conducted with a view to determining whether further criminal charges should be brought. That the potential for a considerable further time to elapse was clear. That it might also be that the full surrounding circumstances came to be considered in any future prosecution. Accordingly the respondent contends that, the circumstances bearing on the public interest in establishing such an inquiry were susceptible to highly significant change and that any commitment of this kind must of necessity incorporate an implicit, but obvious, qualification that the ultimate decision to establish the inquiry would be subject to an assessment of the public interest at the time that decision ultimately falls to be made. The respondent contends that there was no promise which was a clear and unambiguous representation devoid of relevant qualifications.

[160] I reject those contentions. The qualifications which the respondent seeks to establish are no greater than those which would be implied in every case. Every clear and unambiguous representation which on the face of it is devoid of relevant qualifications is subject to the implicit qualification that the public authority, in this case the SOSNI, 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. To articulate the grounds upon which a promise can be overridden is only to conflate the two stages involved in the enforcement of a substantive legitimate expectation.

[161] I consider that there was a promise which was a clear and unambiguous representation devoid of relevant qualifications that a public inquiry into the death of Patrick Finucane would be held if one was recommended by Judge Cory.

[162] The applicant also seeks to establish that there was a promise that the public inquiry would be of the kind recommended by Judge Cory. The respondent contends that, it was not a commitment as to any particular form of any public inquiry. The Weston Park agreement and the subsequent letter to Judge Cory inviting him to conduct his review of the case, are both silent as to the form or detail of any public inquiry which might be established. They refer only to "a public inquiry." In the event Judge Cory included recommendations on the format for a public inquiry within his report but there is no evidence that he had been invited to do so by either Government and there is no evidence of any promise to the applicant that any such recommendation as to the form of any public inquiry would be followed.

[163] I consider that whilst there was a clear and unambiguous representation devoid of relevant qualifications that a public inquiry would be held if one was recommended by Judge Peter Cory I do not consider that there was any promise that such a public inquiry would be of the kind recommended by Judge Peter Cory. I note that in *David Wright's application for Judicial Review* [2006] NIQB 90 the same factual conclusion was reached by Deeny J who said

> "The second contention under the ground was that there was legitimate expectation that the inquiry would comply with the recommendations of Justice Cory. Accepting for these purposes that it is arguable that the inquiry will not so comply it does not seem to me, nevertheless, that this contention is made out. It does not seem to me that there is any clear representation that it would so comply. It is also right to say that the role of the Canadian jurist was to advise whether inquiries were necessary rather than the particular form of the same. Binding a statutory inquiry in the United Kingdom to the particular recommendations, essentially obiter, of Justice Cory would, I respectfully say, be surprising."

I come to the same conclusion on the evidence in this case.

[164] I conclude that there was a promise which was a clear and unambiguous representation devoid of relevant qualifications that a public inquiry into the death of Patrick Finucane would be held. The promise was not only to the applicant but was also to the government of the Republic of Ireland, to the political parties at 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. The rationale for making such a promise was that certain cases from the past which give rise to serious allegations of collusion by the security forces remain a source of grave public concern. The only relevant qualification to that promise was that the public inquiry had to be recommended by Judge Cory. As soon as that recommendation was made then there was a substantive legitimate expectation that a public inquiry would be held.

[165] I also conclude that the promise did not extend to a promise that it would be a public inquiry *of the kind* recommended by Judge Cory. There was no representation to that effect.

b) Has the respondent identified any overriding interest or interests to justify the frustration of the expectation?

[166] The written ministerial statement laid in Parliament on 11 November 2010 (3/59/57) identified six public interest factors five of which could justify the frustration of the expectation namely:

(i) The conclusions of reviews and investigations into the case and the extent to which the case has caused, and is capable of causing, public concern.

(ii) The experience of the other inquiries established after the Weston Park commitments.

(iii) The delay that has occurred since the 2004 announcement and the potential length of any inquiry.

