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*Judgment: approved by the court for handing down (subject to editorial corrections) **	*Delivered:* **09/05/2023**

IN THE CORONER'S COURT IN NORTHERN IRELAND

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IN THE MATTER OF AN INQUEST INTO THE DEATH OF RAYCHEL FERGUSON

_____

BEFORE CORONER McCRISKEN

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OPEN RULING ON AN APPLICATION FOR RECUSAL

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Introduction

[1] I commenced the hearing of an inquest inquiring into the death of Raychel Ferguson, on 2 May 2023 in Derry Courthouse. On 4 May 2023, prior to any evidence being heard, counsel for the Raychel's next of kin (NoK), made an application that I should recuse myself from continuing the inquest. I asked that this application be made in writing and allowed the other properly interested persons (PIPs) to comment in writing. Coroner's Counsel also prepared written guidance which has been shared with the PIPs. I have considered all of the written submissions before arriving at my decision, which is set out below.

Background

[2] An understanding of the background to this application is important. On 3 May 2023, in advance of the first nurse being called I commenced a hearing into whether the nurses ought to be warned regarding their privilege against self-incrimination pursuant to rule 9 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 ('the 1963 Rules') and if so, when such a warning should be given. I invited each of the Properly Interested Persons ('PIPs') to address me on this issue in advance of the witnesses giving evidence.

[3] Coroner's Counsel, Mr Chambers BL, indicated that, in his opinion, the privilege against self-incrimination would be engaged when the nurses were asked about the care, or lack of care, they provided to Raychel after she had been operated on. Mr Chambers BL confirmed that there was an active Police Service of

Northern Ireland ('PSNI') investigation into the nurses' conduct during this time period.

[4] Counsel for the nurses, Mr Boyle KC, asserted that in all the circumstances, the test for privilege was made out. He referred to the ongoing PSNI investigation into all of the deaths which were the subject of the Inquiry into Hyponatraemia Related Deaths ('the Inquiry'). He also referred to the fact that each of the nurses provided detailed statements and were questioned at length during the course of the Inquiry. Those statements and the transcripts of their evidence have been admitted as evidence before this inquest pursuant to rule 17 of the 1963 Rules, meaning that I may consider them. Mr Boyle KC pointed out that each of the nurses had given statements and evidence to the Inquiry in circumstances where they had been given an express undertaking that this material could not be used in criminal proceedings against them. Mr Boyle KC submitted that, in the circumstances, it would be inappropriate for them to be asked whether they adopted this material as their evidence in the Inquest since it contained information that might tend to incriminate them. Mr Chambers BL agreed with this contention.

[5] Ms Gallagher BL, for the Western Health and Social Care Trust ('the Trust'), made no submissions and my counsel, Mr Chambers BL, referred me to two leading judgments on this issue.

[6] Counsel representing Raychel's next of kin ('NoK'), Mr Coyle BL, indicated that he had instructions to remain neutral.

[7] After considering these submissions I decided that it would be appropriate to give each of the witnesses the warning as envisaged in rule 9 if questions were asked which, if answered, might incriminate and that this warning should be given at the point when the nurses were being asked to answer questions relating to the direct involvement with Raychel's care.

[8] The first nursing witness to give evidence was Nurse Noble. She answered a number of general questions asked by Mr Chambers BL regarding her experience and qualifications. She then answered general questions about Solution 18 and the fluid management arrangements in place in Altnagelvin in 2001. When Mr Chambers asked a series of questions directly related to the treatment she had given to Raychel Ferguson, having been given a warning that the answer may incriminate her, Nurse Noble indicated that she was declining to answer. Mr Coyle then asked Nurse Noble questions about her role as a nurse. At one point Mr Coyle asked a question, the answer to which would clearly infringe against the right not to self-incriminate, and the witness declined to answer. When Nurse Noble finished her evidence, the inquest adjourned for lunch.

[9] Upon return from lunch break, Mr Coyle indicated that he had taken instructions from Mr and Mrs Ferguson, and he was not going to ask any further questions of the nursing staff. He indicated that I might consider adjourning the

inquest so as to allow an update from the PSNI Senior Investigating Officer ('SIO') in terms of the police investigation. He drew my attention to the inquest into the death of Arlene Arkinson and a discussion took place between Mr Coyle and I regarding his rationale for suggesting that an adjournment would be appropriate. When pressed further as to whether he was actually making an application to adjourn the inquest, he told me that he would take further instructions overnight and would 'let me know' the following morning regarding the continued involvement of Mr and Mrs Ferguson in this inquest. I took this to mean that, if I did not accede to an application to adjourn, Mr and Mrs Ferguson would not take any further part in the inquest.

[10] Nurse Gilchrist was called to give evidence and did so in a manner similar to Nurse Noble. Those representing the NoK did not ask any questions of this witness.

Submissions from the PIPs

[11] The NoK have submitted two written arguments in support of their application that I should recuse myself. I have set out the core aspects of these submissions below:

(i) Paragraph 3 of the first written submission sets out the comments which the NoK say show bias on my part. These comments, amounting to two short questions, formed part of much more detailed discussion between myself and Counsel for the NoK. The portion of the commentary cited as follows:

> "The Ferguson's and everyone else sat through a multi-million-pound public inquiry...
>
> What else do you think needs to be discovered at this inquest which was not discovered at the public inquiry?"

