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IN THE CORONERS COURT FOR NORTHERN IRELAND

CORONER ANNE-LOUISE TOAL

IN THE MATTER OF AN INQUEST TOUCHING THE DEATH OF HUGH GERARD CONEY

RULING ON WHETHER ARTICLE 2 APPLIES TO THE INQUEST

Introduction

[1] Hugh Gerard Coney ("the deceased"), a detainee at the Maze/Long Kesh internment camp, died on 6 November 1974, as a result of injuries he received when he was struck by a bullet whilst attempting to escape with a number of other detainees. This inquest will, by virtue of my ruling of 18 April 2023, be heard by a jury who will be directed to address the four statutory questions as set out at Rule 15 of the Coroners (Practice and Procedure) Rules (NI) 1963 ("the 1963 Rules").

[2] In light of that ruling, I requested submissions on any adjustments that may be required given that the matter would be heard by a jury rather than a Coroner sitting alone. This is the first legacy inquest which will be heard by a jury in a considerable period, and the first since the five year plan and legacy inquest case management and witness protocols were introduced.

[3] An issue was raised in the submissions provided on behalf of the MOD, PSNI and NIPS, which are Properly Interested Persons (PIPs), as to whether the procedural duty within article 2 was now engaged in the inquest in light of the Supreme Court decision in *McQuillan*[1] and how this may relate to both the questions the jury would be asked to address and the proposed scope of the inquest.

[4] In the intervening period the decision of the Supreme Court in *Dalton*[2] was handed down, on 18 October 2023. It dealt with article 2 in the realm of legacy inquests. Therefore, I gave the PIPs a further opportunity to supplement their written submissions in light of what was said in that judgment.

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[1] [2021] UKSC 55

[2] [2023] UKSC 36

[5] I received a number of helpful written submissions from all the PIPs addressing this issue and convened an oral hearing on 18 December 2023 so that additional oral submissions could be given focussing on a number of discrete issues namely:

(a) Whether *McCaughey*[3] has been overruled?

(b) Whether the circumstances of this particular case are governed by *McCaughey* and/or the line of jurisprudence culminating in *Dalton*?

(c) The "Convention values" test.

(d) The approach of other Coroners to the issue in other recent legacy inquests in this jurisdiction.

(e) Whether it is necessary to determine if article 2 applies at this stage?

[6] At the hearing I was also provided with a number of authorities in support of the various positions.

[7] I thank all counsel for both their helpful written and oral submissions which I found useful in reaching a determination on this issue.

Submissions made on behalf of the parties

[8] As outlined above, I received detailed submissions from counsel, both oral and written, on the issue of whether article 2 is engaged in this inquest. I do not intend to rehearse all of the arguments made here, but rather I have attempted to distil the detailed arguments into a number of succinct points made on behalf of each PIP.

Submissions made on behalf of the MOD/PSNI

[9] The MOD and PSNI submit that this inquest should not be considered to be an article 2 inquest. They argue that the line of jurisprudence culminating in the recent decision of *Dalton* supports that assertion. They argue that the Supreme Court has held the article 2 procedural obligation is only capable of applying to a death that occurred within an outer period of 12 years before the Human Rights Act 1998 ("the 1998 Act") came into effect, on 2 October 2000, unless the Convention Values

[3] [2011] UKSC 20

test (as initially set out in *Šilih v Slovenia*[4] and later elaborated on in *Janowiec v Russia*[5]) is met and they argue it is not.

[10] As this death occurred in 1974, some 26 years before 2 October 2000, they say this death falls outwith the temporal scope for article 2 to apply. They note that in *Dalton* careful consideration was given to the cases of *Šilih*, *Janowiec* and *McQuillan* and the recent decision of *McQuillan* was approved.

[11] They say that to rely on the earlier dicta of the Supreme Court in *McCaughey*, as the NOK seek to do, is to fail to recognise the developments in the understanding of the law, by both the Supreme Court and the European Court of Human Rights ("the Strasbourg Court"), since it was handed down. Namely, the genuine connection test, as originally set out in *Šilih,* and grappled with by the Justices in *McCaughey*, will require (in addition to the other requirements as set out in *McQuillan* and *Dalton*) a temporal connection, normally ten years pre-commencement date and not extendable beyond 12 years, and it is no longer enough that a significant proportion of the investigation was conducted after the critical date (2 October 2000). In short, they argue that the law on article 2 has moved on since *McCaughey* was decided, particularly as a result of the commentary provided in *Janowiec* on temporal connection, which was considered in detail in a series of subsequent Supreme Court decisions.