(iv) Political developments that have taken place in Northern Ireland since 2004.

(v) The potential cost of any inquiry and the current pressures on the UK Government's finances.

Those matters were also contained in the briefing paper dated 1 July 2011 (5/15/75-161) and in the detailed background paper for the meeting on 11 July 2011. Inevitably in the decision-making process some of those factors obtained greater emphasise, but I consider that the respondent has established in relation to each of them that they were overriding interests which as far as the decision maker was concerned justified the frustration of the expectation.

c) Does the decision in this case lie in what Laws LJ called the macro-political field?

[167] I consider that the decision in this case was clearly concerned with macro political issues of policy. There are numerous pointers in that direction including the impact of the decision on relations with the Government of Ireland, on the political parties in Northern Ireland and in the rest of the United Kingdom, on the peace process and on public finances. The number of persons impacted by the decision is also an indicator. The applicant was a crucial person to whom the promise was made but it was also a promise to a wide-range of persons and bodies and was part of a complex interlocking process. This is a classic case of wide-ranging issues of general policy with multi-layered effect.

[168] I reject the suggestion that because some of the reasons for the decision are within the courts competence that the entire decision therefore lies outside the macro -political field. I accept that the court can form an assessment as to whether it is a more effective way of getting to the truth to compel witnesses to answer questions at an inquiry rather than having a review of an archive of documents with the ability to request, but not to compel, witnesses to answer questions. I also accept that the court can form an assessment as to whether an inquiry can be confined to narrow issues or will be prolonged or may be subject to complex judicial review challenges. Those matters are within the court's competence but they do not change the essential macro political nature of the impugned decisions. The court's assessment of those factors will be subject to more intense scrutiny in deciding whether the frustration of the applicant's expectation is so unfair as to be a misuse of the respondent's powers. However the overall context is that the impugned decisions were in the macro political field and the overall intensity of review is limited.

d) Was the frustration of the applicant's expectation so unfair as to be a misuse of the respondent's powers?

[169] It is for the court to weigh the requirements of fairness against the interests upon which the respondent relies to justify the frustration of the expectation.

[170] Fairness to the applicant is the fulfilment of her legitimate expectation which is a significant expectation based on an international agreement supported by Judge Cory and which is to be seen in the context of a breach of the most fundamental obligation of the state to protect the life of its citizen. It is also to be seen in the context that there was undoubted collusion by servants of the state not one of whom has been prosecuted or disciplined.

[171] It was accepted on behalf of the applicant that there had been no detrimental reliance by her on the promise.

[172] Fairness to the applicant also encompasses the issue as to whether a review is an effective way of getting to the truth. She contends that it is not and that the only effective way is by a public inquiry at which witnesses can be compelled to attend and compelled to answer questions. That is an issue within the courts competence.

[173] The investigations by the RUC which took place immediately after the murder could not compel any witness or suspect to answer any questions. If an individual wished to refuse to answer any question they were free to do so. The inquest that was held did not investigate any allegation of State collusion. The Stevens 1, 2 and 3 investigations were all police investigations and again there was no ability to compel any witness or suspect to answer any question. The Langdon Report was prepared on the basis of an examination of documents and no oral evidence was obtained from any of the individuals. The Cory investigation took the form of a scrutiny of the documentary evidence. Judge Cory stated that given the preliminary and provisional nature of the task assigned to him and the desirability of arriving at recommendations expeditiously it was not necessary or appropriate for him to hear any oral evidence from the individuals referred to in his report. He went on to state that:

> "Obviously, before any final findings of fact or determinations of responsibility could be made, it would be necessary for individuals to have an opportunity of answering any potential criticisms which might be made of them." (2/29/297).