(ii) Paragraph 7 details that the NoK believe these comments amount to bias. They also allege that the 'tone' I am alleged to have used further demonstrates an 'attitude' towards the NoK. Further, they say my comments 'demonstrate a mindset that the family should be content with a highly circumscribed inquest' by dint of the nurses asserting their right to not answer certain questions.

(iii) In paragraph 9 the NoK say that bias was further displayed by my refusal to accede to the suggestion of their Counsel that I should call the investigating police officer to this inquest.

(iv) In paragraph 11 the NoK say that "the coroners displayed attitude inclines any reasonable and fair minded observer to take the view that his appraisal is that the coronial inquiry is down to a grace and favour obligement…" As is explained below, this is not the correct legal test to be applied in cases of bias.

(v) In paragraph 12 it is asserted that, "it is clear from the textbooks that if there are any real grounds for doubt as to bias than that should be resolved in favour of recusal." No mention is made of which textbooks are being referred to here although a case is referenced in a footnote.

(vi) At paragraph 16 the NoK allege that I have a negative view of the Ferguson family and their entitlement to full and thorough inquest. Paragraph 17 goes further and alleges that the Ferguson family are being denied "a proper full lawful inquest." It is alleged that this denial is due to my refusal to call the investigating police officer to "scope out" how this denial can be resolved.

(vii) Paragraph 18 says that my comments to Counsel for the NoK during our discussion "demonstrate an unlawful pre-determination as to the outcome of this inquest" because my comments allegedly suggest that there is nothing to be gained by this new inquest.

[12] In response to the NoK written submission I received a response from Mr Boyle KC on behalf of those nurses who worked in Altnagelvin in June 2001, and who are now PIPs at the inquest. I have set out the main submissions made on behalf of the nurses below:

(i) The nurses' position is that there is an insufficient justification for recusal and that when the application before the court is properly considered, and in particular, considered in the full context of the proceedings to date, the legal test for recusal is not met.

(ii) Reference is made to the clear guidance provided by Treacy LJ in *Downey's Application for Judicial Review* [2022] NICA 67 when he set out the legal principles to be applied when considering an allegation of actual bias, apparent bias, and pre-determination (as a species of bias). The nurses say that, in this case, there is a notable and significant distinction between the Downey case and the current inquest. In Downey, the issue related to a view expressed on a discrete and specific issue to be determined, namely, the application of article 2 of the European Convention on Human Rights. In this inquest the Coroner has not expressed any view, let alone one which could be said to be biased or pre-determined, in relation to an issue to be determined. Indeed, the contrary is the case - the role of a Coroner in an inquest is to answer four questions, the most significant being - how (in what circumstances) Raychel came by her death. To date, the Coroner has not expressed any view as to how that question will be answered. On the allegation of pre-determination, the nurses say it is difficult to distil from the NoK submissions what it is suggested has actually been pre-determined.

(iii) When this case is considered in its proper and full context, the allegation of bias/pre-determination is not one that is sustainable in law. The nurses

acknowledge that this inquest has been directed by the Attorney General for Northern Ireland notwithstanding the "extensive inquiry by Mr Justice O'Hara in the Inquiry into Hyponatraemia-related Deaths." However, they say, the AGNI did not suggest that the inquest should be considered in a vacuum. To the contrary, the AGNI clearly, and expressly contemplated that a coroner would consider the Inquiry's work - "I have no doubt, however that the work of the new inquest will be greatly assisted by the evidence gathered by Mr Justice O'Hara and by his analysis." The rationale for AGNI's direction that a fresh inquest be held, is, it is submitted by Mr Boyle KC, captured in the AGNI's observation that:

> "Mr Justice O'Hara as Chair of the Inquiry was unable to correct or revise the findings [of the first inquest] and it seems to me of the utmost importance that the inquest findings of Raychel's death should reflect the full facts which were not available to the first inquest."

(iv) The 'fair-minded and informed observer' will know that the Coroner has clearly embarked upon that task in this Inquest with an open, not a closed, mind. In support of this assertion reference is made to the evidence of Dr Haynes and more importantly the questioning of Dr Haynes by Coroner's Counsel which, has already subjected the very text of Mr Leckey's narrative verdict to 'evidential unpicking.' Mr Boyle KC, for the nurses, says that this is the very antithesis of bias or pre-determination.

(v) The discussion about the nature, extent and propriety of the warnings that should be given to the nurses occurred in open court with the engagement of all PIPs. It is important context that the NoK stated that their position in respect of the Coroner's duty to warn was "one of neutrality."

(vi) It is difficult to see how not calling an investigating officer in an ongoing investigation is indicative of bias or pre-determination. The reality is that it is ongoing, and no application has been made by those investigating to adjourn.

(vii) In seeking to address the issue of the nurses declining to answer certain questions the Coroner has (i) admitted the very extensive evidence from nurses and others; and (ii) observed during submissions that he will have regard to the same when reaching his verdict.

(viii) In conclusion, the nurses submit that the fair-minded and informed observer would not conclude that there was a real possibility of bias or that there has been pre-determination, in the circumstances of this case.