[12] They also note that *McCaughey* would have fallen within the temporal connection envisaged in *McQuillan* if the ten year temporal issue had been a feature of the jurisprudence at that time.

[13] As such, they argue the genuine connection test is not satisfied in this case, the death occurring in 1974 and falling outwith the temporal limits set out in *McQuillan* and confirmed in *Dalton*, nor is the *Brecknell* revival applicable, and therefore article 2 does not apply to the inquest.

[14] If their submission is accepted, they submit that this impacts on both the nature of the questions to be considered by the jury and the proposed scope of the inquiry in the inquest. They say if article 2 is not engaged this is a "*Jamieson*"[6] inquest in that the statutory question of "how" is to be interpreted in the narrower context of "by what means" rather than the broader "*Middleton*[7]" interpretation of "by what means and in what circumstances."

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[4] [2009] 49 EHRR 37

[5] [2013] 58 EHRR 30

[6] *R v Coroner for North Humbershire and Scunthorpe, ex parte Jamieson* [1995] QB 1

[7] [2004] 2 A.C. 184

[15] As a result, they argue that a number of changes should be made to the existing provisional scope document to reflect that this is a *Jamieson* inquest, in particular removing issues such as the justification for the use of force, planning and events which occurred *after* the death.

[16] They argue this decision on whether this is an article 2 inquest should be taken at this juncture to enable the issues on scope to be decided.

The NIPS submissions

[17] The submissions on behalf of NIPS echo those of the MOD and PSNI. They point out that the death occurred well outside the 12 year outer temporal limit which forms part of the genuine connection test, outlined in *McQuillan* and confirmed in *Dalton,* for the imposition of the article 2 obligation.

[18] They further assert the Convention values test, which they note is an "extremely high hurdle", is not met in the circumstances of this case and they quote from Dalton to exemplify the "extraordinary situations" outlined in *Janowiec* which may satisfy the test, such as war crimes, genocide or crimes against humanity.

[19] They submit that the *Brecknell* revival test cannot be relied upon as there has been a considerable passage of time since the deceased's death and there is no clear evidence of any new information.

[20] They argue the decision on article 2 should be taken now, given the impact this will have on the issues of scope in light of their contention this is a *Jamieson* type inquest, rather than a *Middleton* type inquest.

The Next of Kin submissions

[21] The Next of Kin acknowledge the developments in the law in light of the decisions in *McQuillan* and *Dalton*. However, they argue that *McCaughey* was not departed from in *McQuillan* and subsequent case law and is binding on this court.

[22] They argue that *McCaughey* is a binding authority for the proposition that an inquest must be article 2 compliant in circumstances where the evidence indicates the death was caused by the acts or omissions of state agents and a decision has been made to hold an inquest after the commencement of the 1998 Act. They argue that this obligation is unaffected by the developments on temporal connection discussed in *McQuillan* and the subsequent authorities.

[23] They further argue that Convention rights are binding on the state as a matter of international law.

[24] Like the other PIPs, they address the Convention values test. They argue that irrespective of any temporal issues, the Convention values test, which does not rely

on the temporal scope as set out in the "genuine connection" test, is engaged in the circumstances of this death, which they say constitutes the deliberate taking of life by an agent of the state in circumstances where the use of lethal force was sanctioned, albeit circumscribed. They argue there are features of the death which relate to the core standards which govern state activity. They recognise that test presents an extremely high hurdle (as highlighted in the case of *Re McGuigan*[8] and in *Re Finucane*[9]). They highlight Article 3 of the Geneva Convention, which applies in the context of non-international armed conflict, in support of their proposition that the circumstances of this death engage the Convention values test. They say that the intentional taking of life by agents of the state in circumstances where it cannot be justified, and where the deceased was under the care and control of the state having been detained by an executive order without trial, amounts to homicide and its prohibition is a peremptory norm of general international law. They argue that even a suspicion that the fundamental values of the Convention are in play is sufficient to animate the article 2 procedural obligation.