The terms of reference of the de Silva review were set out in a letter from the SOSNI dated 12 October 2011 (3/75/651). That letter stated that he was not being asked, nor did he have the power, to hold oral hearings. If he wished to meet people who could assist him with his work then that was a matter for him and the Government would assist this process wherever possible. It was also open to him to invite or consider written representations or submissions as he saw fit. Sir Desmond met with individuals who had served in the army, the RUC and the Security Service and questioned them. He also received a series of written submissions. Those with

whom he met and from whom he received written submissions are set out in his report (6/746/148). He met and received submissions from amongst others Colonel J. He also sought to meet with one of Brian Nelson's former handlers (A/13), but in the event this was not to be possible due to medical reasons pertaining to the handler. There is no evidence before this court as to what was the nature of the medical condition, or as to whether it persists or whether she is unable to give evidence by virtue of it, either with or without the benefit of special measures to take into account any on-going health problems. Sir Desmond also noted that with the passage of time several additional witnesses were sadly deceased including two former senior Security Service officers, a former RUC Assistant Chief Constable, one of Brian Nelson's former handlers (A/10), one of William Stobie's former handlers (R/05) and the two agents, Brian Nelson and William Stobie.

[174] The most crucial witness to the question as to whether Brian Nelson informed his FRU handler about the role he played in targeting Patrick Finucane before the murder was the handler (A/13). She has never answered any question in relation to any of the investigations including the de Silva review.

[175] The need for oral evidence is to be seen in the context of deficiencies in the written documentation. Records kept may well not reflect the truth (6/744/1.39). Records are missing (6/747/1.50). A significant illustration of a missing record is to be found in the Cory Report (2/29/1.110). A FRU document states "Patrick Finucane, RC, 21 March 49 (D) PIRA P2327." "P2327" is a file reference number indicating that FRU had a file on Patrick Finucane or a "P" card or both. That file or P card is missing.

[176] This issue was considered in the decision making process with the initial view being that "there is also a considerable risk that a documentary review such as this may not be able to produce definitive account of the case. Cory was clear that some of the documentary evidence was contradictory and that the issues would need to be tested in an inquiry. This model would effectively represent a re-run of the Cory investigation but with document release supplementing a final report on the case." The contrary view was that "trying to establish definitively who knew what, when and at what level either about the Finucane murder, or agent handling issues more generally will be extremely difficult" and that "As far as we are aware many of the witnesses on the Government side are still alive (including from the FRU, RUC and Security Service) and could be summoned to give evidence. However, there is no guarantee that they would illuminate the facts further and a number of other key witnesses in the case (including Brian Nelson) are now dead." And finally that "While there would be no cross-examination of witnesses in (the review) model there is no guarantee in any case that those witnesses still alive would remember events sufficiently clearly to assist an inquiry, or necessarily reveal all that they know."

[177] The most significant witness who has not answered any questions to date is A/13 Brian Nelson's handler at the time of the murder. After the elapse of time

between 12 February 1989 and the date of the impugned decisions and given her failure to answer any questions to date I consider that it is unlikely, though not impossible, that she would remember events sufficiently clearly to assist an inquiry or necessarily reveal all that she knew and that this is particularly so given that Brian Nelson who implicates her is dead. I take into account that if there was a public inquiry then that assessment would be tested, but there are other interests in play which have to be balanced against the chances of oral evidence leading to a more effective investigation.

[178] Another issue within the court's competence is whether an inquiry would be prolonged, costly and with a significant risk of judicial review applications. I do not consider that a public inquiry could be confined to narrow issues. For instance any inquiry could be drawn into a wide ranging consideration of collusion. There would be issues as to similar fact evidence. There is a vast archive of documents. There are difficult legal issues around section 19 of the Inquiries Act 2005 which may well lead to judicial review applications. I agree with the assessment that an inquiry would be protracted. I consider than any public inquiry would be significantly longer than the other inquiries considered by Judge Cory.

[179] The context of the impugned decisions was at a time of financial restrictions following the downturn in the economy in 2008. That is a significant change of context. It is the responsibility of governments to control the country's finances and governments have to respond to changes in the financial situation.