[13] Ms Gallagher, instructed by the Directorate of Legal Services on behalf of the Trust also provided a detailed written submission which is summarised below:

(i) The Trust submission sets out the relevant case law and test to be applied. In relation to the NoK application, at paragraph 5, the Trust say that - "the application on behalf of the Next of Kin has taken a comment made by the Coroner in a relatively lengthy exchange between the Coroner and Counsel for the Next of Kin without setting it in its proper context."

(ii) In respect of the NoK allegation regarding the PSNI investigation the Trust highlight that the current inquest has been ongoing since 11 January 2021. They say that the issue of the ongoing PSNI investigation has been apparent to all PIPs for some time and the legal framework in respect of the privilege against self-incrimination has not changed. Accordingly, the Trust submit that it would have been apparent to all involved, including the NoK, and that this legitimate right could be exercised. Since the PSNI has confirmed that the investigation is ongoing but no application to adjourn has been made the Trust say that it is hard to see how a decision not to call an investigating officer demonstrates any bias against the NoK.

(iii) The Trust further submit that the key focus of the Attorney General in directing a further inquest, was to afford a new tribunal the opportunity to explore all of the available evidence that was adduced before the Inquiry when determining the four statutory questions as required by rule 15 of the 1963 Rules. It is abundantly clear, say the Trust, from the Coroner's actions in extending the scope to include not just the factual matters of the report but also the findings and analysis of the Inquiry Report that his clear intention is to conduct a full and fair Inquest without bias or predetermination.

[14] A second written submission was received on behalf of the NoK later on 5 May 2023. The primary focus of this submission is to take objection to the use of the word "context" in the written submission of the Trust. At paragraph 8 it is suggested that following the evidence of Nurse Noble I should have adjourned the inquest should so that the NoK could have 'a period of reflection' overnight.

[15] Mr Chambers prepared an extremely helpful written advice note for my benefit. This was circulated openly to all PIPs. In summary, Mr Chambers advised as follows:

(i) It should be noted that the privilege against self-incrimination is a right which exists not only in coronial law, but in common law, and the same issue could legitimately arise, were this inquest to be heard now, tomorrow or in five years. The Coroner cannot force a witness to answer a question if they exercise their entitlement to decline to answer a question which might incriminate them.

(ii) Further, Coroner's Counsel is not aware of any authority which supports the proposition that in an inquest, where key witnesses exercise a right against self-incrimination, that the inquest is not considered to be proper of full.

There have been many inquests held, particularly Legacy Inquests in the last five years, where key witnesses have taken such a course.

(iii) The PSNI has indicated that they are not making any application that the Coroner should halt his Inquest. At no stage prior to the commencement of the inquest has any PIP suggested that the Coroner should pause or adjourn the inquest until the conclusion of the PSNI investigation even though everyone was aware that the PSNI investigation encompassed an investigation into the conduct of the nurses and doctors responsible for Raychel's care and whether they may have committed criminal offences.

(iv) The NOK have made an application for the Coroner to recuse himself by reason of bias and animus. This appears, on its face, to amount to an allegation of actual bias. However, as the NoK skeleton argument develops, it appears that the real complaint is one of unlawful predetermination - essentially that the Coroner has predetermined that nothing will be gained by conducting this inquest.

(v) It seems therefore that the Coroner should apply both the test for actual bias and apparent bias when considering whether or not he should recuse himself.

(vi) Applying the legal principles then to the application that the Coroner recuse himself, the court might, in applying the fair minded and informed observer test, consider a number of relevant factors:

a. The full context of the exchange between Counsel for the NOK and the Coroner should be considered. A more fulsome transcript has now been obtained of this exchange and will be served along with this advice. The transcript reveals Mr Coyle saying that since the nurses appeared to him to be adopting the "stratagem" of asserting the privilege against self-incrimination that the scope of the inquest was being "circumscribed to a profound degree." He acknowledged that the "in spite of the [Coroner's] efforts" to have a proper inquest this was being frustrated. There was then an exchange on the utility of calling the SIO. The Coroner then explained in some detail that there are many inquests conducted in Northern Ireland which involve witnesses exercising their right against self-incrimination and that these are still proper inquests. Mr Coyle indicated he disagreed with this in the strongest terms and that unless the Coroner paused the inquest and called the SIO that the family would be considering whether or not to remain involved in the Inquest.

The following exchange then took place:

> "Mr Coyle – Sir, I don't want to be repetitious but I differ and disagree – how much more useful then would you have found those more focused

questions on the really crux issues, when now it is only left to guess, and the Ferguson family, are left to guess what the answers would have been if put by your own counsel or by me & we now won't know that, and they won't know that, and this is their last chance.

Coroner – look to the transcripts of the public inquiry, Mr Coyle, the Fergusons, and everyone else, the medics, sat through a multimillion-pound public inquiry.

Mr Coyle – yes

Coroner – Do you not think you got answers from that? In fact, it is confirmed in your instructing solicitor's closing submission to the Inquiry, that you got answers from the public inquiry.

Mr Coyle – we did

Coroner – What else do you think needs to be discovered during this inquest, that you didn't find out during the Inquiry?