[25] They agree that the engagement of article 2 will have a bearing on scope.

The decisions in McCaughey and Dalton and their application

[26] I do not propose to set out in detail the history of the procedural limb of article 2 and the evolution of the jurisprudence on the "detachable" obligation to carry out an effective investigation into the circumstances of certain deaths beginning with the decision in *Šilih* and progressing through to the most recent decision of *Dalton*. This has already been very ably charted in all the submissions provided by the various counsel in this inquest, and I am grateful for their efforts in doing so.

[27] It is prudent however, given the arguments raised by the PIPs, to consider again what the Supreme Court said in both *McCaughey* and in *Dalton* in relation to the application of article 2, and to look at the subject matter of what each Court was asked to decide on each occasion.

[28] In *Dalton,* the family of the deceased was challenging a decision by the Attorney General not to direct the holding of an inquest. In *McCaughey*, the decision to hold an inquest had already been made and the family was challenging the scope of that inquest.

[29] *McCaughey* was heard by the Supreme Court after the handing down of *Šilih* in 2009, which introduced the concept of the detachable procedural/investigative obligation, but before clarification was provided by the Strasbourg Court in *Janoweic* in 2013 as to the temporal scope of the genuine connection test. The inquest

[8] [2017] NIQB 96

[9] [2017] NICA 7

concerned the deaths of Martin McCaughey and Dessie Grew, who were shot and killed by members of the British Army on 9 October 1990. The appellants sought a declaration that the scope of the inquest, which had already been directed but not opened, should comply with article 2 of the Convention and therefore should extend to an examination of the planning and control of the operation that led to the deaths. The issue arising in the appeals was whether the appellants were entitled to bring a domestic claim under the 1998 Act, which came into force on 2 October 2000, in respect of deaths that had occurred before the commencement of the 1998 Act. At that time there was a conflict between the decision of the House of Lords in *Re McKerr*[10], which had held that the procedural obligation to investigate a death was triggered by the death and that investigations into deaths occurring before 2 October 2000 were not within the reach of the 1998 Act as it was not retrospective, and the decision of the Strasbourg Court in *Šilih.* In *Šilih* the Grand Chamber ruled that article 2 imposed, in certain circumstances, a freestanding (detachable) obligation to investigate a death which applied even though the death occurred before the Member state had ratified the Convention.

[30] In *McCaughey,* the Supreme Court, by a majority (Lord Rodger dissenting), allowed the appeal and held that the coroner holding the inquest must comply with the procedural obligations under article 2. The Supreme Court considered the decision in *Šilih*. The Justices expressed their concerns about the uncertainty regarding what circumstances were required to activate the detachable obligation, however the majority agreed that if the state had decided to hold an inquest after the commencement of the 1998 Act, it was under a freestanding obligation to ensure that it complied with the procedural obligations of article 2.

[31] It is clear that the Court was aware that it was not only this inquest that required a decision on the applicability of article 2. Lord Phillips in his introduction at para 7 said:

> "These appeals relate to two of a significant number of deaths that occurred in Northern Ireland well before 2 October 2000 in respect of which inquests are still pending"

[32] He continued at para 11:

> "What is clear is that a decision of this Court is needed to prevent the delay and expense involved in interlocutory in-fighting in this and future inquests raising the same issue" [my emphasis]

[10] [2004] UKHL 12

[33] Lord Phillips went on to consider what the Grand Chamber determined in Šilih:

> "49. The meaning of each of the three sentences of para 163 is far from clear. The concept of a "connection" between a death and the entry into force of the Convention for the state in question is not an easy one if, as seems to be the case, this connection is more than purely temporal. The final sentence of the paragraph is totally Delphic and would seem designed to prevent the closing of the door on some unforeseen type of connection. I shall say no more about it.
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> 50. The second sentence is designed to explain the meaning of the first. In part the explanation seems to me to be simple. The obligation to comply with the procedural requirements of article 2 is to apply where "a significant proportion of the procedural steps" that article 2 requires (assuming that it applies) in fact take place after the Convention has come into force. This appears to be a free standing obligation. There is no temporal restriction on the obligation other than that the procedural steps take place after the Convention has come into force. Thus if a state decides to carry out those procedural steps long after the date of the death, they must have the attributes that article 2 requires."
> [my emphasis]

