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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY SALLY GRIBBEN

AND IN THE MATTER OF DECISIONS MADE BY THE CORONER FOR BELFAST IN THE INQUEST TOUCHING ON THE DEATHS OF

MARTIN McCAUGHEY AND DESMOND GREW

Before: Morgan LCJ, Gillen LJ and Weir LJ

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against the decision of Weatherup J whereby he dismissed the appellant's application for judicial review of decisions made by the coroner during the inquest into the fatal shooting of Martin McCaughey and Desmond Grew in October 1990 by soldiers who were part of a specialist military unit as a result of which it was claimed that the appellant's rights under Article 2 ECHR were violated. Ms Quinlivan QC appeared for the appellant with Ms Campbell, Mr Simpson QC appeared with Mr Doran QC for the Coroner, Mr Perry QC with Ms Cumberland for the Ministry of Defence and Mr McGleenan QC for the PSNI. We are grateful to all counsel for their helpful oral and written submissions.

[2] The appellant contends that the learned trial judge erred in failing to find that the inquest did not satisfy the adjectival obligation in Article 2 ECHR for the following reasons:

(i) the Coroner failed to disclose to the next of kin relevant or potentially relevant material relating to the involvement of military witnesses in other lethal force incidents in Northern Ireland;

(ii) the Coroner refused to permit the next of kin to cross-examine military witnesses as to their involvement in other lethal force incidents in Northern Ireland;

(iii) the Coroner redacted statements of military witnesses so as to remove all references to their involvement in other lethal force incidents in Northern Ireland;

(iv) the Coroner failed to recall a witness to permit questioning regarding his involvement in previous lethal force incidents; and

(v) the learned trial judge also erred in refusing leave to apply for judicial review of the Coroner's decision to conduct the inquest with a jury.

Background

[3] On the night of 8 October 1990, as part of an ongoing operation by the RUC, soldiers from a specialist SAS unit of the British army were conducting a surveillance operation on a mushroom shed containing a stolen car at a farm complex at 91 Lislasley Road, Moy. Shortly after midnight two men, Martin McCaughey and Desmond Grew, appeared outside the mushroom shed. Both were armed with AK47 rifles and wearing gloves and balaclavas. A confrontation between the British soldiers and McCaughey and Grew ensued and resulted in McCaughey and Grew being shot dead by the soldiers. The IRA subsequently stated publicly that McCaughey and Grew were IRA volunteers on active service at the time of their deaths.

[4] There were a total of nine soldiers directly involved in the operation. Soldiers A, B, C and D were located in the field observing the mushroom shed and all four fired shots at the two deceased. Soldiers E and F were positioned observing a laneway leading to the mushroom shed and did not fire any shots. Soldiers G and I were providing mobile support. They did not arrive at the scene until after the shooting and did not fire any shots. Soldier H was the officer in charge of the surveillance operation. He was located in the headquarters of the RUC Tasking and Coordination Group ("TCG") and was in radio contact with Soldier A. Evidence at the inquest was also received from soldier J about the training of SAS soldiers and soldier K who was the officer commanding the specialist soldiers who were providing military assistance to the RUC in Northern Ireland at the time. He had

previously held the position occupied by soldier H in this operation during a previous deployment to Northern Ireland in 1983 – 1985 and gave evidence in particular about the training and mindset of those involved in operations of this kind in the context of the shoot to kill case explored by the next of kin. Evidence was also received from experts in military logistics concerned with the positioning and location of the soldiers in the context of the operation.

[5] The RUC conducted an investigation into the shooting. They interviewed the soldiers involved. Soldier A confirmed he fired 20 rounds, Soldier B 17 rounds, Soldier C 19 rounds and Soldier D 16 rounds. Soldier D also confirmed that the last two of his shots were fired into one of the deceased on the ground. On 2 April 1992 the Director of Public Prosecutions issued a direction of no prosecution in respect of the soldiers.

[6] The soldiers contended that while carrying out surveillance on the mushroom shed, armed men approached their position and, perceiving them to be a risk to their lives, the soldiers opened fire. The next of kin, however, maintained that the claimed surveillance operation was in actual fact an ambush, as evidenced by how the soldiers had positioned themselves and their response to the changing circumstances. It was not contended that there was any evidence that the RUC prompted or instructed an ambush.

Scope and Disclosure

[7] The first three grounds of appeal arose from disputes around the proper scope of the inquest and the related question of the extent of disclosure provided to the Coroner by the MOD and thereafter by the Coroner to the next of kin. In 1994 the RUC provided a limited number of the investigation papers to the Coroner. Many years of disputes and legal challenges relating to the disclosure of documents by the police to the Coroner, disclosure of those documents by the Coroner to the deceased's next of kin and the scope of the inquest followed. On 8 December 2009 the Coroner issued the following preliminary definition of the scope of the inquest that he proposed to hold:

> "The coroner will consider the four basic factual questions concerning: (a) the identity of the deceased; (b) the place of death; (c) the time of death; and (d) how the deceased came by their deaths.
>
> Further, related to the 'how' question, the coroner will examine in evidence the surveillance operation that culminated in the deaths with reference in particular to

> the following: (i) the purpose of the operation; (ii) the planning of the operation; (iii) the actions of those involved in the operation; (iv) the state of knowledge of those involved in the operation; (v) the nature and degree of the force used in the operation. In considering this matter, the coroner will also examine such evidence as exists concerning the circumstances in which the deceased came to be at the locus of death at the relevant time."

He stated that this was only preliminary and might be subject to revision at any time. He invited written representations from the parties in relation to it.

[8] On 18 January 2010 the next of kin submitted that the scope of the inquest should be as follows:

> "In determining how the deceased came by their deaths the coroner will determine by what means and in what circumstances the deceased came by their deaths and examine:
>
> i) the surveillance operation that culminated in their deaths with reference to:
>
> a) the purpose of the operation;
>
> b) the planning and control of the operation and whether it was planned and controlled so as to minimise to the greatest extent possible, recourse to lethal force;
>
> and,
>
> ii) how the operation which culminated in the deceased's deaths was executed with reference to:
>
> a) the actions of those involved in the operation;
>
> b) the degree of knowledge of those involved in the operation;
>
> c) whether the operation was executed so as to minimise to the greatest extent possible, recourse to lethal force;

> d) the nature and degree of force used in the operation and by whom it was used; and
>
> e) whether the force used by individual soldiers was absolutely necessary.
>
> In considering this matter the coroner will also examine such evidence as exists concerning the circumstances in which the deceased came to be at the locus of death at the relevant time."

In a further written submission on 28 January 2010 the next of kin submitted that the Coroner would need to investigate whether the objective of the operation was to kill the deceased given the allegation that this was a shoot to kill operation.

[9] The Coroner did not agree that the scope of the inquest should extend to an examination of how the operation was planned and controlled so as to minimise to the greatest extent possible recourse to lethal force. Judicial review proceedings were issued contending that the inquest was one to which the adjectival obligation under Article 2 of the Convention applied and that the scope of the inquest should be extended as the appellant contended. The appellant's submission was ultimately successful in the Supreme Court (re McCaughey and another [2012] 1 AC 725). Following that decision the Coroner convened a preliminary hearing on 31 May 2011. In the course of that hearing he indicated that the inquest would be conducted as an Article 2 inquest and that matters of planning and control would form part of the scope of the inquest. No further submissions were made by any party at that hearing on the issue of scope and no-one took issue with the Coroner's characterisation of the scope. The next of kin submitted at that hearing that the inquest could be ready to proceed within four weeks although disclosure still remained outstanding.

[10] There was a further preliminary hearing on 24 June 2011 as a result of which the next of kin's solicitors wrote to the Coroner on 6 July 2011 and addressed the issue of planning and control in the following passage:

> "At the last preliminary hearing we were also invited to make representations in relation to witnesses who should be called relevant to the planning and control of this operation. It appears to us that the first point of reference in addressing this issue must be soldier H who apparently conducted the briefing in relation to this operation and was the senior officer on the ground. It

> appears to us that soldier H is a witness who can give relevant evidence in relation to the planning and control of the operation. It is our contention that a further statement should be taken from soldier H to ask him to address the planning and control aspects of the operation and to identify who was present at the briefing for this operation, what was covered in the briefing, and to identify any further witnesses who may be relevant to this issue, including identifying all persons present at the briefing and clarifying whether earlier briefings of more senior officers occurred. Clearly any military personnel who were present at the briefing and were more senior than soldier H are likely to be relevant witnesses, in addition any RUC officers present at the briefing are also likely to be present (*sic*). It is our contention that the statement from soldier H should be taken by someone entirely unconnected with the operation which resulted in the killing of the deceased."

[11] The next of kin's solicitors again returned to the issue of scope and disclosure in a letter of 4 October 2011. After complaining about the limited disclosure that had been received by that time the solicitors said:

> "In those circumstances we consider that we should identify material which we contend to be relevant to this inquest and seek confirmation that the appropriate searches have been or will be made. Given the allegation that this was a "shoot to kill" incident and that soldiers responsible failed to take step (*sic*) to arrest the deceased we are anxious to ensure that steps are taken to confirm that there has been, or will be, full and complete disclosure, focusing on the following areas:
>
> **1) Cross referencing of material**
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> Full and comprehensive preparation for this inquest requires the material is sought and made available in the following areas:
>
> **a) Material relating to those involved in the deaths of Martin McCaughey and Dessie Grew and the subsequent investigation.**

> - Material relating to soldiers A – H and their supervising officer should be made available, including in particular, details of their involvement in previous or subsequent lethal force incidents. We observe that such a request is not limited to their direct involvement, in the sense of having used lethal force, but their participation in an incident which has involved the use of lethal force….
>
> - Material emanating from the Historical Enquiries Team investigation, including any transcript of the interview the soldier A.
>
> **b) Material demonstrating the pattern of SAS activity between 1983 and 1992.**
>
> It has been widely written and reported that this incident was part of a wider "shoot to kill" policy employed by the SAS in Northern Ireland. There are a number of well-known incidents in which suspects who, it has been argued could have been arrested and detained, were shot and killed. Details about the training of SAS soldiers, in particular their training as it relates to the use of use of lethal force should be disclosed."

[12] The issues raised in the preceding correspondence were then addressed at a further preliminary hearing on 17 October 2011. It was common case that further material was required in order to deal with the planning and control issues. The MOD submitted that further statements were being obtained to address firstly command and control of the operation which led to the use of lethal force; secondly, the planning of the operation including its objective; thirdly the briefings prior to the operation and what was known about the deceased by those involved in the use of lethal force; fourthly any steps taken to reduce the risk of fatal force being used and finally justification for the use of lethal force in the particular circumstances. The MOD intended to address those matters through the soldiers already identified but suggested that any outstanding matters not covered in the statements could be addressed as and when they arose. The MOD invited the Coroner to direct that the proposed statements should be served by 23 December 2011.

[13] In the course of that hearing counsel on behalf of the appellant indicated that the material identified in the letter of 4 October 2011 needed to be searched and considered by the Coroner. She expressed specific concern that material relating to soldiers A to H and their supervising officers should be made available particularly

in relation to their involvement in previous subsequent lethal force incidents. She referred to a number of previous lethal force incidents involving Army personnel and submitted that one of the questions that had to be asked of the soldiers was about their involvement in any such previous incidents and the documentation relating to it. She submitted that it was clearly relevant if soldier A was also involved in other shooting incidents. She accepted that there had to be limits to how these enquiries occurred but as a first step the question had to be asked and the material considered. She also raised the question of training for SAS personnel and indicated that she would be content with that information in respect of soldiers A to H as a starting point. Counsel for the MOD indicated that the soldiers were to be asked about previous involvement in lethal force incidents and accepted that such involvement might be a relevant issue.