Coyle – When one stands back, and considers Mr Justice O'Hara's report, as we saw from the portion I took the witness to, Mr Doherty spotted this, that that led to a fertile serious of questions being put to the witness Dr Makar, and I don't mean this in any pejorative sense, you took over, I having put in the ball as it were, and conducted a series of very rigorous questions, out of the content of the report, which in 2012,2013 we didn't have

Coroner – yes

Coyle – And that is a clear and plain example of what I mean, of the utility being circumscribed and I don't criticize Mr Boyle or his solicitors, we had heralded this in July last year, but I have now said I think everything I can usefully say Sir."

(vii) A fair-minded and informed observer might conclude that the question posed by the Coroner, when placed in context, conveys a different meaning than that portrayed in the skeleton argument filed on behalf of the NoK.

Essentially the Coroner was disagreeing with the suggestion that the family didn't have answers as to how Raychel was treated by the nurses and doctors as they had all given evidence and been questioned extensively at the Inquiry and all that material had been admitted into evidence at the Inquest. A fair minded and informed observer might not accept that the Coroner was saying he didn't think there was anything to be gained by holding an Inquest.

(viii) The fair minded and informed observer would also take account of the fact that the Coroner had spent several years conducting preliminary hearings and gathering and disseminating a large body of material in preparation for this Inquest. This may be considered to sit awkwardly with the allegation that he thought nothing was to be gained by the Inquest.

(ix) During the lead up to the Inquest the Coroner indicated he was minded to excise the opinion parts of Mr Justice O'Hara's report on the basis that the decision in *Re Siberry's Application (2)* [2008] NIQB 147 precluded him from receiving them as evidence. The NoK argued that he should admit the report in full while counsel for the Trust contended that he should omit the opinion parts. The Coroner ruled in favour of the NoK and admitted the report in full. A fair minded, informed observer might conclude that this is not consistent with a judge who bears "animus" to the NoK or has pre-determined the Inquest in some unspecified way since he changed his mind, in favour of the NoK, having been persuaded by the merits of their argument relating to an important matter in this Inquest.

(x) A fair minded and informed observer would undoubtedly want to consider the way in which the Inquest had be conducted up to the point where the exchange in question took place. Such analysis would reveal that the Coroner had involved himself extensively in questioning and probing witnesses - particularly Dr Makar - for which, rather counter to the argument advanced by them, he was praised by counsel for the NOK.

(xi) A fair minded and informed observer might also take account of the fact that the NOK never suggested that the Inquest should be paused to allow the police investigation to take place before the Inquest started and their counsel did not object to the witnesses being warned about their legal right not to answer certain questions. A fair-minded observer might, in those circumstances, make some allowance for the Coroner expressing frustration when an application is made to adjourn the case in protest at these obvious and foreseeable issues arising.

(xii) When considering the allegation that the Coroner had pre-determined that nothing would be gained from this Inquest. The observer might take account of the fact that this Inquest had been listed over 8 days with significant time being allocated for the questioning of the witnesses.

A third submission was received from the Solicitor for the NoK, unexpectedly by e-mail in response to this advice note. I have considered the contents of this submission also.

Relevant law

[16] In *Downey's Application for Judicial Review* (above) Treacy LJ very helpfully summarised the law relating to bias and pre-determination:

> **"Distinction between Actual Bias and Apparent Bias**
>
> [36] In *Re Medicaments (No. 2)* [2001] 1WLR 700, 711 at [37] the Court of Appeal held:
>
> > '[37] Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than the other. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or arise from particular circumstances which, for logical reasons, pre-dispose a judge towards a particular view of the evidence or issues before him.
> >
> > [38] The decided cases draw a distinction between "actual bias" and "apparent bias." The phrase "actual bias" has not been used with great precision and has been applied to the situation (1) where a judge has been influenced by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party. "Apparent bias" describes a situation where circumstances exist which give rise to a reasonable apprehension that a judge may have been or may be biased.'

The Test for "Apparent Bias"

[37] Later in the same case the court summarised the relevant principles for apparent bias under ECHR jurisprudence as follows:

> "[83] ….
>
> (2) Where actual bias has not been established the personal impartiality of the judge is to be presumed.
>
> (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do, the decision of the judge must be set aside.
>
> (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court.
>
> (5) An important consideration in making an objective appraisal of the facts is the desirability that the public shall remain confident in the administration of justice."

[38] Following consideration of the decision of the Court of Appeal in *Re Medicaments*, the House of Lords *in Porter v Magill* [2001] UKHL 67 elaborated upon the test for "apparent bias" as follows:

> 'The question is what the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was real possibility of bias.' [Lord Hope at para 105]

[39] In *Flaherty v National Greyhound Racing Club* [2005] EWCA Civ 1117 at para [27], the Court of Appeal stated that the test for apparent bias involves a two-stage process:

> 'First the court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased.

> Secondly, it must ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased … An allegation of apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided: see *Locabail (UK) Limited v Bayfield Properties Limited* [2000] 2QB 451, 480 para 25. The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing.'