[180] Another context of the impugned decisions was the change in the political situation in Northern Ireland. That is pre-eminently a macro-political issue for a government to assess rather than for this court except on clear grounds of irrationality which are not present in this case.

[181] In arriving at a conclusion as to the fairness of the frustration of the applicant's expectation I have also considered the process by which the impugned decisions were made which I consider to be fair both in relation to the applicant and also in relation to the wider interests concerned.

[182] In relation to the applicant she was afforded the opportunity to make representations. There had been discussions with the applicant about the possible form of any public inquiry. She was aware of the concerns as to how to deal with the national security requirements and of concerns that a public inquiry which risked collapsing would not be in the public interest. The applicant was informed in 2010 that the decision to establish a public inquiry was to be reconsidered. She was also informed of the process to be followed leading to a decision. She was invited to make and she made representations. Those representations received particular emphasis.

[183] The decision making process recognised that there were wider interests to be considered which should be taken into account before arriving at an informed

decision as to where the balance of public and private interests lay. The promise was made at Weston Park and following Judge Cory's recommendation the two key public statements announcing the government's response were made in the House of Commons. The promise was not made to the Applicant alone. She has a particularly deep interest in that promise and is uniquely affected by it, but the essential character was of a promise made to the public at large in response to the requirements of the public interest at that time. A consideration of those wider issues commenced with a two month consultation period which was extended to four months. The public and government authorities were all invited to express their views on the question of whether a public inquiry should be established. The representations which were received were considered in the decision making process.

[184] In arriving at a decision the fact that a commitment had been made was taken into account. The public interest factors considered in the decision making process included the commitment given by the previous Government in 2004 which was a commitment, in particular, to, amongst others, the applicant. In the briefing paper of 1 April 2011 the SOSNI was specifically advised in relation to the public interest factors that "…. It is for you as Secretary of State to decide on the relative weighting to accord to each factor, though you must consider each factor and *explicitly take into account the factor relating to the previous commitment made*…." (5/15/87). In the opening paragraph of the briefing papers circulated by the Cabinet Office to Ministers on 7 July 2011 they were reminded of the existence and content of the prior commitment. That paragraph stated that "The murder of Patrick Finucane is one of the most long running and totemic cases arising from the Northern Ireland troubles. … The need for a decision arises from the previous Government's commitment to an inquiry in 2004 following Anglo-Irish political talks in Weston Park in 2001 and a review of the case by Judge Cory in 2004…."

[185] The decision not to hold a public inquiry was connected to the decision to establish the independent de Silva review. The expectation was not to be totally defeated but rather a review was to be conducted by Sir Desmond who was completely independent, who has an international reputation, who was to be given full access to all documents, who could declassify and publish documents, who had the assistance of government and who had an assurance from the Prime Minister that there must be no attempt to hide the truth. The review process would be quicker than a public inquiry and put less pressure on public finances. The report would be published. So prospectively it could be anticipated that the facts surrounding the murder of Patrick Finucane would be subjected to a most rigorous forensic examination and that the findings would expose those facts, whatever they might be, to public scrutiny. That was an appropriate prospective assessment.

[186] The overall level of review by this court is limited given the macro-political context and on the basis of such a limited review I do not consider that the frustration of the applicant's expectation and the decision to set up the review is so unfair as to be a misuse of the respondent's power.

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

[187] This issue does not arise given my earlier conclusions.

Part Seven: Procedural legitimate expectation

[188] The applicant contends that by virtue of the fact that she had a substantive legitimate expectation that a public inquiry would be held then that she had a procedural legitimate expectation that she would be consulted about the review process that would be held instead of a public inquiry. Mr Macdonald submitted that the appropriate remedy was that the applicant should now be consulted about the review process despite the fact that the review had taken place and despite the fact that the applicant did not attempt to obtain any interim measures to prevent the review from taking place. He also accepted that consultation about a review would, in effect, be a consultation about holding a public inquiry, a matter about which the applicant had been consulted. However he submitted that having a consultation process about a review would have enabled the applicant to explain to the decision-maker that a review does not establish the truth and that the only way of establishing the truth is to have a public inquiry at which witnesses can be compelled to answer questions. Accordingly that if consultation had taken place the misapprehension of the decision-maker would have been dispelled.