[14] Summing up at the end of this hearing the Coroner stated that while he would take a wide scope he was principally concerned with the deaths of Mr McCaughey and Mr Grew as opposed to what was going on over a 20 year period. Where possible, research should be narrowed down to the individuals who were actually concerned in the matter as opposed to any individuals outside it. The inquest was fixed for hearing on 7 March 2012.

[15] The statements from soldiers A –H were not in fact provided by 23 December 2011 and on 13 February 2012 the next of kin's solicitors were provided with statements from soldiers A, C, D, E, G and I. This is an example of over-promising and under-delivering which regrettably seems to have been a feature of the preparations for this type of inquest. In a letter of 16 February 2012 the next of kin's solicitors identified further enquiries that arose in respect of those soldiers. First it was noted that soldier A had been involved in two other lethal force incidents in Northern Ireland and in one incident he had been a shooter. The solicitors contended that the Coroner should consider his accounts to determine whether they were relevant to these proceedings. It was noted that the incident in which he was not a shooter probably related to the death of Seamus McElwaine. It was contended that there were similarities between the actions of the soldiers in that operation and those in this incident. The depositions prepared for the inquest into the death of Mr McElwaine were available for examination by the Coroner.

[16] The statement from soldier C indicated that he was involved in an incident in Coagh in which the SAS killed three men. That incident was the subject of a pending inquest and the depositions were again available to the Coroner. Soldiers D and G stated that they were involved in incidents where weapons were discharged and there were fatalities but did not give any details. Soldier E and I give no indication as to whether they were involved in other such incidents. The next of kin's solicitors

contended that further enquiries needed to be made in relation to those soldiers. On 20 February 2012 the Coroner wrote to the Crown Solicitor's Office requiring that the details of the incidents referred to in the statements should be identified to him so that he could consider their relevance. He also required written confirmation that these incidents were the only such involving fatalities whilst those soldiers were in Northern Ireland.

[17] A further preliminary hearing was fixed for 1 March 2012. In a submission dated 28 February 2012 it was asserted on behalf of the next of kin that if the soldiers involved in the use of lethal force resulting in the death of Mark McCaughey and Dessie Grew were involved in other lethal force incidents details about those incidents should be provided so that the Coroner could determine whether any material was relevant or potentially relevant to the inquest. The issues in the inquest included whether this was a "shoot to kill" incident, a pre-planned ambush, whether soldiers were instructed in such a way as to reduce recourse to arrest and increase the likelihood of recourse to lethal force and whether soldier D shot both deceased on the ground whilst they were injured and posing no threat.

[18] In those circumstances parallels between the involvement of soldiers in other lethal force incidents, their conduct and the accounts they gave in relation to the other incidents were clearly relevant or potentially relevant for the purposes of cross-examination. Specific reference was made to the lethal force incident in which soldier A discharged his weapon. Because the incidents involving the soldiers were heavily anonymised it was submitted that the next of kin were not in a position to conduct a meaningful analysis of their relevance or potential relevance. The Coroner needed specific information in relation to each incident and the role of the soldier. The next of kin did not intend to engage in satellite litigation but where material was relevant or potentially relevant to the actions of those who shot the deceased, the credibility of the accounts given by soldiers at the time which would impinge on their reliability as a witness was material that should be disclosed.

[19] The MOD replied to this submission on 29 February 2012 and argued that the other incidents raised by the next of kin were irrelevant to the issues to be determined in this inquest. The argument on behalf of the next of kin proceeded on the basis that the other incidents involved the unjustified and deliberate use of lethal force. It would then have to be asserted that the unjustified and deliberate use of lethal force on earlier occasions supported the conclusion that the shootings in these cases were unjustified and/or deliberate. If the earlier incidents were to be relied upon there would have to be a detailed investigation of the facts which would add weeks to the time estimate of the present inquest. In fairness to the military witnesses account would also need to be taken of incidents where there was

potential justification for the use of lethal force but such force was not used. There was no requirement in Article 2 of the Convention for such collateral matters to be explored.

[20] At the preliminary hearing on 1 March 2012 the next of kin were directed to lodge written submissions setting out the relevance of material relating to the involvement of soldiers A-H in lethal force incidents other than their involvement in the shooting of the deceased. They duly did so by submission dated 5 March 2012. On 2 March 2012 the Coroner had been provided with a grid setting out the involvement of each of the soldiers in other lethal force incidents together with a document summarising each of those incidents. He also reviewed the personnel files of the military witnesses and in an affidavit sworn on 4 February 2016 he said that he had reviewed the inquest file into the death of Francis Bradley on 18 February 1986, the inquest file into the death of Seamus McElwaine on 26 April 1986 and the inquest file in relation to the death of a soldier in an incident at Dunloy on 21 February 1984.

[21] The incident concerning the death of Francis Bradley involved disputed circumstances in which Soldier A had discharged his weapon and shot Francis Bradley. The incident concerning the death of Seamus McElwaine involved a disputed shooting where Soldier A was present but did not fire. Soldier A claimed that he had given first aid to an injured terrorist in that encounter. That was disputed. The incident at Dunloy concerned the death of a soldier who was shot by a terrorist who was lying on the ground and believed incapacitated. One of the issues in this inquest concerned the decision of Soldier D to open fire at one of the deceased who was on the ground. In addition to this information the Coroner also had available the statements made by the military witnesses for the purpose of the inquest. Those statements had, of course, been shared with the next of kin but the remaining material set out at paragraph [20] above was not disclosed.

The applications for judicial review

[22] The Coroner gave his ruling on the application on 8 March 2012. The inquest had by then been put back until 12 March 2012. He stated that he had examined whether each incident was relevant or potentially relevant to the issues to be addressed at the hearing and in particular whether evidence relating to the other incident was capable of being logically probative of an issue to be determined by the jury at this inquest. He concluded that the incident involving Soldier A, who opened fire on Francis Bradley, was potentially relevant to the issues to be determined. He stated that he would hear further submissions on whether evidence relating to that incident was in fact relevant to the issues to be addressed and if so whether the material should properly be introduced at the hearing or whether it would divert the

jury from the task in hand. He directed that the statement made by Soldier A for the purpose of the inquest and also the findings of the inquest should be disclosed to the next of kin.

[23] The next of kin immediately lodged judicial review proceedings seeking a declaration that they were entitled to information about the involvement of each of the soldiers in other lethal force incidents and that the failure to provide that information denied them an opportunity to make representations on the probative value of those incidents in contravention of their right to participate adequately in the inquest. In respect of soldier A the next of kin also sought disclosure of information in relation to the McElwaine incident. The next of kin wished to challenge his credibility on the giving of assistance to the injured terrorist.

[24] Weatherup J dealt with the leave application. He noted the authorities urging restraint on the intervention of judicial review proceedings in other ongoing hearings. He concluded that had the inquest not already commenced he would have been minded to grant leave in relation to the provision of information about those soldiers who had not disclosed whether they had been involved in any lethal force incidents and in relation to the disclosure of further information by way of statements from all soldiers identifying their involvement in such incidents in order to provide the identifying features and their role in relation to those incidents. He considered, however, that once the inquest had commenced after years of waiting it should not be disrupted by other proceedings unless there were exceptional circumstances. He noted that the Coroner said that he had not made a final decision in relation to relevance and presumably had not made a final decision on the information that might be produced for his consideration or that he might require to be provided to the appellant or to be put before the jury. There remained scope within the inquest for a review of the information relating to the soldiers and their role in any incident. That placed the management of the inquest and of the information required to be produced in the hands of the Coroner. The judge did not consider that there was anything exceptional about the application that required the grant of leave at that stage.

[25] The appellant appealed the refusal of leave to apply for judicial review in relation to the failure by the Coroner to provide information about those soldiers who had been involved in previous lethal force incidents. The Court of Appeal granted leave in relation to that matter because it was concerned that the Coroner may have proceeded on the basis that shoot to kill was not in issue in the inquest (see [2014] NICA 42).

[26] Shortly after the commencement of the inquest, on 15 March 2012, the Coroner indicated that having examined all of the information with regard to soldiers A - K and their involvement in previous incidents he was satisfied that the only potentially relevant information concerned soldier A in the Bradley case. He considered that no questions should be put concerning past incidents to other witnesses. He heard further submissions on 21 and 22 March 2012 on whether evidence in relation to the death of Francis Bradley on 18 February 1986 was relevant to the issues to be addressed in the inquests and if so whether the material should properly be introduced at the hearing.

[27] He concluded that he was satisfied that there were a number of similarities between that incident and the incident with which the inquest was concerned in that both occurred at night and both occurred in rural locations where the SAS was concealed and lying in wait. Both incidents involved the use of lethal force by soldiers when they considered themselves to be under threat by a person or persons carrying arms and in neither incident were any shots fired by the deceased. He considered accordingly that the evidence about the involvement of soldier A in the death of Francis Bradley was potentially relevant.

[28] The Coroner decided, however, that he should not admit the evidence. He considered first that it was unfair to soldier A to do so. He noted that the original inquest into the death of Francis Bradley did not express any criticism of soldier A. The papers were not referred to the Director of Public Prosecutions. He pointed out that the death remained contentious and that a new inquest had been ordered by the Attorney General for Northern Ireland. He assumed that new statements would be taken from all of the witnesses and that a new Article 2 compliant inquest would be held. He concluded that there was a very real danger of unfairness in putting questions to soldier A regarding his involvement in the present incident in the context of another contentious and unsettled death and that to allow material about that other incident would be more prejudicial than probative.

[29] Secondly, he considered that it was difficult to contextualise the various incidents within soldier A's career history. There was a risk that the jury may overestimate the significance of the previous similar incident. The focus of the inquest should remain on the circumstances leading to the deaths on 9 October 1990. The Coroner had no jurisdiction to conduct a general enquiry into SAS deaths in Northern Ireland and to admit evidence in relation to Francis Bradley’s death would have substantial potential to both distract and dilute attention from consideration of the central issues to be addressed by the jury. In respect of the second incident involving soldier A where he stated that he had administered first aid the Coroner

concluded that it was not a relevant previous lethal force incident for the purpose of the inquest. No reference to the incident would be introduced in evidence.

[30] Further judicial review proceedings were then launched in relation to this decision and were heard by Weatherup J. The grounding affidavit indicated that the next of kin wished to investigate at the inquest whether there was a shoot to kill policy by which they meant a policy by the army to kill those who might otherwise have been arrested or a tendency by individual soldiers such as soldier A to act in that fashion or whether the training of the soldiers engaged in such operations was of such a character that it promoted an outcome that resulted in unnecessary deaths. In the Bradley incident it was stated that 19 shots had been discharged and the deceased had been hit a number of times. The grounding affidavit indicated that the information provided in relation to the death by the pathologist suggested that Bradley had been shot in circumstances that were inconsistent with the statement made by soldier A and that the evidence suggested that lethal shots struck Bradley when he was lying on his back on the ground. The next of kin accordingly sought to cross examine soldier A because of the similarities between the two incidents in order to address the shoot to kill issue.

