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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY BRIGID HUGHES FOR JUDICIAL REVIEW

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AND IN THE MATTER OF THE ONGOING FAILURE OF THE EXECUTIVE OFFICE, THE EXECUTIVE COMMITTEE, THE MINISTER OF JUSTICE, AND THE SECRETARY OF STATE FOR NORTHERN IRELAND TO PROVIDE ADEQUATE FUNDING FOR LEGACY INQUESTS

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The Rt Hon Sir Paul Girvan

Introduction

[1] "Lost Lives" by David McKittrick, Seamus Kelters, Brian Feeney, Chris Thornton and David McVea traces the origins of the Northern Ireland conflict from the firing of the first shots, through the carnage of the 1970s and beyond. It provides a sobering and heart rending account of the fatal casualties of the conflict: police and army victims, Catholics and Protestants, participants in the terrorist campaigns, workers and children. As pointed out in the Introduction to that monumental work between the lines there lie much grief and tragedy. In its last edition published in 2004 within its covers the circumstances in which more than 3700 lives were lost are recounted. The account bears testimony to what happens to a community which resolves its differences through violence. The authors expressed the hope that readers would be affected, as they were, by the powerful message of what violence can do to individuals, families and communities. It deals with deceased victims of the conflict but, of course, there were large numbers of other individuals deeply affected by the so called Troubles, injured in body and mind many of whom continue to suffer even after the cessation of violence. This is quite apart from the massive and costly destruction of property and livelihoods in the course of a conflict in which many egregious crimes occurred.

[2] The question of how the legacy of the past should be dealt with is a deeply troubling and divisive one. It raises issues that can only finally be solved by a political consensus or by a political decision by the relevant authorities to which effect is given by legislative change. It is a question on which no agreement has been found notwithstanding the recognition of its importance and significance. The Belfast Agreement recorded that "The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the human rights of all." The road to reconciliation, tolerance and mutual trust has been a rocky one and the outworking of the Belfast Agreement and the devolution that flowed from it has been marked by periodic breakdowns of trust leading to legal or de facto suspension of devolution. Northern Ireland finds itself once again in such a situation. The Stormont House Agreement ("the SHA") in 2014 represented an attempt by the parties to provide for an agreed way forward. In para 21 of that Agreement the parties agreed that as part of the transition to long term peace and stability an approach to dealing with the past was necessary with respects to promoting reconciliation, upholding the rule of law, acknowledging and addressing the suffering of victims, facilitating the pursuit of justice and information recovery, and which was human rights compliant and was balanced, proportionate, transparent, fair and equitable. They agreed to the establishment of an Oral History Archive, an Historical Investigations Unit overseen by the Policing Board, an Independent Commission on Information Retrieval and an Implementation and Reconciliation Group. They also agreed to take steps to ensure victims and survivors had access to high quality services. In the autumn of 2015 talks took place dealing with the implementation of the Stormont House agreement. These resulted in the so called Fresh Start Agreement. The parties purported to reaffirm their commitment to the full and fair implementation of the SHA provisions on the past. It was recorded that while a large measure of agreement had been found on the detail of many of the issues addressed by the SHA and that indeed progress had been made on most aspects of the past they had been unable to agree a way forward on some of the key issues. There remained a need to resolve the outstanding issues and the UK and Irish Governments would reflect on the options for a process to enable this.

[3] In other conflict situations different ways have been adopted to deal with past conflict and division. For example, after the Restoration in 1660 following the traumas of the Civil War both the English and Irish Parliaments enacted Statutes of Indemnity and Oblivion which provided a pardon in relation to all but the gravest offences committed during the Civil War. It provided that the Interregnum should be legally forgotten. It did not pardon the regicides some of whom were executed. Similar legislation emerged in various American states after the War of Independence to deal with the actions of former Loyalists. In Spain following the end of the Franco regime a so called *pacto de olvido* emerged. This pact of forgetting was an attempt to put the past behind Spain. It led to the Spanish Amnesty Act

drawing a veil over alleged crimes of the former regime. This approach has been criticised by inter alia the United Nations which urged Spain to repeal the amnesty as under international law amnesties cannot apply to crimes against humanity. In other situations the UN has applied a different approach accepting some amnesties as important steps in restoring peace and strengthening government. Following the end of Apartheid in South Africa a truth and reconciliation commission was established to allow an exploration of the past in a way intended in the long term to reduce tensions and division. That system had its supporters and critics. Finding the right approach in relation to dealing with the past and with past violence raises highly complex political and legal questions and requires considerable sensitivity on the part of those charged with trying to find a way forward.

[4] In the course of what is commonly called the Peace Process political decisions leading to statutory changes in the law have occurred in this field. Thus, for example, a Commission for Victims and Survivors was established in 2006. By way of further example a process of reduction of sentences was introduced by the Sentences (Northern Ireland) Act 1998 in relation to many terrorist crimes as part of a package of measures to assist in underpinning the Peace Process. However, subject to the specific changes introduced to deal with aspects of the past conflict and until further changes are agreed in the political process and given legislative effect, existing principles of law must be applied when dealing with existing disputes in cases raising issues from the past frequently described as "legacy issues." This application is a case in point. No counsel took issue with the proposition.

The application

[5] At the heart of this judicial review application the applicant challenges the ongoing failure of the Executive Office ("the EO"), the Executive Committee, the Department of Justice for Northern Ireland ("the DoJ"), the Minister of Justice ("the MoJ") and the Secretary of State for Northern Ireland ("the Secretary of State") to put in place adequate funding to prevent further delays in relation to what have come to be called *legacy inquests* relating to deaths during the years of violence. The applicant contends that this ongoing failure is unlawful for the reasons set out in the amended Order 53 statement. She contends that the effect of the failure to provide resources has been to cause inexcusable delay to the listing and completion of numerous inquests, including the inquest into the death of the applicant's husband. It is part of her case that the former First Minister ("the FFM") unlawfully prevented the tabling and discussion of a paper put forward by the MoJ which attempted to advance the securing of additional funding for the coronial system to assist it in progressing the legacy inquests and reducing systemic delays in the progressing of those inquests.

[6] Mr Macdonald QC SC and Mr Bunting appeared for the Applicant. Dr McGleenan QC appeared with Mr McLaughlin and Mr Fletcher for the Secretary of State for Northern Ireland ("the SOS"). Mr Coll QC appeared with Mr McAteer for the Executive Office, the Executive Committee and the Department of Justice

("the DOJ"). During the opening of the case by Mr Macdonald on 27 September 2017 it became clear that it was necessary to add the FFM as a respondent to the application and an order was made for her joinder. The case was adjourned until she had an opportunity to consider the proceedings. She was represented by the Attorney General and Mr Sayers. The Attorney General previously applied to set aside the order whereby the FFM was joined as a party but that application was dismissed. He also applied to me to recuse myself as a retired judge invited to sit in this and other matters. This application which received no support from any other party was misconceived and dismissed. It was clear that as she was the maker of the impugned decision not to permit the tabling of the MoJ's paper the FFM was a proper respondent on that issue and fairness required that she should have an opportunity to justify the impugned decision. The court is grateful to counsel for their full and helpful submissions written and oral in a matter of considerable complexity which has raised a number of matters of constitutional importance.

The background to the inquest into the death of Anthony Hughes

[7] The applicant's husband, Anthony Hughes, died on 8 May 1987 when soldiers and police officers set up an ambush to surprise a suspected IRA attack on Loughgall RUC station. The security services killed eight active members of the IRA (Patrick Kelly, Michael Gormley, Seamus Donnelly, Patrick McKearney, James Lynagh, Eugene Kelly, Declan Arthurs, Gerard O'Callaghan). In addition the applicant's husband lost his life. It is not disputed that the applicant's husband was an innocent man who got caught in the cross-fire during the incident. It was not until March 2014, some 27 years after the fatal shooting, that the Ministry of Defence issued a belated apology to the applicant and acknowledged that her husband was wholly innocent of any wrong doing.

[8] Despite the fact that the applicant's husband died over 30 years ago, there has been no Article 2 compliant investigation into his death. Seven families of the deceased individuals including the family of Mr Hughes issued civil proceedings against the Ministry of Defence in respect of the deaths. The applicant's claim was settled on 25 April 1991. The Director of Public Prosecutions considered the issue whether prosecutions should be brought against any persons arising out of the deaths but on 22 September 1988 he concluded that the evidence did not warrant any prosecution.

[9] An inquest into the relevant deaths commenced but on 24 September 1990, the Coroner adjourned the inquest pending judicial review proceedings brought by the relatives concerning the admission in evidence of written statements. That inquest was not concluded until 2 June 1995. A challenge into the adequacy of the entire investigatory process into the relevant deaths (including but not limited to the inquest) was brought before the European Court of Human Rights the applicant being one of nine applicants in that case. The Court found that the United Kingdom had breached Article 2 by failures in the investigatory process: Kelly and others v

United Kingdom (App. No. 30054/96). At paragraph 136 of its judgment, the European Court found that the proceedings for investigating the use of lethal force by the security forces disclosed a number of shortcomings. These comprised (a) a lack of independence in relation to the investigating officers from the security forces involved in the incident; (b) a lack of public scrutiny and information in respect of the decision not to prosecute; (c) the fact that the inquest procedure did not allow for findings which could play an effective role in securing a prosecution in respect of any criminal offence; (d) the fact that soldiers who shot the deceased could not be compelled to attend the inquest; (e) a lack of disclosure of witness statements preventing proper participation by the next of kin and (f) the delay in the inquest proceedings.

[10] Many years later on 23 September 2015 the Advocate General ordered a fresh inquest into the applicant's husband's death. There was a preliminary hearing in the inquest proceedings before Weir LJ in January 2016. However, that inquest has not taken place and no date has been set for any further preliminary hearings. On 8 November 2016, the Minister of Justice stated in the Northern Ireland Assembly that "Truthfully, I do not have a specific timescale for how we are going to progress legacy inquests." The conclusion to be drawn is that there has already been delay in the inquest process in the present case and that it is inevitable that continuing delay will occur unless there is an improved adequately funded system which will enable the inquest to be conducted with greater expedition.

