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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY DOROTHY JOHNSTONE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE ATTORNEY GENERAL FOR NORTHERN IRELAND

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DEENY J

[1] This is an application by Dorothy Johnstone, the daughter of the late Sean Eugene Dalton, to bring into court and quash by certiorari the decision of the Attorney General for Northern Ireland not to exercise his powers pursuant to Section 14 of the Coroner's Act (NI) 1959 by directing the holding of a further inquest into the death of Mr Dalton. Leave was granted by Maguire J on the ground that it was arguable that a fresh inquest was necessary for the purpose of discharging the investigative obligation on the State under Article 2 of the European Convention on Human Rights and that the Attorney had misdirected himself on this issue and, if he had properly directed himself, would have directed a fresh inquest.

[2] At the full hearing of the matter Ms Fiona Doherty QC and Mr Malachy McGowan appeared for the applicant. Mr David Scoffield QC appeared for the Attorney. I am grateful to counsel for their thorough and helpful written and oral submissions.

Factual background

[3] In 1988 the late Mr Dalton was the father of six children, including the applicant, of whom two were still living at home with him. He had been recently widowed. His neighbour, referred to at the hearing before me as person A, had been absent from his home for some time by 31 August 1988. It has now become clear that he had been kidnapped, with another man, by the Provisional IRA and held by them. The IRA had planted an explosive device in the flat. It seems likely that the intended victims were police officers who would be lured to the flat either by the

abduction of the occupant or by other steps that were taken between 25 and 31 August.

[4] These latter circumstances were unknown to Mr Dalton who was an entirely innocent neighbour of A, the occupant of the flat at 38 Kildrum Gardens in the City of Derry. He and two other neighbours, Sheila Lewis and Thomas Curran, were concerned about A. They gained entry to his flat at around 11.50 am on 31 August 1998 through a window but, tragically, having done so triggered an explosive device left by the terrorists. Mr Dalton and Ms Lewis were killed immediately and Thomas Curran later died of the injuries he received.

[5] There was an investigation of this crime and these deaths by the Royal Ulster Constabulary. The IRA admitted responsibility for placing the device in the flat.

[6] An inquest into the death of Mr Dalton was held on 7 December 1989 before the Coroner for the District of Londonderry. He found that Mr Dalton:

> "died from injuries received when an explosive device was detonated at No. 38 Kildrum Gardens, Londonderry around 11.50 am on 31 August 1988. The deceased's body was buried in rubble caused by the explosion."

[7] The police had gathered some 45 pages of statements relating to the death and the explosion which were proved in evidence before the Coroner or taken as read pursuant to the statutory provisions. The explosion had been a substantial one in this gable end flat of a three storey terraced block, causing three outer walls to collapse and a partial collapse of the roof above. The deponents included person A and another man abducted by the IRA.

[8] The statements included in the court papers are redacted to a degree having reached the parties and thus the court through third parties. It was agreed that this did not present a problem for the application before the court.

[9] In 2005 the applicant's brother, Mr Martin Dalton, made a complaint to the Police Ombudsman for Northern Ireland (PONI). In support of that he made a three page statement on 27 September 2005. In that he contended, inter alia, that there was a rocket and shooting attack at Rosemount RUC police barracks on 25 August 1988 and that the car involved was later found outside their block of apartments in Kildrum Gardens. A male ran away from it shouting there is a bomb in it. The car was later burnt out but the police never came to the scene.

[10] He further drew attention to the fact that there was a robbery on 27 August 1988 in the Creggan and that a card was dropped by the robbers with the details of person A who lived at 38 Kildrum Gardens.

[11] Furthermore he contended that on 30 August there was an abduction of a friend of person A and a phone call to the police suggesting that he was being held in Kildrum Gardens.

[12] It was Mr Dalton's contention that this was all done to lure the police or army to the scene. He then summarised his complaints as follows.

> "(i) They (the police) failed in their duties to properly investigate the death of my father and Mrs Lewis on 31 August 1988.
>
> (ii) They failed in their duties by knowingly allowing an explosive device to remain in a location close to where the public had access, this was done in order to protect a police informant.
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> (iii) They failed in their duties to advise the local community or its leaders of possible terrorist activities in the area.
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> (iv) Under Article 2 of the European Convention and Human Rights, which states, 'everyone's right to life shall be protected by law'. The police failed in their responsibilities to uphold my father's right to life."