[31] Weatherup J concluded that the examination of soldier A about the Bradley incident may well lead to an application for the admission of further evidence on that incident but he considered that the Coroner could control to what extent such further witnesses should be involved. If the incident was otherwise relevant the Coroner could by that means secure for soldier A an adequate enquiry into his involvement in the incident that would not be unfair to him. In looking at the question of fairness it was important to ensure that it applied also to the next of kin who had an interest in seeking an examination of that incident and its relevance to the shoot to kill enquiry. The introduction of further evidence would also ensure that the Bradley incident would be contextualised within the career history of soldier A.

[32] The judge noted that the Coroner stated that the admission of evidence in relation to Mr Bradley's death would have the potential for distracting and diluting consideration from the central issues to be addressed by the jury. He noted, however, that the effective central issue in this case was whether the deaths were unnecessary and whether they were brought about by a shoot to kill policy. The circumstances of the Bradley incident could have informed that central issue so that it could not be described as a distraction. It was an important aspect of a proper enquiry into whether or not there was a shoot to kill policy. If the case of a common soldier in two similar incidents could not permit of examination of the shoot to kill policy by reference to that other incident then it would seem that there would never be an inquest that extended beyond the facts of the particular case. Any danger that

the jury may overestimate the significance of the previous similar incident would be dealt with by directions from the Coroner. Accordingly Weatherup J found that the objections of the Coroner to the admissibility of the evidence of soldier A in relation to the Bradley incident were not well founded and did not warrant the exclusion of the evidence on the shoot to kill issue. He granted the judicial review application on that issue. He found that the credibility matter which the applicant sought to challenge in the McElwaine incident was collateral and that the Coroner was right to reject that application.

[33] Weatherup J proceeded on the basis that soldier A would be made available to give further evidence at the inquest if the judicial review application was successful as indeed it was. In light of that decision the Coroner sought to organise a timeframe for the questioning of soldier A on the death of Mr Bradley. In circumstances which we discuss later in this judgment, soldier A did not return to give evidence at the inquest as a result of which the Coroner placed before the jury various documents which had been introduced in the original inquest into the death of Francis Bradley. We will deal later with the effect of that decision.

[34] The jury gave their verdict on 2 May 2012. It is not necessary to set out the full narrative verdict but their conclusion was that the objective of the military operation was to continue surveillance of the car in the mushroom sheds, to arrest anyone involved in terrorist activity and to place a camera in the area of the mushroom sheds. The soldiers opened fire and shot the two men in the belief that their position was compromised and that their lives were in danger. The soldiers believed that radio tones may have alerted the men to their position. Mr McCaughey and Mr Grew were approaching the soldiers with guns at the ready position. After opening fire the soldiers continued firing believing that they were under sustained fire. They interpreted sparks, rebound flashes and tracer rounds as they saw them through their night sights as muzzle flashes. The jury indicated that they could not be unanimous on the balance of probabilities as to whether or not there was an opportunity to attempt to arrest in accordance with the yellow card prior to the soldiers feeling compromised. However, once the soldiers felt compromised they agreed that there was no other reasonable course of action.

[35] The appellant was dissatisfied with the conduct of the inquest and pursued a judicial review application in respect of the matter upon which the Court of Appeal had given leave and the circumstances surrounding the failure of soldier A to be recalled to give evidence on the Bradley shooting, subsequent to Weatherup J's ruling on 18 October 2012. In addition the applicant sought leave to judicially review the Coroner's decision to conduct the inquest with a jury. Weatherup J refused leave for that challenge and we deal with it later.

Weatherup J's conclusion on scope and disclosure

[36] The Court of Appeal granted leave in relation to the non-disclosure of other evidence of fatal shootings in which soldiers A - K were involved and the prohibition of any cross-examination of the soldiers by the next of kin on those incidents. It did so because it questioned whether or not the Coroner had understood the scope of the inquest to extend to consideration of the issue of shoot to kill. For the purpose of the hearing before Weatherup J the Coroner swore an affidavit in which he recognised that the next of kin raised the question of whether this was a shoot to kill incident in correspondence of October 2011 and in subsequent submissions. The Coroner stated that he considered the material relating to other lethal force incidents for the purpose of his ruling on 8 March 2012 and continued:

> "The question of whether soldiers deliberately engaged in unlawful force to the exclusion of other reasonable courses of action that may have been open to them (such as the arrest of the two men), went to the very heart of the evidence and submissions in the case. The issue of whether the soldiers had resorted to "shoot to kill" was thus examined with reference to the defined scope of the inquest, as had been confirmed following the decision of the Supreme Court. I can say therefore that material suggestive of any operation that was planned or conducted with the objective of killing Mr McCaughey and Mr Grew, contrary to the soldiers' account that they had resorted to the use of force in the belief that the lives were in danger, would have been regarded by me as relevant or at least potentially relevant to the issues to be determined in the inquest.
>
> The inquest was not, however, tasked with examining the broader question of whether there was a "shoot to kill policy" pursued by the security forces in Northern Ireland at the relevant time. Had the inquest been tasked with examining the broader question, it would have been necessary to engage in an enquiry extending well beyond any enquiry ever contemplated or proposed by any interested party in this inquest."

[37] The appellant did not contend that there was a general policy or order issued to shoot all suspected terrorists and there was no evidence that such a policy or

order existed. She contended that there was the use of unnecessary force when soldiers confronted armed men by not being prepared to effect arrests. The planning of the operation was said to be marked by aggressive positioning so as to promote the use of lethal force. A further aspect was said to be the culture that had developed among the soldiers of unnecessarily aggressive action against suspects. Soldier K, the officer commanding the unit, dealt with questions directed to whether there was a shoot to kill policy and in relation to the planning of the operation and aggressive positioning. Soldier H gave evidence as the officer commanding the operations who had conducted the briefing. The soldiers who undertook the shooting also gave evidence other than soldier B who was unable to attend. Weatherup J considered that the jury had the opportunity to consider issues of culture or the manner in which the operation was conducted touching on the shoot to kill issue.

[38] He noted the appellant's argument that she was disadvantaged in exploring with military witnesses allegations of their involvement in a shoot to kill policy or allegations that SAS soldiers were more likely to have recourse to lethal force or to use excessive force where that was not absolutely necessary or allegations that individual soldiers had a propensity towards the use of excessive force. The trial judge noted, however, that the Coroner kept open the shoot to kill issue and he was satisfied that the Coroner did not find anything emerging in the course of the evidence that could have been potentially relevant to the issue of shoot to kill.

[39] It was submitted that the evidence of soldier K, the officer commanding the unit, assisted the appellant in showing that the Coroner was inaccurate in his consideration of what was potentially relevant. Soldier K undertook a tour of duty from 1983 - 1985 in Northern Ireland when seven deaths occurred and again from 1989 - 2001 when eight deaths occurred. He was not directly involved in those operations but carried out the command and control role in 1983 - 1985 of soldier H in this operation. The learned trial judge noted that soldier K was not engaged in the planning of this operation, he was not present at the scene and was off duty when the incident occurred. He was extensively cross examined on the training issues upon which he gave evidence. The learned trial judge was satisfied that the Coroner kept the matter of shoot to kill under review as the inquest progressed and had no occasion to change his position on the issue of potential relevance of the involvement of the other soldiers in lethal force incidents. The judge was satisfied that there had been an effective examination and investigation of the shoot to kill issue for the purposes of Article 2 subject to the circumstances surrounding the recall of soldier A which we touch upon later.

The appeal on scope and disclosure

[40] A number of the authorities touching on the relationship between the Coroner's obligation to make disclosure to the interested parties and his obligation to determine the scope of the inquiry arose in connection with inquests to which the provisions of the Human Rights Act 1998 did not apply. The principles behind those authorities, however, remain of considerable assistance. The purpose or scope of the inquest was described by Lord Bingham in Jordan v Lord Chancellor [2007] UKHL 14 at paragraph 37:

> "I take it to be common ground that the purpose of an inquest is to investigate fully and explore publicly the facts pertaining to a death occurring in suspicious, unnatural or violent circumstances, or where the deceased was in the custody of the state, with the help of a jury in some of the most serious classes of case. The coroner must decide how widely the enquiry should range to elicit the facts pertinent to the circumstances of the death and responsibility for it. This may be a very difficult decision, and the enquiry may range more widely than the verdict or findings."

[41] The role of disclosure in the determination of the scope of the inquest arose in Chief Constable PSNI's Application [2008] NIQB 1. The Chief Constable applied for leave to judicially review the decision of the senior coroner to require the production of a police report into the death of Patrick Pearse Jordan with a view to considering its relevance and to take it into account in determining the scope of the inquest. The senior coroner saw no reason in principle why he should not provide a copy of the report to the legal representatives of the next of kin. The application for leave was refused. The court was satisfied having viewed the report that there was every reason to believe that it was relevant for the purpose of the inquest. The court also indicated that where such relevant material had been provided the proper approach was to disclose it to the interested parties so as to obtain their assistance on the question of the scope of the inquest. By that means the interested parties were able to participate effectively in the inquest proceedings.

> [42] The issue of scope was considered further by Weatherup J in Hemsworth's Application [2009] NIQB 33 and Ramsbottom's Application [2009] NIQB 55. The approach that he took was set out at paragraph 11 of the latter case:

> "The functions of an Inquest include, as was noted in the Broderick report in 1971, the allaying of rumour and suspicion. Thus it becomes necessary to identify the circumstances in which rumours and suspicions are required to be addressed at an Inquest. The Coroner cannot be expected to carry out an inquisition into every stated rumour and every stated suspicion, however apparently unfounded or unreasonable. There must be a plausible complaint relating to the issues touching the means by which the deceased came by his death. There must be a reasonable basis in evidence before the Coroner can be expected to conduct such an inquisition. There must be grounds for reasonable suspicion or a reasonable basis for the rumours, not amounting to mere speculation, to warrant further enquiry at the Inquest. If there are grounds for reasonable suspicion in relation to actions that are relevant to the direct cause of the death it is the obligation of the Coroner to conduct a full investigation and a public investigation as to the circumstances and responsibility for the death."

[43] Disclosure of documents and its importance in the determination of the scope of the inquest arose again in PSNI's Application [2010] NIQB 66. The applicant challenged the decision of the senior coroner who directed that the Chief Constable make available to him redacted copies of the Stalker and Sampson reports for onward dissemination to the other interested parties to enable consideration of the resumption of a number of inquests. The senior coroner had read the reports and considered them generally relevant to all of the deaths but had not determined the scope of the inquest. He considered that the report should be made available to the interested parties so that they would properly have an input into determining the scope and viability of a resumption of the inquests. The applicant contended that it was for the Coroner to rule first on the actual relevance of the materials.

[44] Gillen J dismissed the application. He noted the inquisitorial and investigative role of the Coroner and the area of discretionary judgement available to him in determining how wide the enquiry should range. He relied on R (Bentley) v HM Coroner for Avon (2001) 166 JB 297 where Sullivan J indicated that there must be a presumption in favour of as full disclosure as possible. Such an approach had been adopted by Scott Baker LJ in the coroner's inquest into the deaths of Diana, Princess of Wales and Mr Dodi Al Fayed where he stated:

> "If ever there was a case that has generated rumour and suspicion, and indeed it has done so on an international scale, surely this is it. Because of this a great deal of evidence has been called that is only of the most marginal relevance to the questions the jury have to answer. However that has been desirable in order to ascertain whether there is any substance in a number of assertions that have been made by Mr Mohamed Al Fayed or have been circulating in the media or both. Nevertheless, it seems to me that there comes a time when a halt has to be called to calling evidence of marginal if any relevance."