[11] The Advocate General's decision to direct a new inquest was reached following a consideration of a large amount of material. The application for a fresh inquest had originally been made to the Attorney General for Northern Ireland by the Committee on the Administration of Justice representing the families of the deceased. The Attorney General asked the UK Government to examine whether any material was held by them relevant to the decision. This led the Secretary of State to issue a certificate pursuant to section 14(2) of the Coroners Act (Northern Ireland) 1959 that the Advocate General should exercise the Attorney General's inquest decision-making functions under that Act in relation to those deaths. The Advocate General made the decision under section 14(3) and stated that he was acting independently of Government in the public interest.

The problem of the lack of resources

[12] It cannot be gainsaid that the delay in dealing with this inquest and other legacy inquests arises from the lack of resources to fund a timely and efficient system to manage and run the statutory inquests having regard to their nature, likely length and complexity. The problems besetting the coronial service in attempting to deal with these contentious inquests have been identified on a number of occasions by the Lord Chief Justice ("the LCJ") who is now President of the Coroners Courts.

[13] On 12 February 2016 he said that "the existing Coroners Service is not adequately resourced to carry the weight of these cases and so we will need to establish a new, dedicated legacy inquest unit as a matter of urgency." He stated that if the necessary resources were provided and if the full cooperation of the relevant statutory agencies was provided he was confident that it should be possible to hear all the remaining legacy cases within five years. In March 2016 he again stated that the plan he had developed "represents the best way forward for these cases and satisfies the criteria that need to be met in order to discharge the UK Government's Article 2 obligations". He added that in order to implement that plan, however, the necessary resources would have to be provided. On 5 September 2016, the LCJ said that progress in respect of his plan had been "hugely disappointing". He said that he had made it clear that "there would be a need for political agreement to an injection of additional resources and the full co-operation of other organisations." These resources had not been forthcoming. The DoJ failed to even provide costings for the full package of measures for dealing with the past. Although a small number of legacy inquests had been heard, the LCJ stated that "the ability of the Coroners Service to undertake any preliminary work into the remaining 56 cases will be severely limited." On 5 September 2017, the LCJ explained that the overwhelming majority of legacy cases cannot proceed because the Coroners Services does not have the resources to carry out the substantial preparatory work that will be required to allow those cases to proceed. Only one such case will be heard in 2018.

[14] The LCJ made a request to the DoJ for funding to create a Legacy Inquest Unit and to put in place a new model for such inquests. His proposals have the support of the Criminal Justice Delivery Group, which is made up of the LCJ, the MoJ, the Chief Constable of the Police Service of Northern Ireland and the Director of Public Prosecutions.

[15] The LCJ's comments and proposals are in accord with comments made by a number of international human rights authorities. For example:

(a) On 6th November 2014, Nils Muiznieks, the Council of Europe Commissioner for Human Rights, addressed the issue of "resource constraints" in relation to legacy inquests and said:

> "It is clear that budgetary cuts should not be used as an excuse to hamper the work of those working for justice. Westminster cannot say 'well, we will let the Northern Irish Assembly deal with this, this is under their jurisdiction'. The UK Government cannot wash its hands of the investigations, including funding of the investigations. These are the most serious human rights violations. Until now there has been virtual impunity for the state actors involved and I think the

> Government has a responsibility to uphold its obligations under the European Convention to fund investigations and to get the results. The issue of impunity is a very, very serious one and the UK Government has a responsibility to uphold the rule of law. This is not just an issue of dealing with the past. It has to do with upholding the law in general"

(b) On 17th August 2015, in its "Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland" (CCPR/C/GBR/CO/7), the United Nations Human Rights Committee called upon the United Kingdom to "ensure that the Legacy Investigation Unit and the Coroner's court in Northern Ireland are adequately resourced and are well-positioned to effectively review outstanding legacy cases."

(c) In its comments regarding the implementation of the judgment in the Applicant's case, the Council of Europe Committee of Ministers stated on 7 June 2016:

> "Regardless of the complexities in the domestic processes concerning funding, it must be strongly underlined that any further delay by the United Kingdom authorities in the provision of the necessary resources and the establishment of the Legacy Inquest Unit will lead to further delay in the conclusion of the examination of these cases by the coroners' courts. As underlined by the Lord Chief Justice, the failure to deal with these cases "has cast a long shadow over the entire justice system". The expertise and authority he commands and the steps taken by him have created a unique possibility for his office to take effective action. It is therefore critical, as the Lord Chief Justice has himself urged, that the United Kingdom authorities do "not to miss this window of opportunity" but instead take all necessary measures to ensure that the legacy system is properly resourced and staffed to enable effective investigations to be concluded."

Following a meeting between 6th and 8th December 2016, the Council of Europe Committee of Ministers commented that it

> "… regretted that the necessary resources have not been provided to enable the Legacy Inquest Unit to be

> established and for effective legacy inquests to be concluded within a reasonable time; strongly urged the authorities to take, as a matter of urgency, all necessary measures to ensure both that the legacy inquest system can be properly reformed, resourced and staffed as proposed by the Lord Chief Justice of Northern Ireland and that the Coroners' Service receives the full co-operation of the relevant statutory agencies to enable effective investigations to be concluded."

Dealing with the issue of resources

[16] In December 2016 the SHA included a commitment to address legacy inquest issues and create a Historical Investigations Unit in order to comply with Article 2 obligations. A funding package of £150m was to be made available by the UK Government. This demonstrated a recognition by central government that it had a role to play and a responsibility to be involved in the legacy issues. The moneys have not yet been drawn down and the commitment to address legacy issues has not led to any resolution of the outstanding issues. On 11 February 2017 the Secretary of State suggested that the UK Government would consider releasing funding early to support inquests. Describing himself as the representative of the sovereign government he stated that he was "acutely aware that we have a responsibility to do all we can to tackle the legacy of the past in (Northern Ireland)."

[17] Following that speech, the DoJ prepared a draft paper dated 18 March 2016 for the Executive Committee ("the MoJ's paper"). In that paper the MoJ sought approval to make a request to the Secretary of State for the funding sought by the LCJ. The MoJ's paper appears to have attracted the support of the Minister for Employment and Learning, the Minister of the Environment and the Attorney-General for Northern Ireland. No Minister of the Executive Committee appears to have raised any objection in correspondence to the DoJ's proposal. It is hardly surprising that the paper had the support of the Attorney General since it was he who decided to direct many of the legacy inquests and it cannot have been his intention to initiate inquests which would have no prospect of being determined until up to twenty years down the line.

[18] In order to fully understand the nature of the legacy inquests the court posed a number of questions directed to the respondents. In relation to the first question namely how many legacy inquests were pending, I was informed that there were currently 54 inquests in relation to 94 deaths. I had been informed that 30 inquests in relation to 51 deaths were directed by the Attorney General and one inquest (the subject matter of the present application) was directed by the Advocate General. I was further informed that 27 inquests of the 31 directed inquests relate to 53 deaths as a result of direct force by state agents.

[19] The other questions which I raised were:

(a) Question 5 – In deciding to direct a fresh inquest what test or tests did the Attorney General or Advocate General apply?

(b) Question 6 – What purpose did the Attorney General or Advocate General consider would be achieved by a fresh inquest?

(c) Question 7 – In directing any fresh inquest did the Attorney General or Advocate General carry out any investigation into the following questions:

(a) The estimated duration of such inquest.

(b) The estimated start date of such inquest.

(c) The estimated cost to public funds of such inquest.

(d) Whether fresh evidence had come to light which called for investigations in the course of a fresh inquest.

(e) If any fresh evidence had come to the attention of the Attorney General or the Advocate General in relation to any death whether such evidence had been referred to the PSNI for investigation and whether consideration of the question of establishing a fresh inquest was postponed pending such police investigation.

(d) Question 9 – Against the background of unresolved political questions as to what measures should be taken to deal with the past in Northern Ireland did the Attorney General or the Advocate General before directing fresh inquests consult and/or take the views of the First Minister or Deputy First Minister and/or Executive Committee on any aspect of the issues relating to legacy inquests.

(e) Question 10 – Are the Attorney General and the Advocate General considering directing any additional inquests and if so how many?

(f) Question 11 – How did the Attorney General and the Advocate General identify the cases in which inquests were directed.

The Departmental Solicitor acting for the Executive Office and the Department of Justice did not or could not answer those questions which were considered to be matters for the Attorney General and the Advocate General.

[20] The Attorney General declined to provide answers to those unanswered questions because he claimed that as counsel to the FFM he could not provide evidence in the present case. By taking on the role of counsel for the FFM he disabled himself from performing the role to be expected of the Attorney General. He did not enter an appearance to the devolution notice. He could not perform the normal role of Attorney General in assisting the court on the very important and complex constitutional questions raised by the application. Furthermore he was in the invidious and potentially conflicted position of representing the FFM in relation to actions and decisions which were influenced by the FFM's adverse view on the political fall-out from the nature of the legacy inquests many of which were directed by the Attorney General himself in relation to cases involving deaths at the hands of state agents. The court did raise with the Attorney General these problems but the Attorney General continued to act for the FFM and continued to decline to further respond to questions raised in relation to the background to the decisions to direct the inquests.

[21] In submissions made by the Attorney General during his application to set aside the joinder of the FFM as a respondent in the proceedings the Attorney General did reveal something of the background to the decisions to direct the inquests. It cannot be said that the Attorney General's general submissions were particularly clear. If I understood him correctly, he was asserting that in some at least of the inquests directed by him an inquest was not required or mandated by the provisions of Article 2 of the European Convention on Human Rights as such. Such inquests would serve the purpose of being investigations into historic truth. Even assuming that the inquests were not mandated by Article 2, the Attorney General accepted that the next of kin had a common law right to expect that the relevant inquest would be carried out within a reasonable timeframe.