[189] The respondent states that whereas the applicant was not consulted about the review process, she was consulted about whether or not to hold a public inquiry (3/58/573-575). The respondent accepts that a departure from a substantive legitimate expectation gives rise to a procedural expectation that the person affected would be consulted so that there was an opportunity of advancing reasons for contending that the substantive expectation should not be withdrawn, see *Council of Civil Service Unions v Minister for Civil Service* [1985] A.C. 374 at 408-409. However the respondent submits that the procedural expectation would not extend to all the potential alternatives to a public inquiry. It was submitted that there was never any express clear and unambiguous representation devoid of relevant qualifications to the effect that the applicant would be consulted about all the potential alternatives to a public inquiry and no such representation should be implied from any substantive legitimate expectation. The respondent also submitted that it was open to the applicant to have made representations about any form of process that was not an open-ended 2005 Act inquiry. That in fact the applicant made clear her views during the consultation process that she did not believe that a non-statutory inquiry would provide an appropriate mechanism and that such an inquiry would not provide the powers that were needed to carry out the task (3/66/611). During the consultation process the applicant's views were also made known that the inquiry should have powers to secure evidence by compelling the attendance of witnesses (3/62/587). Accordingly the respondent contends that, as a result of the consultation process that did take place, the applicant's views were clear that any process would be

insufficient if it did not include the power to compel witnesses and that those views were considered.

[190] The sequence of events establishes that the applicant was aware that the consultation included whether there should be no inquiry. I consider that by definition that includes consultation about the lack of compulsion of witnesses. I consider that the consultation process was sufficient to allow the applicant to express views about the alternatives to a public inquiry and that she did in fact articulate her views that the only appropriate process was a public inquiry at which witnesses could be compelled to answer questions. That issue was firmly before the decision-makers both as a result of the consultation process and as a result of the briefing papers provided by civil servants. Accordingly if there was a procedural legitimate expectation I consider that it has been met.

[191] If I am incorrect in that conclusion then I do not consider that it is appropriate to imply from a substantive legitimate expectation the type and detail of the procedural commitment contended for by the applicant in this case. Accordingly I do not consider that the applicant has established an express or implied clear and unambiguous representation devoid of relevant qualifications that she would be consulted about all possible evolving options if it was decided not to hold a public inquiry.

[192] If I am incorrect in both of those conclusions and there was a procedural legitimate expectation which has not been met, then given that the review process has been completed I would not have considered it appropriate to grant any relief apart from a declaration that the applicant ought to have been, but was not, consulted about the mechanism of the review process.

Part Eight: Failure to properly take into account the existence of the applicant's legitimate expectation

[193] The applicant submits that the promise made to the applicant was not taken into account properly or at all as the SOSNI only took into account the commitment made to *Parliament* by the previous Government in 2004 rather than the commitment to her. However I consider that it is clear from a reading of the papers that a reference to the commitment to Parliament *included* a commitment to the applicant and that all involved in the process took the commitment to the applicant into account. I reject this ground of the challenge.

Part Nine: Sham process and closed mind

[194] I have set out the process which was followed to arrive at the impugned decisions which, if genuine, was detailed, included consultation, carefully weighed the arguments for and against a public inquiry and was fair. It is urged on behalf of the applicant that in reality it was a sham process to give legal protection to a

decision which in reality had been taken at the earliest stages of the process or to give legal protection to a closed mind.

[195] There is no direct evidence that the decision had been taken at the earliest stages and there is no direct evidence of a closed mind. The policy was that whilst generally against open-ended, long running and costly public inquiries into the past in Northern Ireland that these decisions should be made on a case by case basis. Views do differ in relation to whether such a policy is appropriate but it is legitimate to have such a policy. It is not an absolute policy evidencing a closed mind. The process which I have set out showed that in fact there was detailed consideration of this particular case involving anxious consideration of the impact of the various policy options.