[45] A similar approach had been adopted by Hallett LJ in the inquest into the London bombings of 7 July 2005. At paragraph [38] of his decision Gillen J noted the observations of Girvan LJ in An application by Hugh Jordan about the difficulties facing a coroner dealing with contentious inquests:

> "The problems are compounded by the fact that the Police Service which would normally be expected to assist a coroner in non-contentious cases is itself a party which stands accused of wrong doing. It is not apparent that entirely satisfactory arrangements exist to enable the PSNI to dispassionately perform its functions of assisting the coroner when it has its own interests to further and protect."

[46] Gillen J concluded that this was all the more reason why in contentious inquests of this nature a coroner must adopt a broad and purposive approach to determining scope and a generous approach to disclosure. In order to ensure that the interested parties and next of kin can participate in an informed, open and transparent fashion on an equal footing disclosure of potentially relevant material to them was required in order to determine the scope of the inquest. Although the focus of the investigation in this case was not upon the actions of any police officers it remained the case that this was a policing operation in which the Army was acting in support. These observations are, therefore, material.

[47] The potential relevance test also has support in ECHR jurisprudence. In McKerr v UK (2002) 34 EHRR 20 the court considered a complaint that the Stalker/Sampson report had not been made available to the coroner. The court concluded at paragraph [151] that the inquest was prevented thereby from reviewing potentially relevant material and was therefore unable to fulfil any useful

function in carrying out an effective investigation. Mr Perry correctly pointed out that the complaint related to the failure of disclosure to the coroner and the court did not comment upon access by the next of kin. Although that is correct, the court, at paragraph [147], stated that the court now laid more emphasis on the importance of involving the next of kin of the deceased in the procedure and providing them with information.

[48] The respondent placed some emphasis on the decision of the ECHR in Bubbins v UK [2005] 41 EHRR 24. That was a case involving a police shooting in which the inquest was conducted prior to the coming into force of the Human Rights Act 1998. The circumstances were that the police were called to a flat where it was believed an intruder, who appeared to have a handgun, had entered. Armed officers were tasked to the scene. The person in the flat appeared to point a gun at the police on several occasions on the last of which he was shot by an armed officer. The person killed turned out to be the owner of the flat and his weapon was found to be a replica. The deceased was found to have a high level of alcohol in his blood.

[49] At paragraph [153] of that decision the court noted the role of the coroner as an independent judicial officer and the safeguards by way of judicial review of any procedural decisions or mistaken directions. These were strong safeguards as to the lawfulness and propriety of the proceedings. Although the coroner was required to confine this investigation to the matters directly causative of the death and not to extend his enquiry into the broad circumstances, this did not prevent examination of matters such as the planning and conduct of, for example, a police operation which resulted in the loss of life, having regard in particular to the fact that the essential purpose of the inquest was to allay rumours and suspicions of how the death came about. At paragraph [161] the court said that what was important was the fact that the family had at its disposal as much information as was commensurate with the defence of its interest in the inquest proceedings, namely clarifying the facts surrounding the death of Michael Fitzgerald and securing the accountability of the police officers involved for any alleged acts and omissions.

[50] This review of the authorities suggests that the procedure should operate as follows:

(i) The PSNI is under a legal duty pursuant to section 8 of the Coroners Act (Northern Ireland) 1959 to furnish to the coroner such information as it then has or is thereafter able to obtain (subject to any relevant or privilege immunity) concerning the finding of the body (Jordan v Lord Chancellor at [45]). Where there is nondisclosure or delay the coroner should actively require fulfilment of that obligation within a realistic timescale.

(ii) The purpose of the inquest is to allay rumour and suspicion and to investigate fully and explore publicly the facts pertaining to a death occurring in suspicious, unnatural or violent circumstances. The coroner must decide how widely the enquiry should range to elicit the facts pertinent to the circumstances of the death and responsibility for it (Jordan v Lord Chancellor at [37], Ramsbottom at [11], Bubbins at [159] and [161] and Scott Baker LJ in the Diana/Dodi inquest).

(iii) Where information which is relevant or potentially relevant to the purpose of the inquest is received by the coroner it should be disclosed, suitably redacted if necessary, to the next of kin. The concept of potential relevance imports a broad ambit to the obligation of disclosure. (Hugh Jordan's Application [2014] NICA 76 at [22] and [43], Bentley and PSNI at [39] and [41])

(iv) The most helpful definition of relevance was set out in The Commissioner of Valuation for Northern Ireland v Debenhams plc [2014] NICA 49 at paragraph [13]:

> "[13] Phipson proposes that the test of evidential relevancy is best expressed in the statutory formulation in section 55 of the Australian Evidence Act 1995:
>
> > 'The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings.'
>
> Rule 401 of the Federal Rules of Evidence (USA) defines relevant evidence as evidence having any tendency to make the existence of any fact more probable or less probable. The Evidence Act 2006 in New Zealand states that:
>
> > 'Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceedings.'
>
> It is not necessary that the relevance of a fact should appear at the time it is proved. The court will often admit evidence on counsel's undertaking to show its

> bearing or admissibility at a later stage, failing which it will be disregarded. In every case the question of relevance of a particular item of evidence can be decided only by looking at it in the context of the whole of the evidence in the case. Modern courts are less concerned with degrees of probative value, taken in the abstract, than with the possible disadvantages of admitting or excluding particular items in evidence. In Clarke v O'Keefe [1997] ATP and CR 126 at 133 Peter Gibson LJ in the Court of Appeal said:
>
> > 'It was said, as long ago as 1969, by no less an authority than Megarry J in Neilson v Poole [1969] 20 P and CR 909 that the modern tendency was towards admitting evidence in boundary disputes and assessing the weight of the evidence rather than excluding it. That tendency has, in my experience not diminished in the intervening years.'
>
> As pointed out in Phipson 18th Edition at paragraph 7.16, a similar tendency has been equally apparent in most other areas of the law."

That passage was relied upon by this court in Jordan's Application [2014] NICA 76 at [22].

(v) Although it is plain that the coroner should disclose any relevant or potentially relevant material received by him concerning the facts surrounding the death of the deceased or relating to the accountability of others for any alleged acts or omissions and should take a broad ambit to the disclosure of such material, the extent of the disclosure may also need to take into account the need to confirm or allay public suspicion particularly where questions relating to those issues have been circulating in the public domain even though that may be as a matter of surmise rather than as a result of evidence. We note that it is now common practice in inquests concerning lethal force incidents in Northern Ireland for the Ministry of Defence to provide the coroner and the next of kin with details of the other lethal force incidents in which the soldiers have been involved. We consider that the approach which we have taken, based upon the observations of Scott Baker LJ set out in paragraph [30] of Gillen J's judgment in PSNI, provides a proper juridical basis for the disclosure of such information in these circumstances.

(vi) In some cases the coroner may have evidence about the conduct of witnesses in other similar situations. The House of Lords had to consider the admissibility of such material in civil cases in O'Brien v Chief Constable of South Wales Police [2005] 2 AC 534. The claimant's conviction for murder had been quashed. He alleged that named police officers used specific operational methods which were oppressive, dishonest and unprofessional. He sought to introduce evidence to show that the same officers had used the same or similar methods into earlier cases. The court dismissed the Chief Constable's appeal against admission. Evidence to be admissible had to be relevant. The test of relevance was that set out in R v Kilbourne [1973] AC 729 at 756:

> "Evidence is relevant if it is logically probative or dis-probative of some matter which requires proof… Relevant (i.e. logically probative or dis-probative) evidence is evidence which makes the matter which requires proof more or less probable."

Evidence that the person had behaved in a particular way in the past may, if true, be probative of the manner in which he engaged in the subject incident. This is sometimes referred to as similar fact evidence. If the evidence is legally admissible there is a second stage. The judge will still need to consider whether it should be admitted. The strength of the argument for admitting the evidence will always depend primarily on the judge's assessment of the potential significance of the evidence, assuming it to be true, in the context of the case as a whole. The arguments against its admission often concern the risk that the trial will be distorted and the jury distracted, that the evidence may be of little probative value and cause unfair prejudice and that it may unduly extend the length of the trial and cause excessive stress and prejudice to witnesses required to consider matters long closed. Where the coroner is faced with such an application he should carefully analyse and apply the two-stage approach set out by the House of Lords bearing in mind the purpose of the inquest. The approach to disclosure is, of course, broader than that which arises at the evidential stage.

(vii) All of these matters need to be taken into account by the coroner when determining the scope of the inquest. As more material becomes available the coroner may be able, after discussing the matter with the parties, to reach a provisional conclusion on the issue of scope. That clearly was the position in this case in May 2011. As the Coroner indicated that decision must, of course, be provisional since the issue of scope may have to be revisited depending

upon the additional material that becomes available to the Coroner and the parties.

[51] In light of the fact that the practice has now changed so that details of the involvement of soldiers in other lethal force incidents are provided as a matter of course and in light of our concern that our approach to disclosure as set out above is somewhat more generous than that applied by the Coroner we asked to see the materials provided by the respondent to the Coroner but not disclosed to the next of kin. The materials initially produced caused us to look for some underlying materials which must have formed the basis for some of the statements in the material supplied to the Coroner. Eventually the respondent was ordered on 7 March 2016 to provide to the appellant by 23 March 2016 redacted copies of the documentation which had been provided to the Coroner and not shared with the next of kin together with the further documentation produced to us but not seen by the Coroner. An affidavit was provided by the respondent explaining the redactions and the process by which the documents were identified.

[52] The documents now disclosed include the grid indicating in relation to soldiers A – K their involvement in other lethal force incidents and a commentary in relation to each of those incidents describing the nature of the soldier's involvement. Those were available to the Coroner. In addition to that a further 48 pages comprising material obtained from the personnel files which were made available to the Coroner and various operation summaries and statements which we understand were not made available to the Coroner in relation to the other lethal force incidents in which the soldiers were involved have now been made available.

(i) In relation to soldier A the material demonstrates that he has completed four tours of duty in Northern Ireland totalling five years and six months between 1982 in 2003. In addition he has completed multiple short duration deployments of 1 to 2 weeks. It is estimated that he was deployed on approximately 1650 occasions and was involved in two other incidents in which lethal force was used. One of those was the Bradley incident in respect of which additional material has been provided. The other was the McElwaine incident in which he did not discharge his weapon.

(ii) Soldier B resided outside the jurisdiction and was not available to give evidence. The material indicates that he had served two tours of one year's duration between 1985 and 1998 together with multiple short duration deployments of 1 to 2 weeks. He had been deployed on approximately 600 occasions but had not been involved in any other lethal force incident and had not discharged his firearm in any incident.

(iii) Soldier C had served one tour of 18 months duration and been deployed on approximately 450 occasions. He had been involved in one lethal force incident on 13 January 1990 when it was asserted that plainclothes soldiers on a familiarisation patrol observed masked and armed men entering a bookmaker's shop from a vehicle on Falls Road Belfast. Believing them to be terrorists two soldiers intercepted them and as a consequence three men were shot and killed. This incident was not part of a planned surveillance or detention operation and he did not discharge his weapon.