[13] I note that this statement refers to his solicitors having written in September 1991 to the Chief Constable requesting information on a number of these points. This elicited the reply that the matters were still under investigation.

[14] While PONI was still investigating this matter the applicant's solicitor wrote to the Attorney General on 12 April 2012 indicating an intention to seek a fresh inquest into the matter. That letter was acknowledged on 16 April.

[15] The 2005 complaint was taken up by the Police Ombudsman for Northern Ireland and investigated by his office. This investigation was prolonged and the Ombudsman changed in the course of it so that the ultimate Public Statement pursuant to Section 62 of the Police (NI) Act 1998 was published by Dr Michael Maguire on 10 July 2013.

[16] The Ombudsman's report was some 63 pages in length and carefully examined the course of events. In the executive summary the Ombudsman recorded that the scope of his investigation was to determine if there was any evidence of police misconduct or criminality in relation to the matters raised. (1.4). His investigation was wide-ranging and thorough. He identified 65 potential witnesses of whom he was able to interview 42 and recorded 23 further statements and secured 372 documents. Some retired police officers provided valuable information and context to the investigation. (1.5 and 5.4) However, he noted at 1.6 that his "investigation was hampered by both the refusal of a number of retired police officers, some formerly of senior rank, to co-operate and by the lost investigation documentation".

[17] At 1.10 one finds the following:

> "The conclusion of my investigation is, that whilst I cannot be certain the police knew there was a bomb specifically at 38 Kildrum Gardens, there is strong evidence that the police had sufficient information and intelligence to identify the location of the bomb, that they ought to have known it was in the vicinity of 38 Kildrum Gardens and that steps could and should have been taken to mitigate the threat and to warn the local community. These steps were not taken and the focus of the police effort appears to have been the protection of officers from the terrorist threat.
>
> 1.12 Whilst the protection of officers is obviously a critical concern, there is also an obligation on the police to protect the lives of and reduce the risk of injury to the public. The failure to warn local people had tragic consequences for Eugene Dalton, Sheila Lewis and Gerard Curran. It is my conclusion that the police failed in their duty to protect the victims by allowing an explosive device to remain in a location that presented a real and immediate risk to life and further, that they failed to mitigate that threat or to advise the local community or its leaders of probable terrorist activity in the area.
>
> 1.13 I have found no evidence that the police failed to act in order to protect an informant. In addition, I believe that on the balance of probabilities, the police did not do anything or failed to do anything in order to protect an informant."

The Ombudsman went on to find that the police murder investigation was flawed and incomplete in several important respects. But he also pointed out that at this time there were 73 areas in and about the city which were "out of bounds" to police and in July and August 1988 alone more than 160 security related incidents were recorded.

[18] On 25 July 2013 the applicant's solicitor wrote to the Attorney enclosing the PONI report and again requesting a fresh inquest into Mr Dalton's death. On 28 August the Attorney's office replied with several requests for information including the original inquest papers.

[19] The applicant's solicitors then wrote to the Public Records Office on 10 September 2013 seeking the inquest papers.

[20] The Ombudsman's strongly worded conclusions had proved controversial with serving and former police officers. They elicited a response from the Northern Ireland Retired Police Officers' Association in October 2013. This Association was critical of PONI both for the length of time, eight years, which it had taken to produce the statement and the fact that three variant draft reports had existed over that space of time. The Association justified the inaction of the police at the time, principally on the basis that the police were trying to identify intelligence as to the precise location of any booby trap advice. Such intelligence might come from an agent in place.

[21] The applicant's solicitor renewed, on 12 November 2013, a request to the Attorney General for a fresh inquest. The letter from his office of 13 January 2014 records that the Attorney "has concluded, on the basis of the evidence presented to him, that the holding of a new inquest would not, at present, be advisable". At this stage he had the PONI report and the Retired Police Officers' Association response to which I have referred. He also had a copy of the pleadings in civil proceedings which had been issued by the family against the police. He did not have the original inquest papers time. The letter went on:

> "In light of the above, it is difficult to see what the utility of a new inquest would be and the Attorney has, therefore, decided that the holding of a new inquest is not advisable. The Attorney further notes the existence of civil proceedings and the possibilities that these may shed further light on the circumstances of Mr Dalton's death."