[34] For present purposes, it is his conclusion at paras 51 and 56 that are most relevant:

> "51. It is this obligation that is of potential relevance in the current case. The United Kingdom is not under a continuing obligation under article 2 to carry out an investigation into the deaths over 20 years ago of Martin McCaughey or Dessie Grew. But an inquest is going to be held into those deaths. As a matter of international obligation it is now apparent that the United Kingdom has come under a free standing obligation under article 2 to ensure that the inquest complies with the procedural requirements of that article, at least in so far as this is possible under domestic law. [my emphasis]…
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> 56. The precise meaning of the most difficult passage of the Grand Chamber's judgment, which I have analysed at para 52 above, has no implications for the United

> Kingdom, either directly or by analogy, for we ratified the Convention over half a century ago and incorporated it into our domestic law over a decade ago. What matters is that this country is under an international obligation under the Convention to ensure that, if it does hold an inquest into an historic death, that inquest complies with the procedural obligations of article 2."

[35] Lord Hope, although of the view that there was no right in domestic law to an article 2 compliant inquest in respect of deaths occurring prior to 2 October 2000, agreed with the majority that where the state has now taken the additional step of deciding to carry out an investigation post commencement into a pre-commencement death, then it must meet the procedural requirements of article 2, as explained in *Middleton*. When answering the question of whether, where the state decides to carry out an investigation into a pre-commencement death where agents of the state are or may be in some way implicated, the investigation which it carries out must meet the procedural requirements of article 2, he said:

"76. As I see it, however, the second question can and does admit of a different answer. We are told by Strasbourg that the procedural obligation, as now understood, has a life of its own as it is detachable from the substantive obligation. Furthermore, there is no need for a trigger to bring the obligation into operation in this case, as it has been decided that an inquest is going to be held into these deaths. The objection that this would be giving retrospective operation to section 6 of the 1998 Act does not arise. The question whether the inquests must satisfy the procedural requirements of article 2 otherwise they will be unlawful in terms of that section is being directed to something that has yet to take place. The answer to it is not to be found in McKerr, as the House treated the procedural and the substantive obligations in that case as inseparable.

77. Lord Rodger says (see para 155, below) that to approach the issue in this way does not reflect the decision in Šilih. I, for my part, think that it does. It is true that it does not say this in terms. What the decision seeks to do in para 163 is to identify those pre-ratification deaths that will bring the procedural obligation into effect after the date of ratification. Its concern is with the circumstances that the Strasbourg Court will accept jurisdiction in such cases. The question whether there is an article 2 obligation to investigate these deaths in domestic law is a different question. But the holding of inquests into the deaths in this case will be a procedural act which the state itself has decided should take place and, as the deaths were the result of acts by agents of the state, the circumstances meet the test for an article 2 inquiry that was identified in R (Middleton) v West Somerset Coroner [2004] 2 AC 182, para 3.

78. These pre-commencement deaths could not have given rise to any violation of the obligations of the state under article 2 in domestic law. But I do not think that we can ignore the possibility that they may have violated the deceased's article 2 rights under the Convention. That certainly is how the matter would be viewed in

Strasbourg. There is no doubt that these deaths fall within the jurisdiction of the Strasbourg court, as the events that have happened since the appellants lodged their application with that court have shown. The effect of Šilih is to breathe life into the procedural obligation post-commencement in a way that domestic law can recognise and give effect to.