(iv) Soldier D was deployed in Northern Ireland for one year and had multiple short deployments of one to two weeks. He was deployed on approximately 300 occasions. He was involved in one lethal force incident on 4 July 1988 when PIRA terrorists attacked an RUC sanger. SAS soldiers occupying the sanger along with RUC personnel engaged the terrorists and an innocent civilian in a passing vehicle was hit by a round fired by those soldiers. No terrorists were killed or arrested during the incident. Soldier D did not discharge his weapon.

(v) Soldiers E and F had each been deployed in Northern Ireland for one year and in addition had multiple short deployments of 1 to 2 weeks. Each was deployed on approximately 300 locations and neither was engaged in any lethal force incidents nor did they discharge their weapons in any incident.

(vi) Soldier G was deployed in Northern Ireland for one year and had multiple short deployments of approximately 1 to 2 weeks. He was involved in two other lethal force incidents and on both occasions discharged his weapon. On 12 November 1990 he was tasked with other soldiers to protect a house in Victoria Bridge where a terrorist attack was anticipated. He was positioned in the laneway running off the County road towards the house. A vehicle came from his left and gunfire was directed towards his position. He stepped out onto the road and fired five aimed shots at the car. One person was killed and eight people were arrested in the incident of which three were subsequently charged with terrorist offences. The second incident occurred on 3 July 1991. Soldier G was deployed with others in a car park in Coagh village as it was anticipated that there would be an attempt to kill a person in the car park. Soldier G saw a dark figure with a weapon in the rear of the car and opened fire believing that the occupants were going to kill someone in the car park. Three terrorists were shot dead in the operation. Further details of this operation are set out below.

(vii) Soldier H completed a one year tour in Northern Ireland and was deployed on the ground on approximately 150 occasions. He has also engaged in multiple short deployments of 1 to 2 weeks. He was not present at the scene of the shooting in this case but was involved in prior planning and was present in the operations room when the incident occurred. He was responsible for briefing the soldier who was in charge of the operation on the ground on 12 November 1990. The task was to protect the house and arrest any terrorist carrying out an attack on that property. He was not at the scene and did not discharge his weapon.

(viii) Soldier I carried out a one-year tour in Northern Ireland and in addition had multiple short duration deployment of 1 to 2 weeks. He was deployed in approximately 300 locations. He was not involved in any other lethal force incidents and did not discharge his weapon.

(ix) Soldier J completed two tours of one year's duration and was deployed on multiple occasions for short durations of 1 to 2 weeks. He was deployed on approximately 300 occasions. He was involved on the periphery of one incident on 16 February 1992 when specialist military soldiers attempted to detain around 10 terrorists. In the ensuing confrontation four terrorists were killed and two were detained. Soldier J was a member of the mobile detention team. He did not fire nor did he make any statement after the incident.

(x) Soldier K completed two tours of two years each. He was deployed on approximately 150 occasions. Between 1983 and 1985 he was a sub unit commander. Between 1989 and 1991 he was employed at HQNI. Between 1983 and 1985 the unit for which he was responsible was involved in three lethal force incidents. The first was on 21 February 1984 when two terrorists and a soldier were shot dead as result of a confrontation when soldiers who were conducting a static surveillance operation were discovered and confronted by a number of masked and armed terrorists. This was an unexpected encounter and there was no planned detention operation. The second incident occurred in 6 December 1984. A surveillance operation was being conducted on the grounds of Gransha Hospital Londonderry. It was anticipated that an attempt would be made to kill a member of the security forces. At approximately 8am a motorcycle was identified with a pillion passenger carrying a handgun. There was a confrontation as a result of which the two terrorists were killed by soldiers on the ground. The third incident occurred in 23 February 1985 when three armed terrorists were shot and killed during a surveillance operation. There was no pre-planned detention operation and the encounter was not anticipated.

Between 1989 and 1991 his unit was involved in five lethal force incidents. The first occurred on 2 September 1989 when a UVF terrorist was intercepted having shot dead a man on the Crumlin road. Brian Robinson was shot dead by members of the unit and his accomplice detained. This did not form part of a planned surveillance or detention operation. There was an incident on 13 January 1990 that has already been discussed in the context of soldier C. The incidents on 12 November 1990 and 3 June 1991 have already been discussed. On 18 April 1992 INLA terrorists were intercepted by soldiers during a terrorist plan to murder an RUC reservist in his home. Mark Corrigan was shot and killed and another terrorist was detained by the soldiers in a planned operation tasked and coordinated by the RUC. Soldier K was not present at the scene of any of the incidents nor did he discharge his weapon on any occasion.

Conclusions on scope and disclosure

[53] The history set out above demonstrates that although there was a draft for a provisional scope of the inquest prepared by the Coroner in December 2009 and by the appellant in January 2010 no further defined statement of the scope was articulated or agreed. There were, however, various stages in the process which enable us to identify the approach taken by the Coroner. There was little discussion about the implications of the change in scope as a result of the Supreme Court decision at the preliminary hearing in May 2011. On 24 June 2011 there was a further preliminary hearing on the question of those witnesses who should be called in relation to planning and control and a letter of 6 July 2011 identified the requirement for a statement to be obtained from soldier H in preparation for him to give evidence.

[54] Although in their correspondence of 28 January 2010 the next of kin had raised the allegation that this was a shoot to kill operation and that there would be a need to investigate whether the objective of the operation was to kill the deceased the letter of 4 October 2011 was the first occasion on which they specifically requested details of the involvement of the soldiers in other lethal force incidents. That letter also referred to what was called a wider shoot to kill policy but did so in the context of a request for details about the training of SAS soldiers relating to the use of lethal force. At the subsequent preliminary hearing on 17 October 2011 the Coroner directed that the respondent should provide statements from the named soldiers dealing with other lethal force incidents in which they were involved by 23 December 2011. Unfortunately, that direction was not complied with and it was not until 13 February 2012 that a limited number of statements were provided.

[55] By that stage the appellant had identified the involvement of soldier A in the Bradley and McElwaine incidents. In a letter of 16 February 2012 it was contended that the Coroner should consider his account and those of the other shooters in relation to those incidents to determine whether they were relevant to these proceedings. This appears to be the only occasion on which the appellant specifically sought consideration of statements of soldiers other than those involved in the operation on the basis that they may be potentially relevant to this inquest. That correspondence also referred to the involvement of soldier C in the Coagh incident. It was thought that he had taken the place of the suspected target on the morning of the attack. It was also noted the soldiers D and G were involved in incidents where weapons were discharged but no details have been given. The next of kin requested further details and asked the Coroner to review the depositions in the inquests in relation to Bradley, the Coagh incident and the McIlwaine case.

[56] Weatherup J noted that the Coroner addressed the scope issue at paragraphs 35 - 37 of his affidavit of February 2015 which we have set out at paragraph 36 above. He looked at the various interpretations that may be placed on the term "Shoot to kill":

> "[22] The expression "Shoot to kill" may be variously understood. On a general level the expression will concern whether or not there was a policy or an understanding that the soldiers would shoot any suspects. Perhaps rather than shoot to kill it is better captured by an expression such as 'shoot on sight' or 'take no prisoners'. The issue is more to do with whether the soldiers would shoot if it was not necessary to do so to protect life. To do so would be criminal. Thus the issue becomes whether there was a policy or understanding to shoot on sight or take no prisoners. The inquest did not involve a case being made that the military operated such a free for all. The applicant's approach at the inquest involved a more subtle examination of the concept of shoot to kill.
>
> [23] At another level shoot to kill may be understood as whether or not the planning of the operation for engagement with suspects was such that by taking up an unnecessarily confrontational position the soldiers might have in effect necessarily occasioned a shooting where

> the adoption of different positions might not have resulted in such ready engagement.
>
> [24] At yet another level, shoot to kill might concern whether or not there was a general culture of unnecessarily aggressive action taken by soldiers that resulted in fatalities when soldiers were engaging with suspects."

[57] Weatherup J stated that in the present case the appellant had not contended that there was a general policy or order issued to shoot all suspected terrorists. Ms Quinlivan accepts that no such case was made at the hearing but her point is that the failure of disclosure inhibited her ability to explore that case. We do not accept that submission. If the appellant wished to explore whether there was a general policy operated by the SAS to shoot suspected terrorists on sight that was a matter that could and should have been brought to the attention of the Coroner long before the proposed hearing of the inquest. It would then have been for the Coroner to examine the papers to see whether and to what extent his enquiry should range into potentially relevant material such as the detail of all other lethal force incidents involving the SAS. That would have required consideration of whether other incidents in which lethal force was not used needed to be taken into account or whether such enquiry could be limited in some way while still remaining probative. He would at an appropriate time then have had to consider the second stage of the O'Brien test. No such submission was made to the Coroner at any stage and the broad parameters of the enquiry pursued by the next of kin were captured in paragraph [23] and [24] of Weatherup J's judgment. We consider, like the learned trial judge, that the Coroner was not obliged in the circumstances of this inquest to embark upon an extended examination of whether there was such a policy pursued by the security forces in Northern Ireland at the relevant time. That conclusion was well within the area of discretionary judgement recognised by Lord Bingham in Jordan v Lord Chancellor and was consistent with the manner in which the preparations for the inquest were being conducted by the parties at the time.

[58] Having dealt with the parameters of the disclosure we consider should have been made it is now necessary to address whether within the terms of the scope set by the Coroner the failure to provide access to the material sought by the next of kin deprived the appellant of the opportunity to participate in the inquest to the extent necessary to protect her proper interests. That, in this case, meant the opportunity to investigate the broad issues identified by the learned trial judge at paragraphs [23] and [24] of his judgment set out at paragraph [56] above. There was specific evidence about training. The expert evidence addressed the position taken up by the soldiers

and their deployment of the soldiers on the ground so that the jury were able to evaluate the argument that their position was unduly confrontational. The real issue was whether the failure to disclose the details of the involvement of the soldiers in other lethal force incidents prevented the appellant exploring whether the shooting was the result of unnecessarily aggressive action taken by the soldiers when engaging with suspected terrorists.

[59] The appellant's submissions highlighted a number of pieces of information in relation to various soldiers which it was contended were relevant to the scope of the inquest. The first was the McElwaine incident in relation to soldier A. For the reasons earlier given we do not accept that this material was relevant to this inquest. The appellant took issue with an assertion that soldier A gave first aid to a wounded terrorist. The Coroner prevented any information in relation to that being put before the jury. Soldier A did not open fire in the incident in question and this material could not have been probative on the issue of whether the shooting in this case was unnecessarily aggressive.

[60] It was suggested that Soldier C had taken the place of the person who was believed to be the target for the terrorists in Coagh. It was not suggested that he opened fire in the incident. He clearly willingly put himself in danger if he did so but the adoption of this role does not give rise to probative evidence about his actions in this engagement. He was present during the incident on 13 January 1990 but did not open fire. Soldier B was present in a sanger on 4 July 1988 when it was attacked by terrorists. Shots were discharged as a result of which an innocent civilian was killed. D did not fire. The presence of C or D during incidents in which shots were fired does not assist in establishing that this is a shoot to kill incident.

[61] Soldier G opened fire on two occasions in lethal force incidents after this engagement. The first was the death of Alex Patterson on 12 November 1990. The material indicates that he opened fire on that occasion after shots had been fired in his direction by terrorists. Although Mr Patterson was killed eight people were detained and as a result three were charged with terrorist offences. This was a return of fire case where arrests were successfully made. It does not assist in relation to a shoot to kill allegation in this case.