[22] Subsequently the first inquest papers were obtained through the Pat Finucane Centre. They had apparently received them at some earlier date from the Court Service.

[23] The matter was further complicated at this stage because the Retired Police Officers' Association and Mr David Turkington, a retired Chief Superintendent of the Police and the Chairman of that Association, brought proceedings by way of judicial review to quash the report of the Police Ombudsman. This was subsequently the subject of a judgment by Treacy J, at [2014] NIQB 58. In the events he dismissed that application on the ground of delay. There was further correspondence in 2014 involving the Police Service of Northern Ireland.

[24] By letter of 2 October 2014 the office of the Attorney noted the receipt of further papers and submissions from KRW Law LLP but the conclusion was the same i.e. that the holding of a new inquest would not at present be advisable. The letter dealt with the engagement of Article 2 of the European Convention on Human Rights. This was, in effect, the ground on which Maguire J granted leave in this case. At page 4 of the letter one finds the following:

> "The Attorney has not been provided with any evidence which would suggest that the identification and/or punishment of those responsible could be achieved if a fresh inquest was to be ordered in this application and he is therefore, of the view that the Article 2 objectives as identified in Janowiec are not likely to be achieved by way of a fresh inquest into Mr Dalton's death. The Attorney further notes that the Police Ombudsman – in a report critical of police – did not refer the matter to the PPS.
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> Although the Attorney considers that Article 2 does not require an inquest in this case, he has further considered whether, quite apart from any Article 2 consideration, an inquest could be said to be advisable. Having regard to the investigation by the Police Ombudsman and the existence of current civil proceedings he does not consider an inquest to be advisable, even if the focus were to be purely on domestic factors."

[25] The applicant was not satisfied with this and on 24 November 2014 her solicitors wrote a letter pursuant to the Judicial Review Practice Note as a pre-action protocol letter. The ultimate response of the Attorney to that is to be found in a letter of 27 March 2015. It is clear, and, I think, not disputed, that he addressed the submissions advanced on behalf of the applicant. He addressed inter alia the Brecknell decision to which I will have to return and he repeated the views earlier expressed by him and remained of the like mind. The letter concluded as follows:

> "As you know, the decision by the Attorney General not to exercise his powers under Section 14(1) of the 1959 Act is not final and the matter can be revisited should relevant evidence come to light or further submissions be received.

[26] The applicant had applied to the European Court of Human Rights in respect of this matter on 25 March 2015. On 22 March 2016 a registrar of the court wrote to Mr Kevin Winters, her solicitor, saying that a Committee of three judges had declared the application inadmissible on the basis that domestic remedies had not been exhausted because no judicial review of the Attorney General's refusal or any other decision by the national authorities had been sought.

[27] As mentioned above this applicant, as personal representative of the estate of the deceased, had issued proceedings against the Chief Constable and Ministry of Defence. These were commenced by writ of 25 September 2012. This was followed

by a statement of claim on 30 May 2014 and by defences of 26 November 2014. A reply was served on 1 December 2014. One might have expected a trial by now but I was told from the Bar that issues of discovery were still on-going.

[28] Judicial review proceedings were then issued on 26 June 2015. The leave hearing was in 2016 and the case was listed for full hearing on 10 and 11 January 2017 by the judicial review judge and heard by me.

[29] Leave was granted by Maguire J for these proceedings only in relation to the applicant's case based on Article 2. Mr Scoffield for the Attorney submitted that it was still the Attorney's position that "in this category of case, where the grounds of challenge are based on common law principles, his decision is immune from review". For the purposes of this case, however, Mr Scoffield opted to defend the decision of the Attorney without relying on that argument.

[30] The parties were agreed that the adjectival duty of the State under Article 2 had been addressed originally and that there was no continuing duty, as Lord Phillips said in Re McCaughey [2012] 1 AC 725. What was at stake was whether that duty had been revived by the PONI Report and, if so, whether it required a fresh inquest contrary to the conclusion of the Attorney. I turn therefore to the leading decision of the European Court of Human Rights on this topic in Brecknell v The United Kingdom [2008] 46 EHRR 42. The applicable principles are set out in paragraphs [65] and following. I shall set out some relevant passages.