79. It may be said that to extend the procedural obligation to these cases would be to give a more generous interpretation to the judgment in Šilih than it deserves. I think however that it would be unduly cautious for us not to do this. The whole idea of bringing rights home was to enable effect to be given to the Convention rights in domestic law. I do not think that we need any further guidance on this matter from Strasbourg. As there is nothing in the wording of the 1998 Act to prevent us from directing that when he conducts these inquiries the Coroner must comply with the procedural obligation under article 2, I would hold that we should. " [My emphasis]

[36] Lady Hale, at para 93, said:

> "This case fits into the limited class of case identified by Judge Lorenzen in Šilih. Accepting that this inquest must comply with the procedural requirements of article 2 does not require that old inquests be re-opened (unless there is important new material) or that inquiries be held into historic deaths. The one case which does not quite fit into Judge Lorenzen's formula is where there is a death before the relevant date and the decision to hold an inquest or other inquiry is taken after that date. To my mind that would still fit into the criterion of "a significant proportion of the procedural steps required by this provision . . . will have been . . . carried out after the critical date." In other words, if there is now to be an inquiry into a death for which the state may bear some responsibility under article 2, it should be conducted in an article 2 compliant way." [my emphasis]

[37] Lord Brown, at para 101, reached a similar conclusion and Lord Dyson at para 140 reached the same outcome.

[38] It has been argued by both NIPS and the MOD that the path taken by the Supreme Court since the clarification by the Grand Chamber in *Janowiec* culminating in their decision in *Dalton* makes clear that *McCaughey* should not now be considered the correct prism through which I should decide whether article 2 applies. They argue that the reasoning and test provided by the Supreme Court in *Dalton* regarding the limits of the temporal scope, should now prevail.

[39] The Next of Kin however argue that *McCaughey* has not been overruled and is applicable to the situation before me, in which a decision has been made by the state to have an inquest after the commencement of the 1998 Act.

[40] It is clear that *Dalton* has set the parameters for the positive obligation on public authorities to investigate an individual's death under article 2, as given effect in the UK by the 1998 Act, where the death occurred before the Act came into force.

[41] The Supreme Court confirmed its decision in *Re Finucane* that the procedural obligation to investigate deaths under article 2 does not apply to deaths which occurred before the commencement date unless either there was a "genuine connection" between the death and the commencement date, or the "Convention values" test was satisfied, and as such did not apply to the death of Mr Dalton, which occurred on 31 August 1988 and whose death did not meet the Convention values test.

[42] The *Dalton* judgment confirms that the "genuine connection" test is made up of two conjunctive criteria, <u>both</u> of which must be satisfied before a genuine connection can be said to exist:

The death must have occurred within a reasonably short time of the critical date – this was normally ten years but could be extended to up to 12 years (as outlined in *McQuillan)* if certain compelling circumstances were present; and

A sufficient amount of the investigation must have occurred after the critical date, or it ought to have occurred after that date.

[43] The Justices also provided guidance on what would be required to satisfy the separate Convention values test, which they confirmed imposes an extremely high hurdle for someone seeking to rely on it, namely matters such as war crimes, genocide or crimes against humanity.

[44] However, *McCaughey* was considered in some detail in *Dalton* and the Justices did not seek to disturb or criticise the specific aspects of that judgment which dealt with the applicability of article 2 where a decision has already been made to hold an inquest post the commencement of the 1998 Act (2 October 2000) in respect of deaths which occurred before that date, oftentimes many years before. Although they were not asked to do so, they did not take the opportunity to clarify the onwards interpretation of *McCaughey* to those inquests where the death falls outside the temporal scope as was clarified in *Dalton*, being at most 12 years before 2 October 2000, despite it being clear that the court in *McCaughey* did not have the benefit of the clarification on temporal scope that was later provided in *Janoweic*.

[45] In short, it appears to me that although the parameters (in particular those of the temporal scope) for the applicability of article 2 have been settled in *Dalton*, inquests such as Coney, where the state has specifically taken a decision to hold an

inquest after 2 October 2000 into a death which occurred before that date, have been placed in a different category by the Supreme Court, and are not subject to the same temporal scope limitations as set out in the genuine connection test outlined in *Dalton*. In *McCaughey* a decision had already been made to hold an inquest after 2 October 2000 about deaths which occurred before that date, whereas in *Dalton* no such decision, to hold a post 2 October 2000 inquest, had been taken.