[62] Soldier G also opened fire in the Coagh incident on 3 June 1991. The circumstances were that three terrorists armed with two AK-47 rifles were driven to a car park in which it was anticipated that they would attempt to murder a person they believed to be a member of the security forces. SAS soldiers had been deployed in the vicinity. As the car approached the car park the deployed soldiers were ordered to stand by. After the terrorists arrived in the car park one emerged from the

side of the vehicle with his weapon. A number of soldiers including G who had been deployed in the back of a lorry then received a "Go! Go! Go!" message over the radio which he understood to mean that there was an immediate threat to someone's life. G saw a dark figure with a weapon in the rear seat of the vehicle and opened fire.

[63] As we have indicated previously the next of kin did not seek to make this inquest a forum for a public inquiry in relation to the activities of the SAS in Northern Ireland during the period from 1980 to 1992 in order to prove that there was a shoot to kill policy. If that was the approach the appellant was adopting one would have expected to see some evidence of the Coroner being asked to review all of the papers in relation to all of the deaths to establish potentially relevant material. If faced with such a request the Coroner would probably have had to take into account the second stage of the O'Brien test at a relatively early stage. There is no doubt that the next of kin had identified cases where there had been controversy and in their submission on 5 March 2012 they had referred to the allegation that 31 people had been killed by the SAS in Northern Ireland in the 1980s and 10 men had been shot and killed by the SAS between 1990 and 1992, primarily in County Tyrone. The next of kin plainly did not need access to the documents which were disclosed on our direction to submit that the scope of the inquest should be extended.

[64] If the scope of this inquest had included a wide enquiry of the nature described in the previous paragraph we agree that it would have been necessary to consider the relevance of the material in relation to the Coagh incident in the context of the other material generated by such a wide enquiry. As is clear from the affidavit of the Coroner and the finding of the learned trial judge the scope of this inquest did not extend in that way. The question, therefore, is whether the material in relation to G's discharge of his weapon in the Coagh incident can assist in relation to the suggestion that firearms were discharged in the subject incident in an unnecessarily aggressive and unlawful manner. G was never in a position to fire in this case. He was one of two soldiers providing mobile cover. There is no suggestion or evidence that he was involved in the planning of the incident or the deployment of the soldiers on the ground or the roles performed by the relevant soldiers in this incident. He did not arrive at the scene until after the shooting had occurred. In those circumstances we do not consider that evidence about the Coagh incident or his conduct in it was relevant. Even if the evidence of his involvement in the Coagh incident had been admitted the Coroner would have been obliged to direct the jury that he had not been present at the scene and had no part to play in the decision to open fire on the deceased. The evidence could not, therefore, have materially affected the determination of the issues before the jury.

[65] Soldier H was the sub unit commander. He was responsible for briefing the lead soldier, Soldier A, and the other members of the team. That required direction in relation to the general deployment of the members of the team although the particular positions taken up depended upon the terrain and were determined when the soldiers arrived at the scene. Soldier H was located in the TCG Headquarters and was at all times in radio contact with the soldiers on the ground. He naturally gave evidence in relation to the content of the briefing and the objectives of the operation. He had performed a similar role in relation to the incident on 12 November 1990 when Alex Patterson was killed. We have already indicated that that was an incident in which fire was directed at the soldiers and an extensive number of arrests were made. We do not consider that H's involvement in the incident gives rise to any relevant material in respect of this incident.

[66] Soldier J gave evidence on training. As previously indicated he was a member of the mobile detention team in respect of the incident at 16 February 1992. He was not, therefore, required to make a statement in relation to the incident. A successful claim was maintained by one of those injured at the scene as a result of being shot by the soldiers. The learned trial judge in that case found that the Ministry of Defence had not established justification for the shooting. There appeared to be conflicting accounts between the evidence of one of the soldiers called and an expert who had been retained in relation to the case. It is difficult to see any basis upon which this was relevant in respect of Soldier J.

[67] The final soldier in respect of whom the appellant made submissions was Soldier K. Between 1983 and 1985 he had been a sub unit commander serving in Northern Ireland and between 1989 and 1991 he was the unit commander. He explained that the role of the sub unit commander in conjunction with his team leaders was to consider the detailed tactical planning of the operation and propose a course of action for the TCG to consider. The implementation of the plan on the ground was the responsibility of the team leader who would be in radio contact with the sub unit commander. The incidents which occurred during K's time as sub unit commander are set out at paragraph [52]. The only planned operation was that involving the deaths of Doherty and Fleming. The appellant points out that the jury in that inquest concluded that the deceased could have been arrested. The purpose of the deployment was a surveillance and arrest operation. Damages were also awarded against the Ministry of Defence in respect of the incident on 23 February 1985. That was not, however, a pre-planned detention operation and the encounter was not anticipated by the soldiers. Soldier K had, therefore, no directing role in relation to that confrontation.

[68] In his evidence he explained his role as unit commander. He indicated that the sub unit commander would have to get authority from him before proceeding with any operation. He would expect to know the objective of the mission so that he could check both the legitimacy of the task and whether he had the necessary resources. He would then assign the operation with the name and provide any overarching direction or guidance. His involvement, therefore, was at a very high level. That is perhaps demonstrated in this case in that he was asleep in his bed at the time this incident occurred. It seems unlikely that would have been the case if he had been expecting a confrontation of this sort.

[69] Soldier K gave detailed evidence in relation to the training of SAS soldiers, the manner in which they were briefed and the general command structure. He was pressed on the extent of documentation that should have been available and a number of references within the documentation to this incident constituting an ambush. He was subject to a very thorough cross-examination on all of those issues. He clearly had a very limited overarching role in relation to this operation and that was consistent with his evidence as to what his role as unit commander was for the period within which this operation took place. His role in respect of other planned operations during this period was the same. We do not consider that the evidence of other incidents occurring during his period of command was probative of anything about the conduct of this operation on 8 October 1990.

[70] We are satisfied therefore, that the material which we directed should be provided to the next of kin was material that should have been directed by the Coroner to enable the appellant to participate in the decision as to its relevance and its effect upon the scope of the inquest. Our analysis of the evidence supports the view of the Coroner and learned trial judge that the appellant elected to proceed with the inquest on the basis of the scope as set out by the learned trial judge and chose not to argue for a wider enquiry embracing the entirety or a portion of the engagements by the SAS with terrorist suspects in Northern Ireland. If any such application had been made it would have required careful consideration by all of the parties interested in the inquest. Even in the original judicial review launched before Weatherup J it is clear that this was directed to the information in relation to the named soldiers only. Some of the information which we ordered should be disclosed had already been gleaned by those representing the appellant as a result of their involvement in other cases and the material we ordered to be disclosed added detail. This is not a case, however, where the material now disclosed opened a door on an otherwise unknown and undiscovered area and we do not accept any suggestion that the cumulative effect of the material we disclosed had such probative significance that it would have provided a justifiable basis for an extension of the

scope onto a wider plain with a consequent impact on the ability of the inquest to proceed. One can well understand that any wider enquiry would have necessitated careful scrutiny of what constituted relevant material before examining the second stage of the O'Brien test.

[71] In our view since the purpose of the inquest is to allay rumour and suspicion that objective is best served by a wide and generous ambit towards disclosure, a transparent analysis of the relevance of the material disclosed and a rigorous investigation of the issues found to be within the scope as determined by the coroner. We have had the benefit of detailed submissions from the appellant on the issue of the relevance of the disclosed material to the scope of this inquest. We are satisfied for the reasons given that the material was not relevant or not material.

The Coroner's alleged failure to procure the recall of Soldier A for further cross-examination and wrongly concluding the inquest without that further evidence.

[72] Soldier A ("A") was the Troop Commander and a person who fired shots in the incident that caused the death of the deceased. He gave evidence at the inquest between Monday 26 and Wednesday 28 March 2012 and was cross-examined in detail on behalf of the next of kin concerning the incident and his part in it. However, on Friday 23 March the Coroner had ruled that A could not be cross-examined about his involvement in another Army fatal shooting in which A (then under the cipher "C") had also fired shots ("the Bradley incident").

[73] The representatives of the next of kin were dissatisfied with that ruling and issued proceedings seeking its judicial review on Monday 26 March. Both the Coroner and Weatherup J were made aware of the need to ensure that A complete his oral evidence, whether with or without reference to the Bradley incident, depending on the outcome of the judicial review. The MOD had previously indicated to the Coroner that A, whose transportation to and accommodation in Northern Ireland for the inquest it had arranged, would be available for the duration of that week commencing 26 March. The Coroner indicated that should the High Court decide that A could be cross-examined in relation to other lethal force incidents he would bring A back to deal with them. A's evidence commenced and proceeded on that understanding.

[74] A completed his evidence on the McCaughey and Grew incident during the course of Wednesday 28 March 2012 and a short time later on that same day Weatherup J gave an ex tempore judgment in which he quashed the decision of the Coroner to exclude A's evidence in relation to the Bradley incident as, put briefly, he considered that such evidence would be relevant to the McCaughey and Grew

inquest. The Coroner and the MOD were both represented when the judgment was delivered.

[75] Notwithstanding this decision and the obvious consequent need for A to be recalled he in fact left Northern Ireland apparently on that same day although the details of his outward itinerary were not provided either to the Coroner or to this court. Presumably his departure, like his arrival, was arranged and facilitated by the MOD. What is clear is that the Coroner was given no notice of A's intended departure nor informed of his actual departure despite the MOD having indicated on the Monday that A would be available for the duration of that week and A having been informed before he left the witness box that he would be required to give further evidence if the High Court so decided, which evidence could readily have been accommodated on the Thursday and Friday of that same week. By the time the Coroner had been told what had happened A had been returned by the MOD to somewhere in Great Britain and may even by then have travelled onwards to the Middle East where he had employment.

[76] The representatives for the next of kin were dismayed by this sudden and un-notified departure which had the effect of making it impossible to continue A's evidence without a break which obviously would have been the preferable course, especially in an inquest where a jury and not a Coroner sitting alone was hearing and deciding upon the evidence.

[77] On Thursday 29 March the Coroner sought to arrange to recall A in the light of Weatherup J's ruling so as to deal with the Bradley incident. He was then informed that A had departed the jurisdiction. It was indicated by the MOD that while A would not be available the following week he might be available in the next following week commencing on 9 April. That week followed the Easter weekend so that the first possible sitting would be on Wednesday 11 April. After various discussions between the interested parties the Coroner directed on 5 April 2012 that A was to re-attend on 11 April. His ruling was in these terms:

> "Accordingly I direct that Soldier A must make himself available in person to the inquest at 10.00 am on Wednesday 11 April 2012 to be questioned on the [Bradley incident] on that and subsequent days deemed necessary by the court."

[78] Despite that clear direction A did not re-attend. Instead an e-mail received by the Crown Solicitor was forwarded to the Coroner at 9.20 am on 11 April. It was an articulate and well-constructed message purportedly written by A on 10 April

although from its format it had clearly been sent through the system of an English firm of solicitors. The e-mail, when reduced to its core points, said that A:

(1) Only learned on Saturday 7 April that he had been directed to return to give oral evidence.

(2) Had only had limited opportunity to obtain legal advice on that day, 10 April, but "any advice is limited by the fact that there is no time for my lawyers properly to consider the position".

(3) Was leaving on 11 April for a long arranged three week family holiday out of the UK.

(4) On his return from holiday was going back to work in the Middle East.

(5) Intends no disrespect but requires a proper opportunity to recall what happened at the time of the Bradley matter some 26 years ago.