> "[65] The obligation to carry out an effective investigation into unlawful or suspicious deaths is well established in the Court's case law. [13] When considering the requirements flowing from the obligation, it must be remembered that the essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility. Furthermore, even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.
>
> [69] The Court would also comment that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the

public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.

[70] The Court would, however, draw attention to the following considerations. It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Art.2 of the Convention. Nonetheless, given the fundamental importance of this provision, the state authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further. Both parties have suggested possible tests. The Court has doubts as to whether it is possible to formulate any detailed test which could usefully apply to the myriad of widely differing situations that might arise. It is also salutary to remember that the Convention provides for minimum standards, not for the best possible practice, it being open to the contracting parties to provide further protection or guarantees. For example, contrary to the applicant's assertion, if Art. 2 does not impose the obligation to pursue an investigation into an incident, the fact that the state chooses to pursue some form of inquiry does not thereby have the effect of imposing Art. 2 standards on the proceedings. Lastly, bearing in mind the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources, positive obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.

[71] With those considerations in mind, the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as

> regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The Court would further underline that, in light of the primary purpose of any renewed investigative efforts, the authorities are entitled to take into account the prospects of success of any prosecution. The importance of the right under Art. 2 does not justify the lodging, willy-nilly, of proceedings. As it has had occasion to hold previously, the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals and they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would not in fact have produced concrete results."

[31] Several aspects of this judgment and in particular those passages should be noted. As is clear from paragraph [69] and the general thrust of the decision there is an emphasis on the prosecution and conviction of perpetrators. It is obviously in the public interest that those guilty of murder be brought to justice even after a long delay. But the critical emphasis in the Ombudsman's report which is said to require the Attorney to direct another inquest is the conduct of the police and not the conduct of the perpetrators. Paragraphs [69] and [71] in particular emphasise the importance of the perpetrators. While it is conceivable that a re-examination of this matter at an inquest, which might involve the calling of retired police officers, might lead to disclosure of intelligence information at that time identifying persons involved in the planting of the explosives device, on the evidence before me that is entirely speculative. Why would such information not already have been given to police colleagues? It is a very frail basis for saying that the Attorney was entitled to let alone obliged to order such an inquest.

[32] This is not a case where there is any evidence of collusion by the police in causing the tragic deaths of Mr Dalton, Mrs Lewis and Mr Curran. Ms Doherty in her submissions contended that the court should not assume that it was only negligence on the part of the police that led to them not intervening and going to Kildrum Gardens. But she could point to absolutely no evidence of anything more sinister or any good reason why that might be properly inferred.

[33] She relied also on Jordan v The United Kingdom [2003] 37 EHRR 2, a further decision of the European Court of Human Rights. But I note at paragraph [105] the court expressly said as follows: "what form of investigation will achieve those

purposes may vary in different circumstances". Even if the duty is activated it need not warrant a full-blown inquest or inquiry. The duty is on the State and cannot be delegated to the next of kin.

[34] I also note that at paragraph [107] the court was concerned about establishing the cause of death "or the person or persons responsible" which is consistent with the emphasis to be found on perpetrators in the Brecknell decision.

[35] As regards paragraph [115] I respectfully accept the view of the court that the obligations of the State under Article 2 cannot be satisfied merely by awarding damages. However they do not say that the ability to bring such a civil action is irrelevant to the decision by the State as to whether any further investigation is required or the form of it if it is required. The Court of Appeal decision in Finucane v The Secretary of State for Northern Ireland [2017] NICA 7 is authority for the proposition that the availability of a civil remedy is a relevant factor. Ms Doherty also relied on Edwards v The United Kingdom [2000] 35 EHRR 19. It is important to note that this relates to the death of a prisoner in custody where, it is clear, a particular onus rests on the State to investigate a violent death.

[36] I note, however, at paragraph [55] of the Edwards judgment setting out the applicable general principles, the following passage:

> "Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising."