[196] The case made by the applicant relies on inferences which it is suggested should be drawn from particular passages in the voluminous documents. Primary facts may support a number of inferences and the onus is on the applicant to establish that of all the inferences that can be drawn the most likely on the balance of probabilities was that the decision had been taken or that there was a closed mind or that the process was a sham. If there is an equally likely or more likely inference then the applicant will not have discharged the burden of proof.

[197] I have considered all the passages upon which the applicant relies both individually and cumulatively. I will confine my analysis in this judgment to some of those passages.

[198] Tom Fletcher, Cabinet Office Policy Advisor to the Prime Minister, in his memo dated 4 November 2010 stated:

> "The key point for the Prime Minister to understand is that whilst the somewhat complex process of lengthy consultation against specified criteria over a period of months may seem *elaborate*, it is viewed as legally essential. Because of the commitment made by the previous Government in 2001 (though not implemented because of the controversy over the 2005 Inquiries Act provisions allowing the Government to withhold sensitive information), the Finucane family are likely to initiate a legal challenge in the event the Government does not agree to an inquiry. To that end 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. To that end, there is an element to which this meeting and the SOSNI's letter is a necessary part of the process; as the issue was considered by the previous Prime Ministers it is assumed it is also an issue on which the serving Prime Minister will be consulted." (4/3/9) (emphasis added)

The words relied on by the applicant are (a) "elaborate" in the sense of the process being in practice unnecessary given that the decision had been taken or that the decision could only be taken in one way and (b) "seen to" in the sense of being seen to do something, rather than actually doing it. I reject both contentions. The advice that the process is "seen" to have given proper consideration is advice from a civil servant to the Prime Minister that as well as following a process those taking the decision must be able to demonstrate that the process has been followed. That construction is clear when one considers the next part of the sentence which contains advice that no premature decisions are taken without due process. The word "elaborate" is an accurate description of the process. It is elaborate. It is legally necessary. In short the Prime Minister was being advised that there was an elaborate process which must be followed and that the Government must be able to demonstrate that it had been followed.

[199] Also on 4 November 2010 Tom Fletcher sent to the Prime Minister the detailed letter dated 3 November 2010 from the SOS NI under cover of a memo which stated:-

> "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 inappropriate.
>
> But we need to think carefully with Owen about *handling* …" (emphasis added)

The words relied on by the applicant are (a) "ideally" in the sense that they were all working towards only one objective and (b) "handling" in the sense that the debate had already moved on to how the inevitable outcome of a decision that there should be no public inquiry would be handled. I reject those contentions. The memo demonstrates that the Prime Minister was being advised not to interfere. The memo allows for the possibility of different outcomes and puts forward a civil servant's view of an ideal. The obligation on the Government is to "handle" potential outcomes and the briefing documents are replete with references to reactions of others in relation to all of the policy options.

[200] I consider that these and all the other examples taken both individually and cumulatively amount to too minute an examination of the individual words. They are totally contrary to the overwhelming evidence which I have already set out of a genuine consideration of all the policy options. The process which I have set out showed that in fact there was detailed consideration of this particular case involving anxious consideration of the impact of the various policy options.

[201] I do not consider that the process was a sham or that the mind of the SOSNI was closed.