[22] Responding to the Attorney's submissions Dr McGleenan clarified the position correctly as follows:

> "We would agree with the Attorney General that there are cases where the requirement to hold inquests is not compelled by Article 2 and an inquest can be re-opened for a range of reasons not mandated by the Convention. The reason why Article 2 is in the mix, as it were, and in play in this case is that a consequence of commencing a new inquest or the direction of a new inquest will engage what we describe as the McCaughey trigger arising from the decision of the Supreme Court in *McCaughey* which means that for those older cases, these pre-2000 cases, before the Human Rights Act came into force, the fact of commencing a new inquest serves to trigger the Article 2 obligation, that it brings it back into play

> again. … Article 2, I'm afraid, is back in the mix again which is why we have then to adhere as public authorities to these obligations."

[23] For present purposes inasmuch as the Advocate General directed the inquest relevant in this case and the Attorney General has directed other legacy inquests those inquests fall to be conducted and proceeded with in accordance with the requirements of the law. There is no challenge in this case to the directed inquest nor does there appear to have been any challenge to the inquests directed by the Attorney General. Inquests into deaths which have either not taken place or have not been complete likewise require to be conducted in accordance with the law. Rule 3 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 ("Rule 3") provides that "every inquest shall be held as soon as practicable after the Coroner has been notified of the death." Apart from that statutory requirement both Article 2, if applicable to a particular inquest, and the common law require that inquests are conducted with reasonable expedition and efficiency. There may be a difference in relation to the remedies available depending on whether there has been a breach of Article 2 or a breach of the common law duty simpliciter. In the former damages may be available to an aggrieved party whose Article 2 rights have been infringed whereas in the latter damages may not.

[24] In Re McCaughey [2012] 1 AC 725 in the light of developments in the European Court of Human Rights the Supreme Court held that the decisions of Strasbourg extended the effect of Article 2 of the Convention so that it now imposed a freestanding and autonomous procedural obligation in relation to the investigation of a death which could arise where the death had preceded the court's temporal assumption of jurisdiction if a significant proportion of the procedural steps which Article 2 would require took place after that date. The majority in the Supreme Court concluded that if the UK authorities decided to hold an inquest into a death which had occurred before 2 October 2000 (that it is to say before the Human Rights Act 1998 took effect) the Convention imposed an international obligation to ensure that it complied with the procedural obligations arising under Article 2, at least so far as that was possible under domestic law. The provisions of the 1998 Act applied to any obligation which currently arose under Article 2. In such a case the Coroner should conduct an inquest satisfying the procedural requirements of Article 2.

[25] The history of the conduct of inquests into deaths arising in the course of the Troubles has been troubled and frequently highly contentious. Such inquests have been marked by long delays, legal wrangling, frequent judicial review challenges and appeals. Cases have ended up in the House of Lords, the Supreme Court and in Strasbourg. The UK has faced criticism in the European Court of Human Rights on a number of occasions in respect of inadequate investigations and inquests into contentious deaths. There have frequently been on-going delays in the furnishing of material and interminable interlocutory disputes in relation to the conduct of the inquests. Delay in any inquest may well lead to the unavailability of witnesses and

inevitably will lead to the actual or claimed fading of witnesses' memories in relation to significant facts. Huge quantities of documents have been generated in the course of procedural wrangles in these cases quite apart from the investigation of substantive issues. Enormous amounts of public funds have been spent in the pursuit of issues subsidiary to the central questions to be determined in the inquests. Coroners have frequently been frustrated in their attempts to get the inquests up and running. Ironically the pursuit of procedural correctness in such inquests by parties intent on ensuring that they are compliant with Article 2 requirements has often resulted in the delays of which they complain which undermine the very object which the satellite litigation has sought to achieve. Sometimes, as Voltaire said, the best can be the enemy of the good.

[26] The question arises as to how and why the law has developed in this way. One of the reasons is that the law of inquests and coroners has developed in an unstructured and piecemeal way, particularly following the incorporation of the Convention and the resultant need to ensure that inquests comply with the state's Article 2 obligation to ensure proper investigation into deaths involving state agencies. The underlying statutory provisions and rules governing inquests were outdated and were clearly not drafted with the Convention in mind. They have had to be reinterpreted and restructured to be made fit for purpose in the new Convention world. Costly and time consuming litigation has taken the place of sensible, rational and structured reform of coronial law. Another reason for the problem lies in the fact that coroners and the courts have had to grapple with the inevitable problems engendered by allowing free rein to be given to satellite litigation around the coronial process. In the field of criminal law and procedure the courts have quite properly set their face against satellite litigation recognising, as they do, the self-evident dangers of such litigation – the consequent delays to the criminal process, the unacceptable interruptions in the normal court process, the encouragement of technical points which have the tendency to divert attention from the real or central issues, and the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little or no practical relevance in the case when properly viewed at the end of the process. While in some jurisdictions such satellite litigation has been permitted in the criminal law context, the resultant problems that this creates have been recognised. In the criminal law context English law has gone down a different and more wisely chosen route. Satellite litigation in the coronial process creates the same dangers in the context of coroners' inquests. Insufficient attention has been given to establishing the proper basis upon which a party to such litigation should be entitled to challenge by judicial review procedural rulings made by a coroner who is attempting to run an inquest.

[27] In the course of submissions in this case the parties did not demur from the proposition that each of the legacy inquests could cost over £1m. This may be a conservative estimate if account is taken of the cost to all the public agencies involved including legal aid in respect of the inquests and the almost inevitable range of legal challenges which could result in interminable proceedings. The case of

Jordan which was the subject of a large number of legal challenges involving the highest courts lasted decades and must have cost an extraordinarily large amount of public money. It is still unresolved in view of pending appeals and challenges.

[28] Against such a background the question might be asked as to the wisdom of directing a large number of inquests in situations in which there were no obligations under Article 2 to establish them and where in the absence of adequate public funding there was inevitably going to be gross delay and disappointment of next of kin's legitimate expectation of a reasonably expeditious process. If the intention was to establish inquiries into historic truth, something which does not engage Article 2 in relation to pre-2000 deaths, thought might have been given to establishing a statutory inquiry along the lines of the Historical Abuse Inquiry which established that such an inquiry can operate efficiently, fairly, within controlled costs and with reasonable expedition. The establishment of such an inquiry would of course have required political consensus which would also be required for a statutory restructuring of the coronial system to remedy shortcomings in the current system. The provisions of the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 might provide useful ideas for a simpler more streamlined system.

[29] The fact remains that the unchallenged decisions of the Attorney General and the Advocate General to direct legacy inquests has produced the unavoidable consequence that the inquests should comply with the Article 2, Rule 3 and common law procedural requirements. For present purposes these include the duty to carry out the inquests as soon as practicable and with reasonable expedition. The decisions inevitably led to a need for resources to be made available if the state is to comply with its obligations to have timely inquests.

The relief sought

[30] The applicant in her finally amended Order 53 statement set out the relief against a range of bodies in person. As the title of the statement shows she challenges decisions and the on-going failures of the EO, the Executive Committee, the DoJ and the Secretary of State for Northern Ireland and the relevant ministers to put in place adequate funding to prevent further delays in legacy inquests. The relief sought includes:

(a) an order of certiorari to quash decisions of the FFM, the DoJ and the EO made since January 2016 preventing the Executive Committee from considering and arranging the provision of additional funding within a reasonable time in accordance with proposals made by the LCJ initially announced on 12 February 2016;

(b) an order of mandamus to compel the EO, Executive Committee (if in existence at the time of any order) the DoJ and the Secretary of State and the relevant

ministers to arrange the provision of additional funding to ensure the hearing of legacy inquests within a reasonable time in accordance with the LCJ's proposal and specifically to ensure the establishment of a Legacy Inquest Unit; and/or

(c) alternatively, an order of mandamus to compel the EO, the Executive Committee (if any at the time of the order), the First Minister (if any at the time of the order), the MoJ (if any at the time of the order), the DoJ and the Secretary of State for Northern Ireland to reconsider their respective duties regarding the provision of additional funding to the Coroners Service for legacy inquests in accordance with the judgment of the court forthwith.

[31] The applicant further seeks declarations that the EO, the Executive Committee, the DoJ and the Secretary of State in their failure to ensure additional funding to ensure a timely hearing of legacy inquests and specifically to ensure the establishment of a dedicated Legacy Inquest Unit were and continue to be in breach of their respective legal obligations to act with reasonable expedition in the matter and are acting unlawfully. She seeks a declaration that the said failure was and is contrary to section 6 of the Human Rights Act as being in breach of Articles 2, 8 and 14 of the Convention. Interlinked to that claim is a claim that it be declared that the conduct of the EO and in particular the FFM in preventing the Executive Committee from considering and arranging the provisions of such additional funding was and is incompatible with Articles 2, 8 and 14 contrary to section 24(1)(a) of the Northern Ireland Act 1998 ; constituted discrimination against the Applicant on the ground of religious belief and/or political opinion; and was in breach of the provisions of paragraphs 1.4, 2.4 and 2.11 of the Ministerial Code. The applicant further seeks a declaration that by preventing the Executive Committee from considering and arranging the provisions of additional funding the FFM acted unlawfully in that (i) she failed to take into account the state's obligations towards the applicant under Article 2, 8 and 14 of the Convention and (ii) took into account irrelevant considerations. As against the Secretary of State the applicant seeks a declaration that she ought to provide such additional funding in the exercise of her powers and/or direct the DoJ and Executive Committee (if in existence at the time of any order) to take action to arrange such additional funding pursuant to section 26(2) of the Northern Ireland Act 1998. Included in the relief sought are claims for damages and just satisfaction.