[40] In *Helow v Secretary of State for the Home Department* [2008] UKHL 62, the House of Lords gave further consideration to the "apparent bias" test in Porter v Magill. In *Helow*, the appellant was a Palestinian who challenged the involvement of the judge in the case because of the judge's association with pro-Jewish lobby organisations. It was alleged that there was an appearance of bias. Elaborating on the attributes of a fair-minded and informed observer, Lord Hope stated at para 2:

> 'The observer who is fair-minded is the sort of person who always reserves judgement on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, paragraph 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. ……. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.'

"Predetermination as a form of bias

[41] The fair-minded and informed observer test set out in *Porter v Magill* has been adopted by the courts to determine whether there is a possibility of bias arising from predetermination. In *Georgiou v Enfield London Borough Council* [2004] EWHC 799 (Admin) at para 30, Richards J held:

> '[30] Predetermination can legitimately be regarded as a form of bias. Cases in which judicial remarks or interventions in the course of the evidence or submissions have been alleged to evidence a closed mind on the part of the court or tribunal have also been considered in terms of bias: see e.g. *London Borough of Southwark v Jiminez* [2003] EWCA Civ 502 at para 25 of the judgment, where the test in *Porter v Magill* was accepted as common ground and was then applied.' [our emphasis]

[42] In *Lewis v Redcar and Cleveland* [2009] 1WLR 83, the Court of Appeal provided guidance as to the approach to be adopted in cases involving apparent bias and predetermination as a form of bias. All three members of the Court of Appeal delivered written judgments. Pill LJ reviewed a number of the authorities delivered since the decision in *Porter v Magill*. With regard to the *Porter v Magill* test and the correct approach of the court to the possibility of predetermination, Pill LJ stated as follows:

> '68. … Where reference was made to the fair-minded observer, the court was putting itself in the shoes of that observer and making its own assessment of the real possibility of predetermination. That, I respectfully agree, is the appropriate approach in these circumstances. The court with its expertise, must take on responsibility of deciding whether there is a real risk that minds were closed.'

[43] In *Lewis*, Rex LJ agreed with Pill LJ's assessment. He also considered the distinction between disposition

and predetermination and considered the test to be applied for distinguishing between the two:

> "It is common ground that in the present planning context a distinction has to be made between mere disposition, which is legitimate, and the predetermination which comes with a closed mind which is illegitimate. However, there is a dispute between the parties as to the appropriate test to be applied for finding the illegitimate closed mind."

[44] The competing tests were (1) actual bias or predetermination: - 'a closed mind in fact' and (2) a test based on 'the appearance of things. (In other words, the *Porter v Magill* test): would it appear to the fair-minded and informed observer that there is a serious possibility of the relevant bias, viz predetermination?" Rex LJ favoured the latter - the test based on the appearance of things:

> '96. So, the test would be whether there is an appearance of predetermination in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards the planning proposal would not for these purposes by itself amount to an appearance of the real possibility of predetermination or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined closed mind in the decision making itself. I think that Collins J put it well in *R (Island Farm Development Limited) v Bridgend County Borough Council* [2007] LGR 60 when he said at paragraphs 31-32:
>
> > '31. The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material conditions and be prepared to change their views if persuaded that they should … unless there is positive

> evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will be suffice to persuade a court to quash the decision.
>
> 32. It may be that, assuming the *Porter v Magill* test is applicable, the fair minded and informed observer must be taken to appreciate that predisposition is not predetermination and that councillors can be assumed to be aware of their obligations.' [emphasis added]

> 97. In context, I interpret Collins J's reference to "positive evidence to show that there was indeed a closed mind" as referring to such evidence as would suggest to a fair minded and informed observer the real possibility that the councillor in question had abandoned his obligations, as so understood. Of course, the assessment has to be made by the court, assisted by evidence on both sides, but the test is put in terms of the observer to emphasise the viewpoint that the court is required to adopt. It need hardly be said that the viewpoint is not that of the complainant."

[45] On this distinction between 'predisposition' and 'predetermination', Longmore LJ stated:

> '106. It is clear from the authorities that the fact that members of a local planning authority are "predisposed" towards a particular outcome is not objectionable see e.g., *R v Amber Valley District Council, Ex Parte Jackson* [1985] 1 WLR 298. …..
>
> 107. What is objectionable, however, is "predetermination" in the sense I have already stated, namely that a relevant decision-maker made up his or her mind finally at too early a stage.'

[46] It is axiomatic, following a review of the authorities, that actual or apparent bias or

> predetermination on the part of the decision maker renders his decision unlawful."

[17] In *Helow v Secretary of State for the Home Department* [2008] UKHL 62, Lord Hope of Craighead, who had also sat on the Committee in *Porter v Magill* [2001] UKHL 67, gave guidance on the attributes of the fair-minded observer:

> "Then there is the attribute that the observer is "informed." It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political, or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment**."**

[18] An example of the sort of comments which have been held to amount to bias in the coronial context can be found in the case of *R v Inner West London Coroner, ex parte Dallaglio and another* [1994] 4 All ER 139. In that case the deceased were two of the 51 who died following a collision between a dredger and a passenger launch, The Marchioness, in August 1989. The inquests were later adjourned on the intervention of the Director of Public Prosecutions pending the outcome of criminal proceedings against the master of the dredger. As a result of a misunderstanding, a bereaved mother Ms Lockwood-Croft, was denied sight of her son's body. The Coroner referred to some of the relatives and survivors as being 'mentally unwell.' Ms Lockwood-Croft, together with another bereaved mother, Ms Dallaglio, later contacted journalists to discuss her conviction that she had been denied access to her son's body to prevent discovery of the fact that his hands had been amputated for identification purposes. Following that meeting, the journalists published an article in a popular Sunday newspaper in which they implied that there had been a cover-up.