[46] Support for this proposition can be found in the specific consideration of *McCaughey* by a number of the Justices in *Dalton*. It is not the case that *McCaughey* was overlooked, or was specifically interpreted in light of the death in that case having occurred within the ten year limit – careful consideration was paid to it in the *ratio* of the Justices, together with an acknowledgement of the ruling that article 2 should apply to those inquests where a decision had been made to hold an inquest post 2 October 2000.

[47] At para 27 of *Dalton,* Lord Reed first refers to *McCaughey*, noting the deaths occurred on 9 October 1990 "slightly less than ten years before the commencement date." However, he pointedly highlights not only did the majority hold that that inquest was subject to the procedural obligation imposed by article 2 but at para 28 he said, "it was, however, generally accepted that inquests held after the Human Rights Act came into force should comply with the relatives' article 2 rights, even if the death occurred before the commencement date." No qualification was given that such a general acceptance should now be read in light of the temporal scope requirements as set out in the *Dalton* judgment.

[48] Again, at paras 122-124, Lord Hodge, Lord Sales and Lady Rose, in their combined judgment, examined *McCaughey* during their consideration of the detachable procedural obligation under article 2. They highlighted at para 123, that Lord Phillips in *McCaughey*, when analysing the Grand Chamber's judgment in *Šilih*, recognised the United Kingdom was under an international obligation under the Convention to ensure that, "<u>if it carries out an inquest into a historic death</u>, that inquest complies with the procedural obligations of article 2." [my emphasis]

[49] At para 124 of *Dalton* they highlight this additional aspect of the reasoning in *McCaughey,* namely that the state had decided to hold an inquest post 2 October 2000, in the judgments of Lady Hale, Lord Hope and Lord Brown:

> "124. … [Lord Hope in McCaughey] concluded that while there was no domestic law obligation to carry out an article 2- compliant investigation before 2 October 2000, the state had decided to hold an inquest into the deaths with the result that the invocation of the free-standing procedural obligation, which was detached from the substantive obligation under article 2, did not involve a retrospective application of section 6 of the HRA (paras

75-80). Lady Hale (paras 90-93) and Lord Brown (paras 100-101) adopted an essentially similar approach."

[50] Although it may be argued that the deaths of Martin McCaughey and Dessie Grew in the *McCaughey* case were in fact within what is now established to be the limitations of the (ten year) temporal scope, there is no clarification provided to the effect that those other inquests, explicitly embraced within the *McCaughey* judgment and highlighted in these paras in *Dalton*, should be treated in a different manner post *Dalton*.

[51] Similarly, there is no such clarification provided when Lord Leggatt deals with *McCaughey* at para 240.

[52] This could be said to be creating a particular category of death – namely one in which the procedural aspect of article 2 is engaged in holding an inquest, even though the death falls outwith the temporal scope which was confirmed in *Dalton*.

[53] The important distinguishing factual feature of this category is the existence of a decision to hold an inquest which will take place after 2 October 2000 (as all the cases in issue involve evidence which suggests the state may have been responsible or partially responsible for the deaths).

[54] I am also conscious of the observations made in *Dalton* about the importance of legal certainty when considering whether *Re Finucane* should be overruled.

The Convention values test

[55] The Next of Kin also argue that the Convention values test applies in this case, such as to engage article 2.

[56] At the oral hearing they supplemented the written submissions to further argue that in order to implement the policy of internment the UK government believed it necessary to invoke article 15 of the Convention to derogate from article 5 - they say this is of importance as the right of derogation can only be invoked in time of war or other public emergency threatening the life of the nation.

[57] They highlighted a number of cases before the Strasbourg Court that hold that even where there is such a valid derogation, that does not absolve the state from observing its other obligations under other international instruments.

[58] They say that one of those international instruments that is engaged is the Geneva Convention and in particular Article 3.

[59] They say Mr Coney was *hors de combat* at the time, unarmed, detained by the state and shot dead, trying to escape in the context of a conflict which the government viewed as threatening the life of the nation.

[60] They say by virtue of this, the Convention values test is engaged. They argue such a test is not required to be met in order for the procedural obligations under article 2 to apply to the proceedings, but rather the test is whether there is a suspicion that the Convention values test may be engaged.

[61] A number of cases before the Supreme Court have considered the Convention values test since it was first postulated (albeit then in very vague terms) in *Šilih*. Most recent consideration of the test arose in *Dalton*.