The applicant's case against the FFM

[32] The applicant's legal challenge involves a broad point incorporating narrower attacks on individual ministers and departments. The broad point may be stated thus. The state authorities owe a duty to ensure the timely conduct of the legacy inquests and to fulfil that duty the state needs to provide the means necessary to ensure that the duty can be fulfilled. The securing and provision of the necessary resources involves various state agencies taking steps to enable the resources to be

put in place. While primarily the duty lies on the DoJ, the department responsible for the proper administration of the justice system which includes the Coroners Service, other agencies must play a role in unlocking the necessary funding. The EO, whose responsibilities include the protection of human rights, has a role to play both in advancing the human rights of the individuals prejudiced by the delays and inefficiencies of the conduct of the legacy inquests brought about by the lack of resources. The First Minister and the Deputy First Minister have a role to play in organising Executive Committee meetings and business and putting on the agenda papers designed to advance the issue of funding. The Executive Committee has a role to play in the discussing and advancing of the securing of resources. The Secretary of State for Northern Ireland has a role to play in unlocking from the Treasury additional funds needed to adequately resource the legacy inquests. The Treasury has a role to play in deciding to release the additional funds needed. The various state agencies have failed to work together to secure the provision of additional resources identified as necessary by the LCJ as head of the Coroners Service and as identified by the former MoJ in the paper he wished to put before the Executive Committee. There is a continuing obligation on the part of the state authorities to take the necessary steps of resourcing the Coroners Service to avoid or at least significantly reduce the inordinate amount of time it will take for the legacy inquest to be conducted in the absence of proper funding. In the current situation in the absence of any working devolved administration Mr Macdonald argues that the executive power is currently exercisable in Northern Ireland by the Secretary of State in whom is vested the power to take the necessary steps to provide additional funding for the Coroners Service.

[33] Moving from the applicant's broad attack, the applicant challenged the FFM's decision not to allow the MoJ's paper to go on the agenda for the Executive Committee. Mr Macdonald contends that the exclusion of the item cannot be presented as simply the consequence of a lack of necessary agreement between the FFM and the former Deputy First Minister. Rather it was the consequence of the deliberate decision by the FFM to exclude it from consideration. That exclusion, he contends, was the result of a decision that was unlawful because the FFM took into account irrelevant considerations (namely that it was proper to require a linkage between the provision of additional funding for legacy inquests and the achievement of an overall package of agreement in relation to the legacy of the past) and that to secure additional funds for the legacy inquests would be to create an imbalance in relation to investigations in relation to state killings as opposed to paramilitary killings. The FFM's decision was the result of a failure to take into account the obligations of the state to secure the timely conduct of the legacy inquests arising from Article 2 and 8 of the Convention, from Rule 3 and from the common law requirement to ensure the timely conduct of inquests. Mr Macdonald's attack on the FFM decision also involved the contention that her handling of the matter was a breach of the terms of the Ministerial Code and constituted discrimination. The FFM was bound to comply with the Ministerial Code under section 28A(1) of the Northern Ireland Act 1998 and had no ministerial authority to take any decision in

contravention of the Ministerial Code (section 28A(10)). By focusing on the difference between innocent victims and those who died at the hands of state agents the FFM was guilty of direct and indirect discrimination in breach of section 24(1) of the Northern Ireland Act 1998 against persons on the grounds of their perceived religious or political belief or opinion. She was actuated by her political opinion that current legacy investigations were unfairly skewed against members of the Armed Forces and police. There was a breach of Article 14 read with Article 2 giving rise to direct and indirect discrimination against the applicant on the grounds of her status as a bereaved member of a family in a legacy inquest. There was a breach of para 1.4 of the Ministerial Code (which obligates the Minister "to serve all the people of Northern Ireland equally") because of the discriminatory treatment of the applicant. She was in breach of para 1.4(cd) of the Ministerial Code ("to uphold the rule of law … including support for policing and the courts") and para 1.4(ce) ("to support the rule of law unequivocally in word and deed and to support all efforts to uphold".) Her refusal to permit consideration of the LCJ's request constituted an improper obstruction of the LCJ in the discharge of his statutory functions as President of the Coroners' Courts under section 7 of the Legal Aid and Coroners Act (Northern Ireland) 2014. Her actions were, according to counsel, a "blatant refusal to uphold the rule of law and to support the court." The FFM was in breach of para 1.6 of the Code which requires openness in decision-making and the giving of reasons. Her refusal to answer the pre-action protocol letter evidenced her unwillingness to give adequate reasons. Her decision to refuse to agree to the Minister's paper being put on the agenda was in breach of para 2.4 and 2.11 of the Ministerial Code. The FFM's decision to block consideration of the issue was a significant obstacle in the path of any of the respondents having an opportunity to grant the necessary funding.

The FFM's response

[34] The Attorney General argued that there had been an absence of agreement between the FFM and the Deputy First Minister to include the Minister's paper as an agenda item. It was perfectly proper for the FFM to conclude that no useful purpose was to be served by the matter being advanced for the Executive Committee's consideration at a time when it would have failed to gain support. The protocol on the conduct of Executive business indicated at paragraph 22 that an Executive paper will normally be included in the agenda no later than the third meeting following the circulation of the initial draft subject to the circulation of a final draft by the relevant minister within the period. There could be no assumption of automatic inclusion of a paper on the Executive Committee agenda. The provisions of the protocol could not be applied because of the approaching end of the Assembly's mandate and new election. No paper on the topic was submitted after May 2016 by the new Justice Minister. Consideration of the Minister of Justice's paper may not, and in the FFM's view would not, have led to a request to the Secretary of State for funding. Even if funding had been provided that did not ensure the holding of an inquest within any particular timeframe. It is the Coroners Service which bears responsibility for the holding of inquests and the FFM had not failed to ensure the

holding of legacy inquests. Policy and budgetary responsibility lay with the DOJ. There was no breach of the applicant's Convention rights. What was in issue was not a positive act but a failure to put the paper on the agenda. A failure to act is not an act (see Lord Rodger in HM Advocate v R [2004] 1 AC 462). In any event the FFM did not act incompatibly with Convention rights. It was not in FFM's gift to put in place funds for the legacy inquests. The question whether the FFM failed to take account of obligations imposed by Convention rights was answered by the Belfast City Council v Misbehavin Limited [2007] UKHL 19 at 31. The question was whether the human rights of the claimant had been infringed not whether the decision-maker properly took the account of the Convention obligation. The applicant was not a victim of anything done by the FFM in breach of Articles 2, 8 or 14. As regards Article 14 there was no relevant comparability as might have been the case if inquests had been additionally funded only when the deaths in question were those of Catholics or Protestants. The complaint of discrimination under section 24(1)(c) was unfounded. The Act was concerned with direct not indirect discrimination.

[35] The Attorney General went on to argue that the FFM in her statements articulated a view about a genuinely held perception of imbalance which was something with which the Secretary of State agreed. The FFM's view that more discussion was required was a political judgment. The issue was not in relation to the principle of the proposal but of the timing, financing and relevant prioritisation of the proposal along with larger legacy consideration. The Ministerial Code provisions pleaded lay outside the area of justiciability (Re De Brun [2001] NIQB 3.) The duty to seek consensus in section 28A(8) and the Code was an important principle and highly relevant in the context of this case. The approach of the FFM was to be subjected to light touch review. The Attorney General kept open the argument that the claim against the former First Minister should be dismissed on the grounds of delay.

The evidence relating to the FFM's impugned decision

[36] In due course FFM filed an affidavit sworn on 8 January 2018. In her affidavit she accepted that she did not agree to the inclusion of the MoJ's proposal for the meeting of the Executive Committee of 24 March 2016. She said that she had been informed by her special advisor Mr Bullick that he had been in contact with the Northern Ireland Office and the Northern Ireland Office had expressed the view that the finances did not stack up behind the paper. His view was that the preparation of the MoJ's paper had been rushed given the impending end of the Assembly's mandate (requiring an election). Advancing the paper was a purely political move on the part of the MoJ. The financial analysis underpinning the paper did not stack up. In paragraph 11 of her affidavit the FFM stated:

> "The NIO view that the financial aspects of the proposals seemed insufficiently robust was consistent

> with my concern that the proposal was advanced in haste. I considered, as I stated publicly at the time, that wider discussion is required to secure a proper basis for progress on legacy issues. That was fair, balanced and in the interests of all. It seemed to me that it would be inappropriate to advance one aspect of the outstanding legacy issues, with uncertain impact and the limited resources that would be available for all legacy issues, in isolation from others. Furthermore, no consensus on the issue was available at Executive Committee level: my understanding of the relevant political calculation was that the proposal would not attract sufficient support if pressed to a vote in the Executive Committee. The then Deputy First Minister did not discuss the matter with me."

She considered it would be inappropriate to place the proposal on the Executive Committee agenda at that time and similarly it would be inappropriate to deal with the matter by way of the urgent decision mechanism. She said that she did not form the view that Article 2 required either that the MoJ's paper be tabled or approved by the urgent mechanism. She denied any discriminatory effect or intention and recognised that the applicant's late husband was an innocent victim. She denied any breach of the Ministerial Code. She stated in paragraph 16 that the recent reporting of her meeting with the Commissioner for Victims and Survivors and a delegation from the Victims and Survivors Forum provided an accurate reflection of her position.

> "Arlene Foster said that she had said previously, that they wanted to see things moved together as a matter of balance but that if there was movement on other legacy institutions she would absolutely accept [and] expect that there would be funding for legacy inquests.
>
> The point where she would differ from many members of the forum would be that the two things should be tied together – I think within that room people would have wanted to see legacy inquests move forward as a matter of right."

[37] Mr Bullick, the FFM's Special Advisor, swore an affidavit on 30 October 2017. In paragraph 11 he said:

> "Though I have by reason of the passage of time no specific recollection of this matter I assume that the

> reason the Minister's papers was not placed on the Executive Committee agenda during the limited period remaining of the Assembly mandate was because it would not command the requisite majority in the Executive Committee, the DUP being disinclined to support the advancement of only one aspect of the legacy issues. Para 2.12 requires that consensus be sought. At this time consensus on this issue did not appear to be present."

He stated in paragraph 14 that he formed the view that the proposal from the MoJ should not be supported because there was considerable uncertainty about the cost implications of the proposal; funding should be viewed in the round. In the absence of an overall agreement Her Majesty's Government would not release the money. The MoJ's letter was more of an act of "virtue signalling" than an attempt to resolve the underlying issue. If the issue had been an appropriate priority for the DoJ the Department could have prioritised funding from within its own budget. Mr Bullick averred that he had no specific recollection of a conversation with the FFM but he would be surprised if she had not shared his understanding and analysis. He referred to a telephone call to the NIO which indicated that there was no real prospect of funding being provided due to lack of robustness in the financial projections.