(6) Would have given evidence voluntarily on the Bradley topic as he had already in relation to McCaughey and Grew if he had been given adequate time to make the necessary practical arrangements, take independent legal advice and prepare for giving that further evidence.

Notably, the e-mail does not suggest when A considered that his conditions for giving evidence might become satisfied nor did it give any information about his future potential availability.

[79] When A did not appear the Coroner directed that the verdict on the inquest into the death of Mr Bradley together with relevant statements and reports from it be read to the jury on 13 April 2012. He further explained to the jury the circumstances surrounding A's absence including the fact that he had expressly directed him to attend, that it would have been helpful to have put questions put to him about the matter and the significance that the jury might attach to the evidence concerning the Bradley incident in the context of the deaths that they were considering. The sitting of the inquest was then adjourned until 25 April by reason of jurors' arranged holidays.

[80] The solicitors for the next of kin continued, not unnaturally, to feel dissatisfied. They wrote to the Coroner on 16 April and again on 18 April urging that every step be taken to secure A's attendance and noting that it seemed that A had engaged English solicitors who had however not come on record, attended before the Coroner or provided any explanation for A's failure to attend on 11 April in compliance with the Coroner's direction that he should. In their letter of 18 April

the solicitors for the next of kin suggested that a subpoena should be obtained from the High Court and served upon A when he returned from his three week holiday requiring him to attend on 2 May. They said "a failure to adopt that course would mean that the Coroner's Court directions and the order of the High Court will have been subverted."

[81] The letter of 16 April produced a response from the English solicitors as follows:

> "We have received a copy of the letter to you from Madden and Finucane dated 16 April 2012.
>
> We have not intentionally come on to the record in the proceedings as acting for Soldier A and have no instructions to do so. We have simply attempted to assist the court by forwarding correspondence from Soldier A in circumstances where his identity is secret and security is paramount and therefore he cannot communicate direct.
>
> As the court is aware, Soldier A is presently on a cruise in the Pacific Ocean. We have no further instructions. Further, in case it is being requested, we obviously cannot disclose privileged information. We therefore cannot see how we can assist the Court with proposals either in writing or by attending at a hearing on 23 April 2012.
>
> We make no comment on the remainder of the letter, which appear to relate to the MOD and others."

[82] The Coroner had replied to the solicitors for the next of kin on 18 April saying that he had written to the MOD, PSNI and the English solicitors asking them for their views on the way forward. This produced a second unhelpful letter dated 19 April from the English solicitors:

> "We have received a copy of the letter to you from Madden and Finucane dated 18 April 2012 and also your letter of the same date.
>
> As stated in our letter of 18 April 2012, we have no instructions from Soldier A. Therefore, whilst he would obviously entirely reserve his position on anything that

> may affect him, in circumstances where he is not even aware of the correspondence from Madden and Finucane, we cannot assist the Court further at the present time."

[83] It may be seen from the foregoing that the point had by then been reached at which A had given no indication of when he would be prepared to return to the inquest, the English solicitors whom he had consulted had declined to come on record or appear at the inquest and said they had no instructions. Neither A nor they provided any information as to when A would next be in the United Kingdom or where within it he might at such time be found. The inquest could not sit again with its jury until Wednesday 25 April as the delay in concluding it meant that the prior holiday arrangements of jurors had to be facilitated.

[84] The Coroner sat without the jury on 23 April to hear, inter alia, submissions as to how the unquantified unavailability of A should be approached. Ms Quinlivan urged that, as A had not said that he would not attend but rather asserted that he was a willing witness, an attempt should be made to subpoena him to attend and if necessary the inquest should be adjourned to secure his attendance. She also suggested that the question of a possible contempt of court by A should be referred to the Attorney General although she accepted such a reference could not impact upon the timetable for the completion of the inquest.

[85] Mr McGleenan who appeared on behalf of the PSNI was invited, in the absence of counsel for the MOD, to indicate his views as to how best to proceed. His submission, which he emphasised he had no instructions from the MOD in relation to, was that it was important that the inquest be drawn to a close without further adjournment because there was a risk of losing the efficacy of the process if the jury were sent away for a further period of time in order to facilitate the attendance of witnesses and that there was a risk of dissipating the scrutiny that the jury had brought to a difficult matter if there were delay. Mr Doran submitted that to adjourn to try to secure the attendance of A would be a "rather speculative course" whereas a further break in the proceedings would be "very dangerous because it would run the real risk of losing individual jurors, possibly ultimately losing the jury and ultimately losing the inquest in its present form". He pointed out that the Coroner had dealt with A's failure to appear on 13 April when he had explained to the jury what had happened and placed the relevant materials from the Bradley inquest before it and that the representatives of the parties would be free, as would the Coroner, to comment on A's failure to return in their closing observations to the jury.

The Coroner's consideration of how best to proceed

[86] Having received these various submissions the Coroner carefully considered the competing aspects of the matter, both those in favour of an attempt to secure A's attendance by a further adjournment and those in favour of proceeding to conclude the inquest without waiting to see whether A's attendance could in fact be secured. The essential elements of the Coroner's ruling, which extends over five pages of transcript, may be shortly summarised thus:

> "(1) He was 'in the dark' about the whereabouts of A and his future whereabouts and availability and without the means of finding out.
>
> (2) Since the judgment of Weatherup J he had supported the view that it would be preferable for A to attend and answer questions about the Bradley incident. The High Court Judge had anticipated that A would attend and the Coroner had made it clear to him that he was expected to attend on the day when the Coroner knew that he would be in the United Kingdom. He had explained this to the jury robustly.
>
> (3) While A's evidence in relation to the Bradley incident was relevant we cannot lose sight of the fact that this inquest was not into the death of Mr Bradley.
>
> (4) He considered that the questions that could have been asked of A concerning Mr Bradley are 'inevitably limited'. In his view it was a 'similar fact type scenario', the similarities were now before the jury and the participants could make further submissions in closing.
>
> (5) He concluded that 'A has effectively put himself outside the reach of the Court or certainly the immediate reach of the court'. In those circumstances to ask the High Court for a subpoena directed to A would be pointless.
>
> (6) On the question of proportionality it was necessary to balance the desirability of having A present against completing the inquest efficiently with the evidence we did have. He concluded that the latter

> outweighed the value in 'speculatively now trying to seek A's attendance which would inevitably be on the basis of some kind of open-ended review of his availability to the Court'. He did not think such a course would be manageable and it would certainly not be desirable in the context of the inquest.
>
> (7) Accordingly he concluded that the proportional approach would be to allow the participants to comment on A's absence in their closing submissions and for him to remind the jury in his own address that A had been directed to appear in relation to Bradley and had failed to do so. It would then be for the jury as to what it made of A's non-attendance.
>
> (8) He further indicated that he would adopt Ms Quinlivan's suggestion of considering a possible reference to the Attorney General in relation to the allegation that A's behaviour had placed him in contempt but that such a course if adopted could not affect the running of the inquest."

[87] Having decided that the balance lay in favour of bringing the inquest to a conclusion without the further unquantifiable delay involved in continuing to attempt to recall A, the Coroner had further to take account of the fact that two jurors had previously given notice of firm holiday plans which together spanned the period between 3 May and 15 May. To have adjourned the inquest would therefore necessarily have involved a break until 16 May at the earliest. The jury had last heard evidence on 13 April and there was no guarantee that A would return, whether on 16 May or at all. He considered that that would have placed an unreasonable burden on the jury, particularly as the inquest was to have concluded before Easter.

[88] In an affidavit sworn on 15 November 2012 the Coroner concludes at paragraph [14]:

> "I did not accept that the failure of Soldier A to address the Bradley incident would render the inquest non-compliant with Article 2. Soldier A was questioned robustly and extensively in the inquest about his involvement in the deaths of Mr McCaughey and Mr Grew. Further, the evidence relating to the Bradley

> incident was before the jury. In having the relevant statements read to the jury, I believe that I had accommodated the judgment of the High Court in the only manner possible in the circumstances that would permit the completion of the inquest."

[89] The inquest was accordingly concluded on 25 April with closing speeches to the jury on behalf of the interested parties and on 26 April the Coroner's observations to it. At paragraphs [15] and [16] of the same affidavit the Coroner deposes that counsel for the next of kin dealt with the Bradley incident in some detail and with its alleged parallels with the deaths of Messrs McCaughey and Grew. Emphasis was also placed upon A's failure to return to give evidence relating to the Bradley incident and the consequent inability of counsel to cross-examine him thereon. The Coroner himself dealt with the matter, reviewing the available evidence relating to the Bradley incident and recalling the details of A's failure to return to give evidence although required to do so.

The challenge to the Coroner's decision to proceed in the absence of A

[90] Before Weatherup J, who also dealt with this challenge, counsel for the next of kin essentially repeated their submissions to the Coroner that he ought to have adjourned the inquest into May to see whether A's attendance could be secured. Weatherup J noted in detail the Coroner's process of reasoning as deposed to and the steps taken by the Coroner both during the inquest and in his closing remarks to place the contents of the relevant materials before the jury and to comment on A's failure to re-attend. His conclusion on this issue was as follows:

> "[38] The applicant says that the approach taken could not replace the oral examination of Soldier A.
>
> [39] Overall the Coroner had to make a difficult decision whether to proceed with the inquest or to further adjourn. He considered Soldier A's return to be a rather speculative matter. Soldier A had also considered it appropriate to obtain independent legal advice in relation to his being examined by counsel about the Bradley incident and he may not have made arrangements at the time. The applicant was able to make assertions about the Bradley incident that Soldier A could not contradict.

> [40] In all the circumstances I am satisfied that there was effective investigation for the purposes of Article 2 despite Soldier A's absence on the issue of the Bradley incident. Overall I am satisfied that there was a fair and compliant process. Accordingly I have not been satisfied on the applicant's grounds for a judicial review. I dismiss the application."

The appeal to this court

[91] The interested parties effectively re-asserted their twice previously stated positions which will not therefore be repeated here. The Coroner was undoubtedly placed in a most unenviable position through no fault of his own. The swift departure of A from the jurisdiction, no doubt effected by the MOD, without notice to the Coroner on the Wednesday of a week when on the Monday he had been said by the MOD to be available throughout it and on the very day when Weatherup J had ruled in the presence of MOD counsel that A should return to give evidence about the Bradley incident was, putting it mildly, most unhelpful. It has not been explained. That the MOD then directed A, so far as is known for the first time, to the English solicitors has not been explained. The e-mail of 10 April says that A took legal advice on that day, presumably from the same English solicitors, but in their subsequent letters they effectively stepped back from the position of advisors, effectively denying any knowledge of A's intended movements, saying that they had deliberately not come on record and that they were without instructions. They had, as Ms Quinlivan appositely described them in submissions to the Coroner, become a sort of "post box" that delivered communications in only one direction. Their interposition did have the effect of appearing to remove from the MOD any continuing responsibility for A's absence from the inquest, concealed the future whereabouts of A and his intended movements while maintaining the rather thin assertion that A would in other circumstances and within a different but unspecified timescale be very willing to further assist the inquest with evidence about the Bradley incident.