[19] The Coroner thereafter met the journalists in an attempt to persuade them to retract the implication and to set the record straight and in the course of that meeting, according to one of the journalists, the coroner described Ms Lockwood-Croft as 'unhinged' and displayed an attitude of hostility towards her. In July 1992, after the conclusion of the criminal proceedings, the coroner wrote to the families of the 51 victims to canvass their views on any resumption of the inquests.

[20] On 22 July the Coroner refused (i) to remove himself on the ground of apparent bias, as requested by a number of the bereaved families, or (ii) to resume the inquests, suggesting that only a minority of the families consulted had favoured

a resumption and clearly implying that the majority wished the whole episode ended. Ms Lockwood-Croft and Ms Dallaglio applied for judicial review of the Coroner's decisions. The court refused their application and they appealed, contending that the use of the word 'unhinged' and the reference to the number of 'mentally unwell' relatives betrayed an attitude of some hostility, however unconscious, towards Ms Lockwood-Croft and members of the action group so that when it came to evaluating the responses to his letter canvassing views on the resumption of the inquests, the coroner belittled the case for those seeking resumption and, doubtless unconsciously, exaggerated the numbers of those opposed. The coroner accepted that the expression 'unhinged' was unfortunate but contended that while it was one thing to believe that the applicants had been behaving irrationally it was quite another to feel hostility towards them.

[21] Simon Browne LJ delivered the judgment of the court and, in terms of the allegation of apparent bias found as follows:

> "I have found this a difficult case and, indeed, my views have wavered during the course of the hearing … if it were necessary for the applicants to establish as a probability that the coroner was biased against them in reaching his decision whether or not to resume the inquests, in my judgment they would clearly fail in the attempt. As it is, however, all that the applicants need show is in the first instance an appearance of bias and then on an examination of all the facts a real possibility that the coroner may unconsciously have felt resentful towards them in such a way as to have influenced his approach to their case for a resumption.
>
> For a judicial officer to say publicly of someone that they are unreliable because 'unhinged' shows, I have no doubt, an appearance of bias: such a description is not merely injudicious and insensitive but bound to be interpreted as a gratuitous insult. I say 'publicly' because, given the manner in which the two journalists had handled the original story, there was little doubt that they would broadcast anything else they felt might discredit the coroner. As to the crucial second limb, I find myself in the last analysis unable to discount the real possibility that the coroner unconsciously allowed himself to be influenced against the applicants and the other members of the action group by a feeling of hostility towards them. There remains to my mind not a probability but a not insubstantial possibility that he thought them troublemakers and, in the result, unfairly undervalued their case for a resumption."

[22] The court set aside the Coroners decision on the basis of apparent bias and directed that the matter should be assigned to a new coroner.

Consideration and conclusion

[23] I consider that the three written submissions drafted on behalf of the NoK present a confused argument in support of their application for recusal. Their first submission confuses and conflates the three broad categories of bias that have been developed by the case law – *actual bias*, *apparent bias,* and *pre-determination* (as a form of apparent bias). The word 'bias' is used throughout without the written argument actually specifying which category is being referred to.

Actual Bias

[24] I make clear that I am not actually biased against the Ferguson family, and I utterly reject the allegation of actual bias. I bear them no ill will or "animus" as alleged. As a sworn judicial officer, I take my duty to hear this case in a fair and independent manner with the utmost seriousness. I had hoped that it would have been obvious to everyone in the manner in which I have conducted this case from the outset that I am not actually biased against or for any person or interest in these proceedings. I am, and remain, utterly determined that my inquiry into the circumstances of Raychel's death should be conducted in a fair, thorough, and impartial manner.

Apparent Bias

[25] In paragraph 13 of the first written argument the NoK make reference to reliance upon the case of *Downey's Application*. As Mr Boyle KC correctly points out in his detailed submission on behalf of the nurses, this case clearly refers to a situation involving the *taking of a decision* which the Court of Appeal found to have been predetermined. In the instant case any complaint by the NoK that I have somehow predetermined a "decision" is bound to fail. The decision under challenge appears to relate to my decision not to call the SIO to give an update open the investigation. There is simply no evidence put forward by the NoK in support of their argument that my decision here was *predetermined by bias*. In fact, my decision was taken after this issue was raised by Counsel for the NoK in open court. What occurred next was a full discussion. The NoK suggested that I should adjourn to call the SIO. After considering the matter I decided that I did not need to, since we were all fully aware of the position regarding the investigation. The Solicitor for the NoK has himself conceded in correspondence that the NoK are being kept appraised of the Police investigation by the SIO.