[38] In his second affidavit sworn at the same time as the former First Minister's affidavit he asserted that a special advisor has a better understanding of political dynamics than permanent civil servants. His view was that there was no way that the Northern Ireland Office would support the Minister's proposals in making a bid for extra funding of the legacy inquests.

[39] Colin Perry, a Director within the NIO, in his affidavit referred to the Secretary of State's wish to encourage the devolved authorities to bring forward a proposal relating to legacy inquests in Northern Ireland which would enable consideration of whether or not to release some of the funding of the £150m identified for supplementing the legacy provisions of the Stormont House agreement. The Permanent Under-Secretary made clear that any request would have to be one that had been agreed by the Northern Ireland Executive. The DoJ, the Office of the LCJ and the Northern Ireland Court Service were informed of the Secretary of State's view. Mr Perry referred to telephone conversations to Mr Bullick on 15 February 2016 and 8 April 2016. In the first the NIO indicated that the Secretary of State would like to see reform of the system for legacy inquests and asked how the proposal was likely to link with wider reforms of legacy institutions. This would be of assistance in discussing funding with the Treasury. The desirability of a cross-community approach was discussed. The NIO saw a copy of the MoJ's paper. Officials within the NIO identified weaknesses within the paper. These included a lack of detail on issues of broader reform of the inquest system;

there was no detailed business case detailing how the money would deliver best public value; and the potential overall costs of dealing with all legacy inquests could be much higher than estimated. In his call on 8 April 2016 Mr Perry indicated that for a future request for funding he expected that there would be a proposal involving clear reform of the system; was fully costed and relationships with broader legacy institutions were considered. The process of obtaining Treasury approval for funding was not to be underestimated. In fact no further request from the DoJ or the Executive for funding was received thereafter.

Discussion of the case against the FFM

The issue of the rationality of the decision in respect of the MoJ's paper

[40] The question of whether the application against the FFM should be dismissed on the ground of delay was left open during the Attorney General's application to have the FFM removed as respondent in the proceedings. It is clear that the case raises issues of practical and legal importance. The argument covered a wide range of issues focusing on the inter-play of responsibilities of various agencies in relation to the question of how the systemic problem of delay in the coronial system in legacy inquests should be dealt with. The role and actions of the FFM are very much linked into the various issues raised. As Brooke J put it in R v Secretary of State for the Home Department Ex Parte Bina Regendra Patel [1995] Imm AR 223 at 227 if "the court at the substantive stage finds that there was something seriously defective as a matter of law then it would be unlikely that the court would refuse to grant a remedy simply because the application was made too late." Initially the case was made against the FFM without her being made a respondent and the court directed her joinder for the reasons already referred to. It would be artificial to remove the legal challenge to the impugned decision of the FFM relating to the MoJ's paper from an overall review of the issues in this case. The unanswered pre-action protocol correspondence highlighted the potential issue. I am satisfied that no prejudice or unfairness is caused to the FFM in relation to allowing the judicial review to continue against her in relation to the challenge to her reasoning in respect of the decision not to allow the MoJ's paper to go on the agenda. The case raises an important issue on the proper relevant considerations to be taken into account and what considerations should be let out of account. However different considerations arise in relation to the question of the passage of time under the Human Rights Act 1998 in respect of the claim that the FFM breached convention rights of the applicant (see below).

[41] The Attorney General's proposition that the FFM did not make a decision that could be challenged by judicial review and merely failed to agree to the placing of the paper must be rejected. In deciding not to agree to allow the paper to go on the agenda the FFM made a conscious decision to keep the item off the agenda. If that decision was legally flawed and/or made in a manner inconsistent with her legal

obligations then there is no reason why judicial review would not lie. There is no reason why that decision should not be regarded as justiciable.

[42] When the matter was first before the court before the joinder of the FFM the evidence relating to the decision was to be found in the affidavits of Neil Jackson, a senior civil servant in the EO and Jennifer McCann, a member of Sinn Fein and a Junior Minister in the EO. Mr Jackson's affidavit averred that his understanding was that there was no agreement on the inclusion of the Minister's paper. No formal decision was conveyed to the MoJ. This gave no explanation as to the reasoning of the FFM to decline to let the matter go on the agenda. While it was to be inferred from his first affidavit that no documentation recorded the decision or the reasons as otherwise it should have been exhibited in his second affidavit he expressly averred that there was no recorded position by either of the FFM or the former DFM in relation to the first draft of the MOJ's paper. With respect to the second version on 18 March 2016 the agreement of the DFM to the paper was recorded on 18 March 2016 and to a revised Annex B to that paper on 23 March 2016. The FFM's advisor on 22 March 2016 recorded the comment "FM to see". No decision of the FM was recorded. In relation to the Minister's urgent decision request on 31 March 2016 there was agreement by the DFM to the request on 4 April 2016. There was no recorded decision from the FFM Minister.

[43] Jennifer McCann in her affidavit of 13 September 2017 recorded the fact that the Secretary of State for Northern Ireland made a speech saying that the UK Government would look very seriously at whether some of the Stormont House legacy funding could be released early to support inquests. Some weeks later the DOJ produced the draft paper. The DFM was in agreement with the MOJ's request for funding for legacy inquests but the FFM refused to agree to them. The MOJ's papers seeking an urgent decision pursuant to paragraph 2.14 of the Ministerial Code had the support of the DFM but again the FFM withheld agreement. Jennifer McCann described the FFM as "adamant that the request be refused".

[44] From the evidence filed in support of the FFM's case it is clear that in her reasoning resulting in her decision not to allow the MoJ's paper to be tabled at the Executive Committee meeting the FFM was motivated by her view that the legacy inquests created an imbalance in relation to state killings as opposed to paramilitary killings, that the LCJ's proposals and the Minister's paper did not address the issues of innocent victims and that the funding of legacy inquests should be deferred until resolution of all legacy issues. Were it not for the duties of the state under Article 2, under Rule 3 and the common law to ensure the determination of inquests with reasonable expedition, the FFM viewpoint was an understandable political viewpoint. In the absence of those obligations it would be entirely legitimate for her to believe that the focus on a large number of legacy inquests dealing with death in circumstances of state involvement could give rise to a false impression of the history of the Troubles (in which of course the great preponderance of deaths and injury were caused by the crimes of terrorist organisations). However, the duty of

the state to ensure the timely disposal of inquests does not entitle the state authorities to delay a proper consideration of the question of the provision of resources to enable the duties to be fulfilled until agreement to an overall package to resolve all the legacy questions can be found. Negotiation of such an overall package evidently presents problems and has generated much delay. The linking of the two has the potential for putting off indefinitely the resolution of the question of funding to enable the state to comply with its obligations to ensure timely conduct of inquests. The point is succinctly made by considering the press report referred to in paragraph 16 of the FFM's affidavit which she accepted accurately reflected her thinking. She records the point where she differed from the next of kin in the legacy inquests in that in her view movement on other legacy institutions and the funding of legacy inquests should be tied together whereas the next of kin "would have wanted to see legacy inquests move forward as a matter of right". On this point the viewpoint of the next of kin in the legacy inquests was right. They do have as a matter of legal right an entitlement to expect the legacy inquests to be progressed in accordance with the procedural obligations under Article 2, Rule 3 and common law. The procedural duty under Article 2 requires an investigation which is practical and effective. A grossly delayed inquest will not fulfil that obligation. The Strasbourg case law makes clear that long delays in the inquest system are a breach of the procedural obligations under Article 2. In Ex parte Middleton [2004] 2 AC 182 the House of Lords held that in the absence of full criminal proceedings and unless otherwise notified a coroner should assume that his inquest is the means by which the State will discharge its procedural obligations under Article 2. In McCaughey the Supreme Court held that where an inquest is conducted into a death in the circumstances arising in the legacy inquests the inquest must be Article 2 compliant even if the death preceded 2000. To postpone consideration of the issue of how the state could properly fulfil its obligations until an overall package is obtained is to create a linkage that does not exist at law and produces a result which is contrary to law. The FFM misdirected herself when concluding that it was permissible to make the linkage.

The Ministerial Code issues

[45] Section 28A imposes a duty on ministers to act in accordance with the Ministerial Code. Section 28A(5) includes an obligation to have a provision requiring ministers to bring to the attention of the Executive Committee any matter that might by virtue of section 20(3) or (4) be considered by the Executive Committee under section 28A(7) and (9). The Code must include provisions as to the procedures of the Executive Committee with respect to the taking of decisions. The Code must provide that it is the duty of the Chairman of the Executive Committee to seek to secure that decisions are reached by consensus and by a vote if consensus is not reached. If any three members of the Executive Committee requested a vote on a particular matter they voted on to require cross-community of support any vote on that matter in the Executive Committee shall require cross-community support in

the Executive Committee. A minister has no ministerial authority to take a decision in contravention of the Ministerial Code.

[46] The applicant argues that the FFM, inter alia, breached paragraph 1.4(cd) and (ce) of the Ministerial Code. These are contained in the section of the relevant document which is entitled "Pledge of Office". Paragraph 1.4(ca) and (cd) were inserted by the Northern Ireland (St Andrew's Agreement) Act 2006 as from May 2007. Paragraphs (ce) and (ck) were inserted by the Northern Ireland (Stormont Agreement and Implementation Plan) Act 2016. Ministers are required to take the pledge of office before taking up office see also section 18(8) and 19(3) in relation to junior ministers. The pledge of office includes a pledge to comply with the Ministerial Code of Conduct. This is a separate provision from the pledge of office. Neither counsel focused attention on the legal significance of the difference between what the ministers undertake under the pledge of office and their obligations under the Ministerial Code. In re De Brun [2001] NIQB 3 argument was presented by the applicants that the First Minister breached his pledge of office "to serve all the people of Northern Ireland equally and to act in accordance with the general obligation in Government and prevent discrimination". They also argued that there was a breach of the Ministerial Code to operate in a way conducive to promoting good community relations and equality of treatment wording to be found in paragraph 1.5(vi) of the Ministerial Code. Kerr J concluded that none of the undertakings contained in the Code was engaged. It was, in his opinion, a matter of political judgment lying well outside the area of justiciability. Insofar as the applicant relies on breaches of the Pledge of Office (paragraphs 1.4(c), 1(4)(cd) and 1(ce), if a breach of these obligations occurred the remedy lies not as a judiciable issue covered by judicial review but lies in the political realm.