[92] Whatever may be the truth concerning these most unfortunate events and actions, the Coroner was unfortunately, as their result, presented with a *fait accompli*. It was impossible for him to know whether A would ever return voluntarily to the inquest or whether or when or where he would next be in the United Kingdom so that a realistic effort could be made to serve him with a subpoena. The jury had last heard evidence on 13 April, ten days prior to his ruling of 23 April and an unavoidable adjournment to allow for two jurors' pre-arranged holidays would have meant a gap of five weeks until 16 May at the very earliest with no more clarity

about A's availability on that date. Rather, the tone and content of the two letters from the English solicitors suggested that A was more intent on evading the Coroner's reach than on making himself available to the inquest at any identifiable point in time.

[93] This court considers that in all the circumstances the Coroner's decision was reasonable, proportionate and well within his discretion. Indeed it considers that he was left with no practical option but to proceed as he did if the inquest were to be concluded while the evidence was sufficiently fresh in the minds of the jury. A further delay without any concrete prospect of A being produced or producing himself might itself well have been the subject of criticism. This court considers that the Coroner carefully weighed the competing factors and arrived at a decision to proceed to a conclusion that cannot be criticised.

[94] This court further considers that the Coroner did everything possible to compensate for A's failure by explaining to the jury on 13 April what had happened. He provided the contents of the written materials from the Bradley inquest, he invited counsel for the interested parties to address the jury in closing on their views of the significance of the Bradley incident to the McCaughey and Grew deaths and of A's failure to return and dealt with the matter again in his own closing observations to the jury. In our view he could in those unwelcome circumstances have done no more. We agree with the conclusion of Weatherup J that the absence of A to be questioned about the Bradley incident did not render the inquest non-compliant with the requirements of Article 2 and we reject this ground of appeal.

The decision to conduct the inquest with a jury

Background

[95] Weatherup J granted leave to judicially review the Coroner on 12 October 2012 on one ground namely the failure of the Coroner to secure the return of Soldier A to give evidence at the inquest. Leave was refused on all remaining grounds.

[96] Thereafter the appellant challenged the refusal of leave on the remaining grounds in the Court of Appeal. In dealing with the additional ground of whether the Coroner should have sat with a jury, the Court of Appeal on 3 June 2014 commented:

> "The last point which the appellants have raised in this court but did not argue before the learned judge is the issue of whether the anonymity of the jury and the requirement to be unanimous meant that the process was

> not compliant with Article 2. In Hugh Jordan's Applications [2014] NIQB 11 Stephens J held that the inquest in that case ought not to have been held with the jury because there was a real risk of a perverse verdict. That case is now subject to appeal and will be heard in October 2014. The parties recognised that the appeal will give guidance on the approach to that issue. We consider, therefore, that we should not grant leave in relation to that issue but note that the appellant may wish to raise it with the judicial review once the judgment of the Court of Appeal is available".

Giving judgment on the judicial review on 13 April 2015 in the instant case Weatherup J refused leave to challenge the decision of the Coroner to conduct the proceedings before a jury.

[97] On 9 June 2015 the appellant lodged a Notice of Appeal together with an application for an extension of time. The Order 53 statement had been amended and this court was invited to quash the verdict, inter alia, because it was contended that in light of the decision of the Court of Appeal in In the Matter of Three Applications by Hugh Jordan for Judicial Review [2014] NICA 76 a jury ought not to have been convened to hear the inquest.

The contentions of the appellant on this matter

[98] Ms Quinlivan advanced the following arguments on this aspect:

- Whilst the Justice and Security Act (Northern Ireland) 2007 renders all juries in Northern Ireland, including coronial juries, anonymous, no consideration of any kind appears to have been given to the potential impact of the provisions when juries in Coroners' inquests are required to reach a unanimous verdict, there being no provision for a majority verdict.

- The Attorney General's Guidelines on Jury Checks recognises that a safeguard against corrupt or biased jurors was the availability to a jury of a majority verdict, a safeguard that does not exist in the coronial system. The Attorney General's Guidelines make reference to safeguards against corrupt and biased jurors but an inquest, such as in the instant case, is the very type of case in which there is a danger that a juror's political beliefs are so biased as to go beyond normally reflecting the broad spectrum of views and interests in the community and so might interfere with a fair assessment of the facts of the case or lead the juror to exert improper pressure on fellow jurors.

- Accordingly inviting potential jurors, who are at all times anonymous, to self-assess their independence and impartiality is inadequate.

- The instant inquest proceedings, where a juror on the second day declared that he had in fact a long history with the British Army, is an example of the danger of the jury system in this context.

- The Court of Appeal in *Jordan's* case raised the need for a Coroner to direct his mind to the risk of jury bias which might lead for example to a disagreement or a hung jury notwithstanding the steps he had taken.

The Contentions of the Ministry of Defence, the Coroner and the Police Service for Northern Ireland on this matter

[99] There was a common approach by counsel on behalf of these three bodies in resisting Ms Quinlivan's contentions and they can be summarised as follows:

- Each inquest must be dealt with on a case by case basis.

- The Coroner in this case took the necessary measures to reduce any risk of a perverse verdict to a sufficiently low level.

- No evidence was adduced retrospectively to support a contention that there was a real risk of a perverse verdict in this instance.

- The jury had given a detailed narrative verdict over an extensive period.

- Weatherup J was singularly aware of all the background facts in this matter and in a proper position to make an appropriate conclusion.

- It was not without significance that the appellant had never objected at any stage, whether at the inquest or in a number of subsequent judicial reviews, to the use of a jury in this inquest .

The relevant legislation

[100] The Coroner's Act (Northern Ireland) 1959 provides, where relevant, as follows:

> "18(2) If in any case other than those referred to in sub-section (1) (not relevant to the instant case) it appears to the coroner, either before or in the course of an inquest begun without a jury that it is desirable to summon a jury he may proceed to cause a jury to be summoned in

> accordance with the said sub-section `if it appears to the coroner … that there is reason to suspect that ……..
>
> (e) the death occurred in circumstances the continuance or possible recurrence of which was prejudicial to the health or safety of the public or any section of the public ….”

The decision of Weatherup J

[101] The reasoning of Weatherup J can be summarised as follows:

- The issue ought to be dealt with by application to the Coroner prior to the commencement of the inquest. “Had the applicant had a real concern about a jury being engaged in the inquest it would have been expected that the issue would have been brought before the Coroner when arrangements were being made for the hearing. This did not happen.”
- No evidence has been produced retrospectively that the risk arose in the present case beyond the general assertion that such a risk may arise in cases involving security forces and suspected terrorists.
- Issues were raised in the course of the inquest about the conduct of a particular juror, that matter was investigated and did not lead to the discharge of the jury. It is not the basis of the present challenge. There is nothing about the inquest which has been concluded that called into question the conduct of the jury in reaching their verdict “nor has anything occurred in relation to the jury that would warrant the quashing of the verdict of the jury”.

In the Matter of Three Applications by Hugh Jordan for Judicial Review [2014] NICA 76

[102] This court considered the issue of a coroner sitting with a jury In the Matter of Three Applications by Hugh Jordan for Judicial Review [2014] NICA 76. That case concerned the shooting of an individual by an officer of the Royal Ulster Constabulary in Belfast in November 1992. The decision of this court in that instance may be summarised as follows:

- A coroner, in exercising his discretion under Section 18(2) must, having considered the facts of the case, ask himself if there is a real possibility that a jury will be biased.

- Having taken steps to address any such risk, the coroner must then stand back and ask himself whether or not he considers that those steps have removed such a risk to a fanciable or remote level.

- It is necessary to confront directly the need to ensure that jury verdicts emerge unconstrained by tribal loyalties.

- The character of the coroner's decision-making is polycentric in character and will include considerations of public interest, the value of the public participating in the administration of justice particularly in the vexed historical context of Northern Ireland, the complexity of the issues, the probable length of the hearing, the amount of documentation involved and the nature of the investigation to be determined. Coroners have a wide experience in dealing with juries.

- The decision in *Jordan's* case however was not intended to fetter the discretion of a coroner in any other legacy inquest. Decisions under Section 18(2) must be made independently by a coroner on a fact sensitive basis in each instance.

Conclusion

[103] We have concluded that Weatherup J came to the correct determination on this matter for the following reasons. First, the anonymity of juries does comply with Article 6 of the European Convention on Human Rights and Fundamental Freedoms – see Re McParland [2008] NIQB 1. Submissions to the contrary were unfounded.

[104] Secondly, as this court made clear in *Jordan's* case, each inquest has to be dealt with on a case by case basis. There is no obligation on a coroner to approach this or any kind of case with a predetermined predilection to avoid empanelling a jury. In this case this experienced coroner carefully considered the facts and the context of this particular inquest before coming to a conclusion (see paragraph 13 of this judgment)

[105] Thirdly, as in this case, the Coroner considered whether there were any steps he could take to reduce a risk of a perverse verdict. It cannot have escaped his notice that no application was made to him to act without a jury at any time and indeed it is relevant for this court to observe that the raising of this point of objection has come at a very late stage indeed. Whilst by itself that may be of only limited relevance, it does reflect the fact that apart from the Coroner, no one else in this case discerned a risk to the administration of justice at the outset or during the course of this case such that an application to discharge a jury was mounted. Weatherup J was

perfectly entitled to note that the applicant had opted for a jury hearing until the jury returned its verdict.

[106] In this instance the Coroner had addressed the question of safeguards by questioning the jury pool and specifically rejecting any person who might not be able to consider the evidence with independence and impartiality. The evidence before this court was that the Coroner reminded the jury on a number of occasions of the need to approach this matter in an open-minded manner and of the need to draw his attention to any concerns to the contrary raised by any member of the jury. These are amongst the conventional safeguards which any judge or coroner takes with a jury in a case of this kind.

[107] Fourthly, Weatherup J, and indeed this court, had the benefit of retrospection. This jury clearly dealt with this matter in a comprehensive and thorough manner. The detailed narrative verdict is proof positive of the care invested in this matter by the jury. Moreover, it invested many hours of discussion over several days before returning the verdict. The verdict was unanimous save for the possibility of arrest as an option. None of this could have furnished the judge with any reason for concluding that the process had been flawed.

[108] Fifthly, the two examples of jury difficulties raised by the appellant in the instant inquest are neither compelling nor particularly relevant to the argument now made. In the first place, the juror who drew attention to his antecedents on the second day of the inquest was discharged once he had indicated his position. There is no reason to believe that that juror had influenced anybody else on the jury before he left and his departure tellingly failed to elicit an application to discharge from the appellant's counsel. The second incident, alleging prejudicial conduct on the part of one juror, has been investigated by the Coroner, Stephens J and Weatherup J – all of whom found no grounds to argue that there was any need to discharge the juror.

[109] Finally, as counsel for the PSNI indicated in his skeleton argument, it is relevant to note that Weatherup J had presided over two judicial review applications during the currency of the impugned inquest and was therefore acutely aware of the background to the case. He had available to him the relevant transcript of the proceedings and the narrative verdict of the jury. The judge was therefore well placed to make an informed assessment of the practical realities of the case, the task confronted by the coroner and the objectivity of the verdict.

[110] It is relevant in this context to observe the dicta in DB (Appellant) v Chief Constable of Police Service of Northern Ireland [2017] UKSC 7 at paragraph 80 wherein Lord Kerr said:

> "[80] … A first instance judgment provides a template on which criticisms are focussed and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting and during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she had reached which is a feature of an appeal found on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent."

[111] We are satisfied that Weatherup J was in a sound position to made the deductions and arrive at the conclusions instanced in his judgment.

[112] In all the circumstances we find no basis for this ground of appeal and accordingly we refuse leave on this ground.

Conclusion

[113] The appeal is dismissed.