[202] The applicant also contends that the impugned decisions were driven by the Prime Minister and the impugned decisions were not taken by the SOSNI. The Ministerial Code requires that the SOSNI consult with the Prime Minister in good time about any proposal to set up major public inquiries under the Inquiries Act 2005. The SOSNI followed the Ministerial Code. This was an issue which had involved previous Prime Ministers (4/3/9). It was obviously one that was to be taken after consulting at the highest levels in Government. The purpose of such consultation is defeated if the views are ignored. It would be surprising if the SOSNI did not take away and give consideration to the Prime Minister's suggestion made in outline in the broadest terms at the meeting on 5 May 2011. It would also be surprising if the SOSNI did not ask his officials to consider the approach as outlined by the Prime Minister. That both happened is not in the least surprising and is a reflection of the consultation process working. I consider that there is nothing inappropriate about a decision of a Secretary of State, being taken on a collective basis, on behalf of the entire government, by a group of interested Ministers, including the Prime Minister.

Part Ten: Wednesbury grounds

[203] I have dealt separately with and rejected the submission that there was a failure to take into account the commitment made to the applicant to hold a public inquiry.

[204] The applicant also contends that in arriving at the impugned decisions the SOSNI took into account the clear conclusions of Judge Cory that there was collusion whereas in fact his findings were "provisional only" and could not be taken to be "final determinations of any matter". However Judge Cory in the conclusion to his report at paragraph 1.293 states:-

> "Some of the acts summarised above are, in and of themselves, capable of constituting acts of collusion. Further, the documents and statement I have referred to in this review have a cumulative effect. Considered together, they clearly indicate to me that there is *strong evidence that collusive acts were committed* by the army (FRU), the RUC SB and the Security Service. I am satisfied that there is a need for a public inquiry." (emphasis added)

[205] Accordingly Judge Cory's conclusion was that there was strong evidence of collusive acts. The CFs to which I have referred at paragraph [43] of this judgment are in themselves strong evidence of collusion. I do not consider that an overstatement of the conclusion of the Cory Inquiry was an overstatement of any significance in the decision making process.

[206] I have already considered and rejected the ground of challenge that the SOSNI erred in considering that a review would be the most effective way of getting to the truth. In addition the applicant contends that the SOSNI failed to give proper

weight to (a) the fact that the Weston Park commitment was included in an agreement between sovereign Governments; (b) the importance of the Finucane case and the concern about it; (c) the previous obstruction of investigations and examinations, despite the assurances of co-operation together with the possibility of continued obstruction; (d) the clear and strong opinions expressed by Judge Cory about the need for a public inquiry and why his conclusions (based on the documents and without examining witnesses and no powers of compulsion) could only be provisional; (e) the Government's previous acceptance of the provisional nature of Judge Cory's findings and the previous stance of not taking a view on those findings for that reason.

[207] I consider that all of these points were considered and that the ultimate decision was not so unfair as to be a misuse of the respondent's powers or was *Wednesbury* unreasonable.

Part Eleven: Article 2 ECHR

[208] The applicant contends that in refusing to establish a public inquiry and instead ordering a review the respondent has acted in a manner that is incompatible with the applicant's rights pursuant to Article 2 and therefore in breach of Section 6 of the HRA 1998 for the reasons that (i) it will not be effective; (ii) it will not be public; (iii) it will not safeguard the interests of the applicant and her family or allow their participation to the requisite standard. On that basis the applicant seeks a declaration that the decision to establish a review rather than a public inquiry is incompatible with the applicant's rights pursuant to Article 2 ECHR and also seeks an order of mandamus compelling the immediate establishment of a public inquiry.

[209] I consider, for the reasons which I have given, that the domestic law Article 2 procedural obligation does apply to the murder of Patrick Finucane.

[210] I have set out the nature of the Article 2 procedural obligation. The form of the investigation may vary in different circumstances. It is not an irresistible requirement under Article 2 that a public inquiry should be held. In *Finucane v UK* the Strasbourg Court found specific breaches of the Article 2 procedural obligation. It did not order that a public inquiry should be held. The Council of Ministers in its decision of 17 March 2009, whilst adverting to a possible public inquiry, accepted that the requirements of public scrutiny and accessibility of the family have been met. In arriving at a decision as to whether the Article 2 procedural obligation has been met I am required to take into account the decision of the Strasbourg Court in *Finucane v UK* and also the decision of the Committee of Ministers dated 17 March 2009.