[47] Different considerations arise where it is alleged that there has been a breach of the Ministerial Code proper. Section 28A imposes a statutory duty on Ministers to act in accordance with the provisions of the Code. A Minister has no ministerial authority to take any decision in contravention of the Code. The applicant relies on an alleged breach of paragraph 1.6 (holders of public office should be as open as possible about all the decisions and actions they take. They should give reasons for their decisions and restrict information only when the wider public interest demands). The applicant's complaint under paragraph 1.6 relates to what followed from the impugned decision rather than from the actual decision itself. This complaint adds nothing of substance to the case. The absence of any recorded material in respect of the decision to refuse to put the matter on the agenda is surprising and constitutes at least a breach of the spirit of paragraph 1.6 though the FFM asserts that she made her position clear in public utterances as to why the matter was effectively blocked. Her reasoning, which has been demonstrated to be flawed, does emerge from her affidavit.

[48] In relation to paragraph 2.4 the clear need for the provision of additional funding to advance the conduct and hearing of the legacy inquests cut across the

responsibilities of the MOJ and the FM and DFM. The latter were expressly responsible for human rights and equality. The systemic delay in the coronial system in respect of legacy inquests engaged the responsibility of the FM and DFM. The issue also engaged paragraph 2.4(v) and (vi) being significant or controversial.

[49] Paragraph 2.11 of the Code provides that the agenda for the Executive Committee meetings will be agreed by the FM and DFM taking account of proposals made by Northern Ireland Ministers. In De Brun Kerr J was satisfied in that case that both the FM and the DFM had to agree on the appointment for it to be effective. In the present case both Ministers had to agree to the placing of an item on the agenda. In relation to the question of ministers having to act jointly Kerr J said that it was clearly implied that they should "conscientiously seek to agree". If joint responsibility is to function properly and to be meaningful it requires of the two participants a conscientious effort to discuss and consider the arguments and issues with an open mind. At the end of the day, in the case of a contentious political issue, the parties may in good faith fail to reach agreement and may legitimately take account of their own political viewpoint having considered and discussed the matter. What is impermissible is the imposition of a dictat without a conscientious attempt to agree or take on board the viewpoint of the other participant in the joint discussion. In this case according to the FFM's affidavit at paragraph 11 the DFM did not discuss the matter with her. What this implies though does not express is that she did not discuss the matter with the DFM either. In fact what the FFM states runs contrary to what is stated by Jennifer McCann's affidavit which records that the DFM was in strong agreement with the MOJ's request and agreed on 18 March 2010 to the paper being included. In fact the DFM's agreement to the paper going on the agenda and to be treated as an urgent matter is properly recorded. Since the FFM did not make any conscientious effort to seek agreement as to what should be done about the MOJ's paper it is unnecessary to resolve the apparent conflict between the two affidavits. The decision to refuse to put the paper on the agenda was procedurally flawed.

The discrimination claim

[50] Under section 24(1)(c) a minister has no power to do any act so far as the act discriminates against a person or class of persons on the ground of religious belief or political opinion. The Attorney General argued that there was no relevant less favourable treatment of which the applicant could complain. The applicant's husband was an innocent victim of the Troubles. The 1998 Act was concerned with direct not indirect discrimination and expressly excluded from the scope of its protection political opinions involving approval or acceptance of the use of violence (see Article 2(3) and (4) of the Fair Employment (Northern Ireland) Order). This definition applies to the Northern Ireland Act by virtue of section 98.

[51] The fact that some of the deceased were or may have been active terrorists (and thus espoused acceptance of the use of violence for political ends) is not to the

point. The next of kin of deceased persons, whether the latter were actual or alleged active terrorists or not, have Article 2 rights to a fair and timely inquest. Strasbourg has frequently stressed the importance of proper investigation into the death of individuals at the hands of state actors. A discriminatory decision would not be protected because the next of kin were related to persons who had held unprotected political opinion. The question is whether a breach of section 24 has occurred and what if any remedy should be granted. Section 76 which contains power to grant damages for an injunction does not apply to public authorities within section 24. An act done in breach of section 24 would be beyond the powers of the minister or department.

[52] The impugned decisions of the FFM prevented the tabling of the MoJ's paper and the use of the urgent procedure. What motivated the decisions was the conclusion that the question of the funding of the legacy inquests should be resolved as part of an overall package. She considered that the legacy inquests would produce an imbalanced outcome between different categories of victims, those who died as a result of actions of state agents and those who died otherwise. If anything her decision favoured members of the security forces involved in the killings. This is not discrimination on the grounds of the religious or political opinion of the next of kin even though a preponderance of them may have come from one section of the community. The case for discrimination has thus not been made out.

The claim in respect of breach of Convention rights

[53] It is now necessary to turn to the question whether the FFM as a public authority breached the Convention rights of the applicant under Articles 2, 8 and 14. The decision question occurred in March 2016. Paragraph 5A of the amended Order 53 statement focuses the complaint on the refusal and failure of the FFM to permit to arrange consideration by the Executive Committee of the funding requirements arising from the proposals of the LCJ announced in February 2016 and dealt with in the MoJ's paper. On this aspect of the case for the purposes of sections 6 and 7 of the Human Rights Act 1998 what was alleged was an illegal act by the FFM in excluding the Minister's paper from the agenda. This alleged illegal act occurred more than a year before proceedings were brought against the FFM. Proceedings were issued on 5 October 2016 but in those proceedings no claim was made against the FFM who was not joined until October 2017. The court does have a power under section 7(5)(b) to extend time if it considers it equitable to do so. While the Attorney General flagged up the question of delay being a jurisdictional bar he did not develop the issue of section 7(5) and Mr Macdonald did not address the time issue arising under section 7(5). While I have concluded that the judicial review proceedings against the FFM should not be dismissed on the ground of delay different considerations arise in relation to the claim in respect of alleged breaches of Convention rights directly. The court would have to be satisfied that it would be equitable to allow a claim to be pursued after the time limit has expired. The applicant inter alia seeks damages against the FFM. The argument against the FFM

involves a personal *ad hominem* attack on the FFM and criticism of her conduct. Judicial review is an unsuitable mechanism for resolution of such arguments. In these judicial review proceedings the applicant has had an ample opportunity to make her legal points touching on what is the correct legal basis for decision-making in relation to the issue of funding for legacy inquests and judicial review is a suitable mechanism for determining such an issue. I do not consider that it would be equitable under section 7(5)(b) to extend the time for asserting a breach of Articles 2, 8 and 14 of the Convention on a personal basis against the FFM. This is particularly so bearing in mind that when the case was started it did not join the FFM as a party or make a claim against her as a named respondent.

[54] In any event the claim that the FFM herself breached the applicant's rights under Article 2, 8 and 14 in declining to allow the paper to appear on the agenda is a difficult one to sustain. There were legitimate grounds on which she could have properly have concluded that the paper should not have been put on the agenda. The paper had insufficient detail and was broadly worded without putting forward a fully costed plan. If the paper was to have any prospect of success in persuading the Treasury to release money (leaving aside the issue of the need for a composite package agreement) more detail and work was needed. The criticisms identified by Mr Perry in his affidavit were rational tenable objections. Even if the paper had gone on the agenda and had been approved for sending to the Secretary of State on a balance of probabilities I conclude that neither the Secretary of State nor the Treasury would have recommended the provision of funding along the lines proposed in the paper without further work on the proposal. At best it would have been sent back for improvement. Even where there is a need for additional funding to ensure human rights compliance proper procedures must be gone through to secure the release of public funds which cannot be paid over without a rigorous examination of the justification for the figures sought. While the court has concluded that the reasoning that prevailed with the FFM was legally flawed and that there was procedural irregularity in reaching the decision to exclude the paper, this is a case in which the court would decline to grant certiorari to quash the decision since, had the illicit consideration been left out of account and the proper procedures had been followed, in all likelihood the matter would not have been put on the agenda in any event. If it had been it is unlikely to have resulted in a favourable decision by the Executive Committee because of the shortcomings in the paper. If it had gone to the Secretary of State and the Treasury money would not have been released even if they put to one side the erroneous belief that it was legitimate to link the question of funding the coronial services and the other issues relating to the past.

Conclusions on the case against the FFM

[55] In the result in relation to the claim against the FFM the appropriate remedy is in the form of a declaration to the effect that the decisions of the FFM to refuse to permit the Minister's paper to be put on the agenda of the Executive Committee for

discussion or permit the matter to be pursued under the urgent procedure were unlawful by reason of the fact that the First Minister:

(1) erroneously took into account the absence of an overall agreed package to deal with legacy issues as being relevant to the question whether additional funding should be sought to enable the Coroners Service to carry out inquests compliant with Article 2 Rule 3 and the common law so that inquests could be carried out within a reasonable time, and

(2) erroneously left out of account that there was an obligation on the state authorities to ensure that the Coroners Service could effectively comply with Article 2, Rule 3 and common law in carrying out inquests within a reasonable time irrespective of whether an overall package was agreed to deal with all legacy issues.

I will hear counsel on the appropriate wording of the declaratory relief.

The case against the Executive Office, the Minister of Justice, the Department of Justice and the Executive Committee

[56] As has been demonstrated above the Coroners Service cannot cope with the backlog of inquests unless greater resources are made available. While it may be possible to divert some funds internally within the DoJ budget the removal of money from such other necessary services will generate pressures on these other services and these may themselves contribute to an infringement of other Convention rights. Obviously unlimited financial resources cannot be provided to the coronial system and delays are likely to persist even with additional funding but even a delayed inquest is better than a grossly delayed inquest. As Strasbourg case law has shown the state has an obligation to correct structural and systemic problems that undermine the effectiveness and fairness of the inquest system. In this case the arguments put forward on behalf of the various respondents stressed the need under the Human Rights Act 1998 to identify the individual public authorities which can be held to account for breach of the Article 2 procedural obligations. At times the arguments sounded like an attempt from all the authorities to escape individual liability on the basis that the fault for not dealing with the problem was attributable to some other public body. Strasbourg is able to avoid allocating liability to any particular state authority because any finding is simply one made against the United Kingdom and it is left to the UK authorities to sort out the national system to avoid the repetition of breaches of the Convention.