[26] The decision not to adjourn was fully within my discretion. It is hard to see how it was infected by bias as a result of predetermination. It seems to me that the complaint from the NoK on this point is that I made a decision that they disagree

with. Judicial office holders all over the world make similar decisions every day. If taking a decision not in favour of one party or the other constitutes bias then, it can be argued, the justice system might struggle to operate. I reject any argument advanced on behalf of the NoK that my decision regarding adjournment to call the SIO displays a predetermination or was infected by bias.

[27] The next two categories of bias – actual or apparent – were properly explained by the Court of Appeal in the case of *In Re Medicaments (No. 2)* [2001] 1WLR 700, 711. At [37] the Court of Appeal held:

> "The phrase "actual bias" has not been used with great precision and has been applied to the situation (1) where a judge has been influenced by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party."

[28] Later in the same case, the court summarised the relevant principles for apparent bias as follows:

> "[83] ….
>
> (2) Where actual bias has not been established the personal impartiality of the judge is to be presumed.
>
> (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do, the decision of the judge must be set aside.
>
> (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court.
>
> (5) An important consideration in making an objective appraisal of the facts is the desirability that the public shall remain confident in the administration of justice."

[29] Following consideration of the decision of the Court of Appeal in *Re Medicaments*, the House of Lords in *Porter v Magill* (above) clarified the test for "apparent bias" as follows:

> "The question is what the fair-minded and informed observer would have thought, and whether his conclusion

would have been that there was real possibility of bias." [Lord Hope at para 105]

[30] What then would the fair minded and informed observer think of this case? The first matter to be considered is the information available to inform the fair-minded observer. Firstly, the fair-minded observer would be interested to examine the entirety of the discussion between the Coroner and Counsel for the NoK. It seems to me that the fair-minded observer would be interested in the *context* of the two short sentences complained about by the NoK as set out in their written submission. Below is a transcript of the conversation with the remarks complained about emboldened:

> "CORONER: …so I don't agree that not being able to ask some of these nurses some questions causes really any detriment to my ability to have a proper inquest which is what I promised the Fergusons when I met them.
>
> MR COYLE: I differ from you sir, in the strongest terms and commencing with the next witness my instructions are, you invite me to ask the next witness if she is called and you proceed I will be instructed not to ask her any questions. There is one issue we want to probe with her but it is likely to lead to the rote formula and therefore the Ferguson family will consider their position if you proceed overnight, and we will let you know tomorrow morning but we will sit in courtesy but generally in silence.
>
> CORONER: Let me know about what tomorrow morning?
>
> MR COYLE: Pardon?
>
> CORONER: Let me know about what in the morning.
>
> MR COYLE: Whether they will continue to participate in this inquest.
>
> CORONER: Well, that would be regrettable if they chose not to do that because - what I can say to you is that I intend to hold and will hold a full, proper and fair inquest looking at the issues. I'm not quite sure why you wouldn't, or you would choose not to ask the nurses any questions because can I say those very general questions that we have been able to ask have been incredibly useful to me as a Coroner in understanding the systems, the

systemic issues that were in place in Altnagelvin Hospital and will form a crucial part of my findings**.**

MR COYLE – Sir, I don't want to be repetitious but I differ and disagree – how much more useful then would you have found those more focused questions on the really crux issues, when now it is only left to guess, and the Ferguson family, are left to guess what the answers would have been if put by your own counsel or by me and we now won't know that, and they won't know that, and this is their last chance

CORONER – Look to the transcripts of the public inquiry, Mr Coyle, **the Fergusons, and everyone else,** the medics, **sat through a multimillion-pound public inquiry.**

MR COYLE – yes

CORONER – Do you not think you got answers from that? In fact, it is confirmed in your instructing solicitor's closing submission to the Inquiry, that you got answers from the public inquiry.

MR COYLE – we did

CORONER – What else do you think needs to be discovered during this inquest, that you didn't find out during the Inquiry?

MR COYLE – When one stands back, and considers Mr Justice O'Hara's report, as we saw from the portion I took the witness to, Mr Doherty spotted this, that that led to a fertile series of questions being put to the witness Dr Makar, and I don't mean this in any pejorative sense, you took over, I having put in the ball as it were, and conducted a series of very rigorous questions, out of the content of the report, which in 2012,2013 we didn't have.

CORONER – yes

MR COYLE – And that is a clear and plain example of what I mean, of the utility being circumscribed and I don't criticize Mr Boyle or his solicitors, we had heralded this in July last year, but I have now said I think everything I can usefully say Sir."

[31] It seems to me, a fair-minded observer, now informed by being able to consider the entirety of the conversation would note some important matters:

(1) The fact that crucial aspects of the conversation between the Coroner and Counsel for the NoK, which provide context, have been omitted from the selective remarks complained about by the NoK. Mr Coyle's response to the Coroner's questions for example do not appear in the NoK written submission.

(2) A confirmation by the Coroner that he intends to hold a 'proper' inquest and that he has in the past confirmed this intention to Mr and Mrs Ferguson.

(3) That the NoK's continued participation in the inquest was conditional on the Coroner acceding to their application to adjourn.

(4) A second confirmation by the Coroner that he intends to hold a 'proper, full and fair inquest' examining systemic issues.