[211] In relation to the breaches of the procedural obligation under Article 2 I have summarised the findings in *Finucane v UK* at paragraph [73] of this judgment. I make the same findings of breaches of the procedural obligation as at July 2003.

[212] Since the decision in *Finucane v UK* the DPP (NI) has made a public statement as to the reasons for prosecutorial decisions. I take into account the decision of the Committee of Ministers dated 17 March 2009. That decision was made without any knowledge of the fact that there was documentary material either directly or indirectly available to the authorities which was received by Sir Desmond de Silva that was not available to Sir John Stevens, Judge Cory or the DPP (NI). Sir Desmond describes the new documentary material as including new and significant information. Accordingly significant information was not seen by the DPP (NI) prior to making prosecutorial decisions and in turn the documents were not reviewed by independent senior counsel prior to those decisions being made. Whilst I am bound to take into account the decision of the Council of Ministers, I am not bound by it. In a situation where, as here, documents which in the opinion of Sir Desmond contain new and significant information were not available to or considered by the PSNI or the DPP (NI) and where those documents were in the possession of Government departments or could have been obtained by the PSNI from other organisations, I consider that there was not, as at March 2009, an effective investigation in compliance with Article 2 ECHR.

[213] There is an on-going police investigation and the de Silva report together with this new documentary material is being considered by the police. It is also clear that it will be considered by the DPP (NI) who, if a decision is made not to prosecute, then in the circumstances of this case, he will then have an obligation publicly to make known his reasons for that decision.

[214] I consider that to be the outstanding issue under the Article 2 procedural obligation but that does not mean that the further investigative measures require a public inquiry or impossible or disproportionate burdens on the authorities. The Article 2 procedural obligation will be met if the de Silva report, the documents disclosed to Sir Desmond, the documents generated by Sir Desmond are all considered by the PSNI and by the DPP (NI) with the assistance of independent senior counsel and thereafter if the prosecutorial decision is not to prosecute, then reasons are given publicly.

[215] In arriving at the conclusion that this is the outstanding issue I have taken into account the lengthy and detailed report of Sir Desmond de Silva all of which has been published. I also take into account the documents which Sir Desmond has placed in the public domain together with his offer to the applicant of involvement in the review process.

[216] I reject the applicant's contention that in refusing to establish a public inquiry the SOSNI acted in a manner incompatible with the procedural obligation under Article 2 but I do determine that the procedural obligation has not been met to the extent that I have identified. I will make a limited declaration to that effect.

[217] There also has to be compliance with the requirement of promptness and reasonable expedition in relation to this outstanding aspect of the procedural

obligation. The issue as to whether in addition to the failure of promptness and reasonable expedition found by the ECHR in *Finucane v UK* there has been a further failure subsequent to the publication of the de Silva report has not been argued in these proceedings. However the language of matters being undertaken "in due course" and of matters being "compromised" and "delayed" by "budgetary constraints," without any explanation as to the budgetary requirements or the attempts to meet that budget, does not sit easily with the context of grievous breaches of the most fundamental obligations of the State and the correct earlier political determination in 2010 and 2011 at the highest level to secure the effective implementation of domestic laws which protect the right to life. I will hear counsel as to whether I should entertain and if so, whether I should permit an amendment of the Order 53 Statement to allow that issue to be litigated in these proceedings. If I did so, I would then adjourn that discrete issue to a further hearing so that evidence can be filed in relation to it.

Part Twelve: Conclusion

[218] I dismiss the application for judicial review except in so far as it relates to a continuing procedural obligation on the State to investigate the murder of Patrick Finucane in respect of which I grant a declaration. I will hear counsel in relation to the form of that declaration. I will also afford the parties an opportunity to make submissions in relation whether it is appropriate to amend these proceedings to include a claim that there has not been compliance with the requirement of promptness and reasonable expedition in relation to this outstanding aspect of the procedural obligation.