[57] In the context of devolution the Northern Ireland administration is responsible for compliance with the Convention obligations. The obligation to protect human rights is clearly underlined by various provisions in the Northern Ireland Act 1998. In the context of situations governed by Article 2 various agencies have a role to play to ensure compliance including the PSNI, the PPS, the coronial

system and the courts. The DoJ has an important and indeed central role but so too has the EO which has primary responsibility for protecting human rights. The Executive Committee has been joined as a respondent in these proceedings on the basis that it has fallen down on the obligations under the Convention. However as Morgan J pointed out in Re Solinas [2009] NIQB 43 at paragraph [30] the Executive Committee has not and never had executive power or the entitlement to exercise executive power. By virtue of section 23(2) of the Northern Ireland Act 1998 the right to exercise executive power is vested in the Ministers and Northern Ireland departments. Another public authority which it is claimed by the applicant has responsibility to ensure compliance with Article 2 is the Secretary of State. One of the most contested and difficult issues in this case relates to the powers and obligations of the Secretary of State in relation to the issue of the provision of funding to enable the Coroners Service to provide timely delivery in the context of the legacy inquests.

[58] The thrust of Mr Macdonald's argument is that jointly and severally the respondents have a responsibility to ensure that decisions are compatible with the rule of law and ensure compliance with the Article 2 procedural obligations. Thus it is argued there is an obligation to ensure the proper working of the coronial system. At the moment in the absence of a working devolved administration section 23 of the 1998 Act preserves the prerogative power of the Crown and that power, according to counsel, can be exercised by the Secretary of State. The Secretary of State made a written statement in Parliament on 24 April 2017 in which he purported to allocate funds to devolved departments and to set an indicative budget. He took that step "consistent with the UK Government's ultimate responsibility for political stability in Northern Ireland" and following advice from the Head of the Civil Service. His actions, it was argued, did not simply represent the setting of budgets which reflect the priorities of the previous Executive but he also made available additional allocations to reflect additional pressures. Counsel argued that the argument that the Secretary of State lacked the power to provide funding to enable compliance with Article 2 in respect of the legacy inquests was demonstrably flawed and misunderstood the extent of his prerogative power.

[59] If an inquest is unreasonably delayed and is not conducted with reasonable expedition the next of kin have a claim that their Article 2 rights have been infringed. They would be entitled to a declaration against the relevant public authorities in default and may have a right to damages. If the delay is persistent and on-going they may possibly have a claim for periodic damages to mark the on-going breach of the duties under Article 2. Such relief does not provide the remedy of ensuring that the inquests are in fact conducted promptly but such relief recognises that the rights have been infringed and require to be vindicated. A claim for such relief can be pursued against various public authorities as noted for example the DOJ, the EO, the MOJ, the FM and the DFM if any and the PSNI if it causes or contributes to the delay.

[60] Each of the organs of the state which has a role to play in ensuring compliance with Article 2 in respect of the legacy inquests must be aware of its obligation and recognise its potential liability to damages. As has been explained earlier, the relevant organs must conscientiously and properly consider the issue of the need for additional funding leaving out of account the legally flawed proposition that the question must await the outcome of an overall package. If they do not approach the question correctly they are contributing to an on-going breach of the procedural obligations arising under Article 2.

The role of the Secretary of State

[61] On behalf of the Secretary of State Dr McGleenan argued that responsibility for compliance with the procedural Article 2 obligations lay with the devolved authorities alone. The power to make decisions concerning spending priorities in departmental budget allocations in respect of transferred matters lay with the devolved administration. While section 26 of the Northern Ireland Act 1998 provides the Secretary of State with a limited power to direct compliance with international obligations this excludes compliance with the Convention (see section 98(1)). Section 26 is a discretionary power and the court's supervisory power in this regard is limited. Section 26 in any event does not empower or compel the Secretary of State to secure additional funding in relation to legacy inquests. The Secretary of State has declined to intervene in the devolved matter. No request had been forthcoming from the Executive or a Northern Ireland minister or department to provide additional funding from the UK Government for conducting inquests. Counsel pointed out that the Departments (Northern Ireland) Order 1999 makes provision for the administration of powers and functions by ministers and departments. Under Article 4(1) at all times functions of a department shall be exercised subject to the direction and control of the Minister. Counsel said that the absence of ministers since the election in March 2017 raised a question germane to this case in relation to the powers and functions of a department in the absence of a minister and it raised the question of what direction the Secretary of State could give to the Northern Ireland Department in the absence of a minister.

[62] The Secretary of State's case is that the applicant was incorrectly proceeding on the basis that the Secretary of State could unilaterally allocate funds to the Northern Ireland Executive to address specific issues falling within the devolved domain. Allocation of resources remained a matter for the devolved administration. The Secretary of State has no power to direct the exercise of executive powers in Northern Ireland which are the prerogative and other executive powers of the Crown in Northern Ireland. He has no unilateral power to direct the Northern Ireland departments as to how the Northern Ireland consolidated funds should be allocated between competing priorities. The extent of the Secretary of State's power is to make additional payments into the consolidated fund from funds provided by Parliament but he cannot direct how it may be appropriated. Even if Parliament has provided funds to the Secretary of State for the purposes of making such a payment

it would be rational and lawful for the Secretary of State to await agreement from the relevant devolved authorities as to how money should be spent. The duties in relation to ensuring compliance with human rights obligations lie with the devolved authorities. The Northern Ireland Act 1998 creates an express distinction between the role of the Secretary of State in relation to the fulfilment of the Convention obligations and of international obligations. The Secretary of State's discretionary power under section 58 of the 1998 Act to pay into the Northern Ireland consolidated fund out of monies provided by Parliament of such amounts as he may determine is a broad power which does not require any particular amount to be paid in any particular circumstances and for any particular purpose. Counsel argued that the courts must be reticent about directing democratically accountable public authorities in matters of expenditure (see for example Nottinghamshire County Council v Secretary of State for the Environment [1986] AC 240, R v Secretary of State for the Environment Ex Parte Hammersmith and Fulham LBC [1991] 1 AC 521 and Pro-Life Alliance [2003] UKHL 23). Policy as to expenditure of public resources is peculiarly within the competence of the executive (Bancoult (No. 2) [2008] UKHL 60 at paragraph 58). The polycentric character of official decision-making is not within the practical competence of the courts to assess their merits. In a devolved administration it is the Assembly alone which must pass any appropriation act to authorise departmental expenditure. The minister alone cannot secure an increase.

Discussion

[63] In the situation of a working devolved administration Dr McGleenan's analysis of the legal relationship between the Secretary of State and the devolved administration in the context of ensuring compliance with Article 2 obligations appears to me to be correct. The fact that it was agreed by central government that £150m would be allocated to assist funding legacy issues shows an engagement between central government and the devolved administration and a recognition by central government that Northern Ireland did require additional funds to deal with problems arising from legacies from the period when Northern Ireland was subject to direct rule. It was open to central government to lay down conditions for the provision of the funds. The requirement of an agreed approach by the Northern Ireland Executive to release some or all of the funds was a policy that the central government was entitled to adopt provided that it had to take account of the possibility that joint agreement might not be achievable. The need for Northern Ireland Executive approval as to the approach highlights the need for the devolved authorities to collaborate and the need for them to properly understand the overall obligations of the devolved administration to ensure Article 2 compliance. At the same time central government had to be able to adjust the policy to take account of the absence of agreement on the issue of the funding of legacy inquests so as to take into account the legal imperative of ensuring that the legacy inquests could be conducted in a manner compatible with Article 2 obligations.

[64] The absence of a working devolved administration has created a vacuum at the heart of the devolved system of government. The problem of the lack of funding for the legacy inquests remains and if central government maintains the policy of requiring an agreed Executive approach on the issue on a release of funds to assist tackling the problems then there is no way in which central government would see its way to release additional funding to deal with the problem of legacy inquests. The longer the absence of a working devolved administration the longer the problem will continue and the greater it will become.

[65] Mr Macdonald contended that in the absence of a working devolved administration the executive power which continues to be vested in the Crown under section 23(1) must in the circumstances be exercisable by the Secretary of State. Dr McGleenan, Mr Coll and the Attorney General contend that as respects transferred matters the prerogative and other executive powers are exercisable only by Northern Ireland ministers or by Northern Ireland departments. There being no ministers the executive powers are exercisable by the Northern Ireland departments. There is a legal conundrum at the heart of the issue. The functioning of Northern Ireland departments under Article 4 of the 1999 Order is supposed to be *subject to the direction and control of ministers.* Subject to the provisions of the Order any functions of a department may be exercised by (a) the Minister, or (b) senior officers of the department. If there are no ministers and if functions are supposed to be exercisable subject to direction and control of ministers how is a department supposed to exercise it powers? Dr McGleenan pointed out in the ordinary course of business there will be ministers in situ exercising control but in the brief period before an election (the so-called purdah period) and the period after an election, normally brief, while new ministerial teams transition into office the departments continue in existence and operate without ministerial direction. The fact that devolution must continue during those periods and the fact that the departments must carry on the duty of functioning indicates that the provisions of Article 4(1) of the 1998 Order must be read as subject to some form of qualification of the obligation to be subject to ministerial direction and control. It is necessary to read into Article 4(1) "provided there is a minister in place". I accept that it could not reasonably be suggested that during the purdah period and during the normally short period of time for the appointment of new ministers executive power reverts to the Secretary of State. Clear wording to that effect would be necessary.

[66] The Northern Ireland Act 1998 does not envisage a protracted period of transition. Provision is made for a limited timeframe for the appointment of FM and DFM under section 16A. While that timeframe was extended by legislative provision that time period has expired and has not been extended further. In the result the statutory requirement of section 16A is currently being ignored. Under section 32(3) if the period mentioned in section 16A(3) ends without the offices of FM and DFM being filled the Secretary of State is statutorily bound to propose a date for an election of the next assembly. That statutory provision is currently being

disregarded. I was informed by Mr Macdonald that an application on this point is going to be brought in other judicial review proceedings.