[62] Lord Reed, at para [21], said:

> "21. In Janowiec the European court also clarified the Convention values test. It accepted that there could be "extraordinary situations" which did not satisfy the genuine connection test, but where the need to ensure the real and effective protection of the guarantees and the underlying values of the Convention would constitute a sufficient basis for recognising the existence of a connection (para 149). It stated at paras 150- 151:
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> > "the Grand Chamber considers the reference to the underlying values of the Convention to mean that the required connection may be found to exist if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity ... The heinous nature and gravity of such crimes prompted the contracting parties to the Convention on the Non- Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that they must be imprescriptible and not subject to any statutory limitation in the domestic legal order."

[63] Lord Leggatt at para [262] noted:

> "Given the apparent restriction of the "Convention values" test in Janowiec to serious crimes under international law, such as war crimes, genocide and crimes against humanity, I would not feel able to say that the facts of Finucane came within this category."

[64] Lord Burrows and Dame Keegan, at para [336] considered:

> "336. We would not go so far as to suggest that the facts of Finucane met the "convention values" test and to that extent we disagree with Stephens J. That test imposes an extremely high hurdle. What is principally in mind are serious crimes under international law, such as war crimes, genocide or crimes against humanity. In McQuillan, while not necessary for the decision, the Supreme Court considered it likely that acts of torture by the state would also satisfy the test."

[65] At para [132], Lord Hodge, Lord Sales and Lady Rose also highlighted those passages of the judgment of the Strasbourg Court in *Janoweic* which alluded to such a test as an "exceptional" other category where "the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention."

[66] I note that in *Dalton* the Justices did not believe the extreme circumstances of the *Finucane* case would satisfy the Convention values case.

[67] The other PIPs pointed to the extreme circumstances of a larger dimension stated as being required to satisfy the Convention values test and they argued that level of exceptionality was not present in the facts of this case.

Ruling

[68] All PIPs were in agreement that the determination of whether article 2 was engaged in this inquest would have an impact on scope. Furthermore, it is axiomatic that it will also have an impact on the interpretation of the question of "how" the deceased died, which will be required to be answered by the jury in light of Rule 15 of the 1963 Rules.

[69] Given that this matter is to proceed before a jury and not a Coroner sitting alone, in order to ensure the efficient and effective running of the hearing, I find it is preferable to decide at this stage whether article 2 is engaged given the potential implications on the provisional scope document, the effect on the interpretation of the statutory questions, and the consideration of the necessity of certain witnesses. This is notwithstanding the wide discretion afforded to me in issues such as determination of scope.

[70] I found both sets of opposing arguments for and against the application of article 2 to be well constructed and attractive. This has been a difficult decision. On the one hand *Dalton* established firmly that there is a ten year temporal restriction on the article 2 obligation on the state to investigate a death which occurred before

2 October 2000 (which may be extended in certain circumstances to 12 years). That clarification was not available when *McCaughey* was decided. On the other hand, the relevant parts of *McCaughey* have not been criticised or overruled in the subsequent decisions outlined above. While *McCaughey* concerned a death which was within ten years of 2 October 2000, that was not part of the discussion (in the sense of being within the limits of the temporal scope) in that case, as those limits for the detachable obligation were not clarified until several years later. The crux of the *ratio decidendi* is that even though the death occurred before 2 October 2000, the state had made a decision to hold an inquest after that date and it ought therefore to be article 2 compliant.

[71] After careful consideration of all the circumstances, together with the submissions and relevant authorities, I have concluded that *McCaughey* has not been overruled nor even disturbed by the more recent decisions outlined above culminating in *Dalton* and applies to the specific factual context before me, where the death occurred before 2 October 2000 but the decision to hold an inquest has been taken by the state after that date.

[72] I find, for the reasons outlined above, the decision of *McCaughey* is binding on me in the current context and that article 2 applies to this inquest in the manner outlined in *Middleton,* notwithstanding that this death occurred in 1974.

[73] In light of this decision, it is not necessary for me to consider whether the distinct Convention values test is met so as to engage article 2, but I am cognisant of the extremely high hurdle it poses.