(5) With regards to the first remark complained about by the NoK as demonstrating bias, the fair-minded observer would note that Counsel for the NoK agreed with the Coroner that there had indeed been a 'multi million pound Public Inquiry', attended by the NoK as well as medics and nurses and no issue was taken with this description. Counsel for the NoK did concede that the NOK had got answers from the Inquiry.

(6) With regard to the second remark made by the Coroner, the fair minded observer would note that this was, in fact, a question posed by the Coroner which was affirmatively answered without issue by Counsel for the NoK. The fair minded and informed observer would appreciate the inquisitorial role of the Coroner during the inquest and the importance of a Coroner being able to ask questions and test submissions.

(7) A confirmation by counsel for the NoK that the Coroner asked a series of 'rigorous' questions of Mr Makar. This would appear to undermine, to a significant degree, the allegation that the Coroner did not think that anything would be gained by this new Inquest since counsel for the NoK praised the Coroner for the additional information he had gleaned through his own questioning of Dr Makar.

[32] I am satisfied that a fair minded, and informed, observer would arrive at a conclusion that the exchange between the Coroner and Counsel for the NoK, when placed in its proper context, conveys a different meaning than that portrayed in the written argument filed on behalf of the NoK. The fair minded and informed observer would conclude that the Coroner was querying with Counsel for the NoK the suggestion that the family didn't have answers as to how Raychel was treated by the nurses and doctors given that they had all given evidence and been questioned

extensively at the Inquiry. All that material having been admitted into evidence at the Inquest by the Coroner. Counsel for the NoK was arguing that the family would have to guess at what answers the nurses would have given had they not invoked their privilege against self-incrimination and the Coroner was querying this assertion, as is his role as inquisitor.

[33] In my opinion, a fair minded and informed observer, having taken into account the Coroner's repeated reassurances that he intends to hold a 'full and proper' inquest would struggle to accept that the Coroner was really saying he didn't think there was anything to be gained by holding an inquest, since all of the Coroners actions up to that point indicated that he considered the inquest to be important.

[34] I also consider that the fair minded and informed observer would take account of the fact that the Coroner had spent several years conducting preliminary hearings and gathering and disseminating a large body of material in preparation for this inquest. Allied to that is that fact that the Coroner previously held an inquest inquiring into the death of Claire Roberts, who's death was examined by the Inquiry and who's second inquest was directed by the Attorney General for Northern Ireland. This inquest proceeded without hearing oral evidence from any of the medical or nursing staff who treated Claire. The Coroner, instead, read their statements and evidence to the Inquiry. The Coroner's inquest findings were considered fair and proper by Mr and Mrs Roberts. The fair minded and informed observer is bound to consider that this sits at odds with the allegation that the Coroner thinks nothing is to be gained by holding an inquest into the death of Raychel.

[35] A fair minded and informed observer would also be bound to conclude that the actions of the Coroner in agreeing to the NoK request to admit the entirety of the Inquiry report is not consistent with a Coroner who bears "animus" to the NoK or has pre-determined the Inquest in some unspecified way since he changed his mind, in favour of the NOK, having been persuaded by the merits of their argument relating to an important matter in this inquest.

[36] A fair minded and informed observer would undoubtedly want to consider the way in which the Inquest had been conducted up to the point where the exchange in question took place. Such analysis would reveal that the Coroner (as outlined above) had involved himself extensively in questioning and probing witnesses - particularly Mr Makar - for which, rather counter to the argument advanced by them, he was praised by counsel for the NoK. Further analysis would also reveal that when he opened the case the Coroner made it clear, directly to the Ferguson family in open court, that he was committed to holding a proper inquest. Again, this is at odds with the assertion that the Coroner believes the inquest to be of no utility.

[37] A fair minded and informed observer might also take account of the fact that the NoK never suggested that the inquest should be paused to allow the PSNI investigation to take place before the inquest started and their counsel did not object to the witnesses being warned about their legal right not to answer certain questions.

[38] It seems to me, when everything is considered properly, the NoK complaint can be distilled down to their perception of an exchange between the Coroner and their Counsel over a matter of crucial importance to the inquest. Robust exchanges between the Bar and the Bench are hardly unusual within the justice system. The Coroners Court, notwithstanding its inquisitorial format, is no exception. While professional and experienced lawyers may well take no issue with, and may even relish, robust and at times intemperate judicial questioning, non-legal bystanders, may interpret these exchanges very differently. The case law on bias makes it clear that the fair minded and informed observer is to be considered to be more resilient and understanding:

> "The observer who is fair-minded is the sort of person who always reserves judgement on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious … Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. … But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially."

[39] Having carefully considered all those submissions presented to me, a transcript of the inquest and the relevant case law I can safely conclude that the NoK assertion that I should recuse myself because of bias must be rejected. I conclude that the test for bias, of any type, is not met, there being no 'real danger' of the tribunal of act being biased.

[40] Finally, I make it clear once again, that I harbour no bias against the Ferguson family, and I utterly reject any allegation of bias. I respect that the family wish to engage in a proper inquest and I have made it clear on a number of occasions that I am absolutely determined to discharge my legal responsibility to conduct a full, fair, and fearless inquest into the circumstances of Raychel's death and to ascertain in accordance with the relevant law how and in what circumstances Raychel came by her death.

Coroner J McCrisken
9 May 2023