[67] The 1998 Act thus did not envisage a lengthy vacuum of power in Northern Ireland. While it would have made political and legal sense for provision to have been made for a resumption of power by the Secretary of State in the situation such as that which currently prevails it would in my view require clear wording to provide the Secretary of State with power to exercise the powers of as yet unappointed ministers of the devolved administration in the intervening period. In the past the problem was dealt with by the imposition of direct rule under express statutory provision. That express statutory power was abrogated and fresh primary legislation to introduce direct rule would be required. In the current situation there is in effect a form of political vacuum in which a department continues to function but without ministerial direction.

[68] Undoubtedly a vacuum in which there are rudderless departments without ministers, the lack of a functioning Executive Committee and the absence of a sitting Assembly produces an essentially undemocratic system of unaccountable government provided effectively by senior civil servants who, as the respondent's counsel conceded, find themselves in an uncomfortable situation. The extent of their powers to take pressing policy decisions is unclear. The departments cannot arrive at a programme for government and the departmental cross cutting provisions do not work in the way envisaged under the Act. I have been informed there are likely to be a number of judicial review challenges in respect of determinations in other judicial review cases arising out of decisions made and decisions not made in the absence of ministers. The normal Westminster Convention is that civil servants do not make policy this being a matter for ministers who are accountable to Parliament. In Northern Ireland ministers are accountable to the Assembly but in the absence of an Assembly there is no democratic accountability in respect of civil servants exercising departmental powers.

[69] While Mr Coll argued that it is possible and legally permissible for the departments to indefinitely provide government in Northern Ireland without ministers a long term hiatus in normal accountable government is something that would necessitate action by the Secretary of State and Parliament, at least in political terms and probably as a legal imperative. For present purposes it is not necessary to come to a conclusion other than that in the absence of fresh statutory provisions executive power in respect of devolved matters and in respect of the control of Northern Ireland departments is not exercisable as such by the Secretary of State. However the sovereign government and the Secretary of State have a power and a duty to ensure the lawful proper governance of Northern Ireland and are accountable to Parliament for that as they are on questions such as whether direct rule should be reintroduced or whether changes need to be made in the constitutional arrangements for the government of Northern Ireland. Ultimately Parliament can legislate to ensure the proper and lawful government of Northern

Ireland if devolved government is not being provided in a way which is compatible with the principles of democratic and accountable government.

[70] Mr Coll QC accepted, and Dr McGleenan did not appear to demure on the point, that it is legally possible for the Department to take steps to present a funding proposal in respect of the systemic failure in the coronial system to deal with legacy inquests. It is argued that senior civil servants would need to consider inter alia the previous ministerial approaches, the wider political circumstances and the utility of making such a request in light of the currently expressed NIO attitude. However, in exercising the power to present such a funding proposal the Department would also be bound now to take account of the terms of this judgment. This judgment establishes that the previous ministerial approach was infected by the identified legal error that it is permissible and desirable to put off the question of seeking funds to enable the Article 2 and other procedural obligations to be carried out until a package in respect of all matters is achieved. The wider political circumstances do not of themselves remove the obligation from (inter alia) the DoJ to reduce delays in respect of the legacy inquests or the obligation of the EO as guardian of human rights to work towards the fulfilment of the state's obligation to achieve Article 2 compliance in respect of the legacy inquests. The absence of ministers in these departments does not mean that the departments are in the meantime discharged from their Convention law obligations as public authorities.

[71] One of the facts identified by the respondent as relevant to whether the DoJ should take steps to present a funding proposal is the utility of making such a request in light of the currently expressed NIO attitude. The NIO policy approach must take account of the prevailing circumstances. If called on to make a decision following a request for funding from the Department, the Secretary of State would be bound to take account of the proper relevant considerations. These would include the terms of this judgment; the absence of an Executive Committee to present an agreed approach, the absence of ministers in Northern Ireland to formulate such an agreed approach; the undesirability of policy issues being made by unelected civil servants; the need for political leadership to be provided by the Secretary of State in the absence of ministers in Northern Ireland; and a recognition that the on-going delay in the determination of the legacy inquests will continue unless additional resources are provided. Central government has already recognised the need for the provision of moneys out of central funds to deal with legacy issues. The Secretary of State would be bound to take account of the fact that, in the absence of a solution to the problem, the UK faces, yet again, the likelihood of being found in breach of its Article 2 obligations by renewed applications to Strasbourg. A failure to grapple with the problem may effectively leave the UK open to a complaint and finding at Strasbourg that the state is providing no just satisfaction in respect of ongoing breaches of Article 2. If domestic law remedies lead to no change of approach the conclusion may be reached that there is no effective domestic law remedy.

[72] In relation to the relief claimed by the applicant paragraph 3(b) of the Order 53 statement sought an order compelling the EO, the Executive Committee, the MoJ, the DoJ and the Secretary of State for Northern Ireland to arrange the provision of additional funding forthwith to ensure the hearing of legacy inquests within a reasonable time in accordance with the proposals made by the LCJ and specifically to ensure the establishment of a dedicated Legacy Inquest Unit. This court cannot direct Government departments how to spend public funds in view of the polycentric issues involved. The use of significant public funds in dealing with legacy inquests would have an impact on other aspects of the DOJ budget and the overall Northern Ireland budget. Important though compliance with Article 2 procedural requirements are, unlimited funds cannot be dedicated to legacy inquests. Funds dedicated to legacy inquests may result in less monies being available in other fields where other pressing human rights issues may arise. Finding the right balance is for the relevant authorities not for the court. Strasbourg authorities recognise that proportionality considerations have a role to play in what is demanded of state authorities in complying with Convention obligations. Identifiable problems have been identified in respect of the Minister's paper arising out of the LCJ's proposals (which set out broad principles and ideas for reform rather than descending to close detail). More work on the detail and in relation to the figures may be necessary.

[73] Recognising the problems of the terms of the mandamus order sought in paragraph 3(b) of the Order 53 statement Mr Macdonald presented an amended form of relief in the terms of (bb):

> "An order of mandamus to compel the Executive Office, the Executive Committee (if in existence at the time of the order), the First Minister (if in existence at the time of any order), the Minister of Justice for Northern Ireland (if in existence at the time of the order), the Department of Justice for Northern Ireland and the Secretary of State for Northern Ireland to reconsider their respective duties regarding the provision of additional funding to the Coroners' Service for legacy inquests in accordance with the judgment of the court forthwith."

Not without some justification Mr Macdonald argued that a mere declaration as to the applicant's rights on the matter would not of itself lead to a correction of the situation. He pointed to the repeated failures by the UK authorities to effectively comply with the criticisms made by Strasbourg decisions in respect of the inadequate inquests and investigations arising out of the Troubles. I am minded to issue a declaration in theses alternative terms but I will hear counsel further on the issue of the appropriate remedies in the light of the terms of this judgment in a remedies hearing to be arranged.

Conclusions

(1) The applicant has established that there is systemic delay in the coronial system in respect of the determination of the legacy inquests including those directed by the Attorney General (which in fact represent the majority of legacy inquests) and the legacy inquest directed by the Advocate General in respect of the death of, among others, the applicant's husband.

(2) The legacy inquests are required to be conducted in a manner compliant with Article 2 procedural rights obligation and within a reasonable timeframe under Article 2, Rule 3 and common law.

(3) The current systemic delay is impacting on the applicant as the widow of the deceased in respect of the inquest directed by the Advocate General. Her Article 2 rights are not being vindicated and the delay engages her rights under Articles 2 and 8.

(4) The systemic delay is caused or significantly contributed to by a lack of adequate resources which are needed to speed up the process of carrying out the legacy inquests.

(5) Various public authorities in Northern Ireland have a role to play in ensuring the taking of effective steps to reduce the delays and to advance the timely carrying out of the inquests. These include the Department of Justice, the EO, the MoJ, the First Minister and the Deputy First Minister (when appointed) and the Ministers sitting on the Executive Committee when appointed.

(6) In her decision not to permit the MoJ's paper to go before the Executive Committee the FFM was in error in concluding that it was legally proper to defer consideration of the question of seeking additional funding to deal with the systemic delays in relation to the legacy inquest until an overall package was agreed in respect of the outstanding legacy issues. She was in error in concluding that it was legally proper to defer consideration of the funding issue because in the absence of an overall package the provision of additional funds to deal with the systemic delays in the legacy inquests would favour victims who were not innocent as against innocent victims of the Troubles.

(7) The Secretary of State and central government have recognised the need to provide additional funding for legacy issues and have earmarked the sum of £150m for the purpose. It was recognised that part of that funding would need to be used in relation to dealing with the problems arising from the legacy inquests.

(8) The approach of the FFM and the Secretary of State has been infected by the legally erroneous view that dealing with the question of the provision of additional

funds to deal with the systemic problems in respect of legacy inquests should await the outcome of an overall package in respect of all legacy issues. Their approach has been infected by the erroneous legal view that there is a permissible linkage between the issues.

(9) This linkage and the present approach disregard the present and on-going breaches of Article 2, Rule 3 and common law in respect of the legacy inquests which require to be addressed and dealt with irrespective of whether an overall package can be agreed.

(10) Whether or not the devolved institutions recommence operations and new ministers are appointed, the on-going problem of breaches of Article 2, Rule 3 and common law in respect of the legacy inquests requires to be addressed.

(11) While the Secretary of State for Northern Ireland does not have executive functions in relation to the Northern Ireland departments during the absence of a devolved administration, she is responsible for an oversight of the functioning of government in Northern Ireland and is answerable to Parliament in respect of the discharge of that function.

(12) The relevant parties must reconsider the question of the provision of additional funding in light of the fact that finding a resolution of the funding issue cannot be postponed until an outcome to a political agreement on other legacy issues.

(13) The relevant decision-makers who will be involved in decision making in relation to whether additional funds should be provided, in what amount and at what time must take account of the contents of this judgment.