[37] In this context one notes several things. Firstly, the issue of resources is relevant to the decision taken by the State with regard to its Article 2 duty. This does not, in this particular decision, seem to have figured largely in the decision of the Attorney General but it could have. It is a matter of public record that the considerable number of new inquests ordered by him has not been matched by an increase in resources to have those inquests held. The courts seek to deal with these inquests with the resources available but inevitably with very considerable further delays occurring. Edwards therefore is further authority for the proposition that the Attorney General should consider whether ordering an inquest would impose a disproportionate burden on the authorities.

[38] That leads on to a relevant consideration about this case. If the death had occurred recently an inquest might disclose a systemic flaw in practice which

contributed to the deaths. But if, as the Ombudsman found, there was a failure here, it took place 28 years ago at the height of the Troubles. It is very difficult to see how any practical benefit could now be obtained for the public in going over the procedures then being followed by police officers in Derry at that time, when they say that much of the city was out of bounds to them by terrorist activity.

[39] Ms Doherty relied on Regina (Amin) v Secretary of State for the Home Department [2003] UKHL 51. I take her submissions and this case into account also. However I note that this is a case of a death in custody. Furthermore apropos of my last observations one of the matters set out by Lord Bingham at paragraph [31] of his judgment as reasons for holding an investigation is "that dangerous practices and procedures are rectified". As I say there is no evidence that that would apply here.

[40] Reference is made to Regina (Smith) v Oxfordshire Assisted Deputy Coroner [2010] UKSC 29. That was the case of a soldier dying on military service in Iraq from hyperthermia while carrying out duties in temperatures exceeding 50 degree centigrade in the shade. Counsel relied on a clause in one paragraph of the judgment of Lord Mance at paragraph 2.10. He was listing categories of cases in which a substantive right under Article 2 has been held to be potentially engaged. The fifth of those, which Ms Doherty relied on, was:

> "Other situations where the State has a positive substantive obligation to take steps to safeguard life.
>
> Such situations exist not only where the right to life is inherently at risk, but also where the State is on notice of a specific threat to someone's life against which protective steps could be taken: Osmond v UK [1998] 29 EHRR 245. "

That is supportive of the general principle on which she relies. But the State here did not deny it had a duty under Article 2. There was a police investigation at the time. There was an inquest in accordance with the practice then prevailing. Furthermore there was a complaint which was dealt with very fully by the Police Ombudsman for Northern Ireland, who has particular responsibility for looking at the actions of the police. I do not find that this dictum assists her in relation to the present situation.

[41] In the circumstances it is not necessary to set out the helpful submissions of Mr Scoffield QC for the Attorney at any great length. He does not dispute that potentially this is a Brecknell case but disputes that any duty to hold an inquest has been triggered on the facts here.

[42] In addition to the authorities referred to above he drew the court's attention to Janowiec v Russia [2014] 58 EHRR 30, a decision of the Grand Chamber with

17 members of the court sitting. This related to the massacre of Polish officers during the Second World War at Katyn Forest.

[43] Obviously this was a vastly different case. It is important for consideration of the appropriate circumstances in which courts should require the State to carry out an Article 2 investigation prior to the European Convention applying in a particular jurisdiction. It will be recalled that the clear decision of the House of Lords in In Re McKerr [2004] UKHL 12; [2004] 2 All ER 409 against the imposition of such an obligation was impacted by the decision of the European Court in Silih v Solvenia [2009] 49 EHRR 996. The Court of Appeal in Northern Ireland declined, for the reasons set out in my judgment, to follow Silih on the merits, as well as being bound by McKerr: see McCaughey and Quinn's Application [2010] NICA 13. Therein I pointed out the Silih decision would introduce the very uncertainty that Lord Bingham and others warned against in McKerr. The Supreme Court chose to follow Silih in In Re McCaughey [2011] UKSC 20. Janowiec dilates on the difficulties that have been presented. The Supreme Court felt unable to fully deal with those in its decision in Regina (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2015] UKSC 69. However, applying the principles that were set out there it can be seen that there is a live issue as to whether Article 2 would be appropriately applied to these tragic deaths in 1988.

[44] The Attorney did not in fact rely on this in coming to his decision not to direct another inquest. If it were put on the scales when deciding whether or not to direct an inquest it cannot assist the applicant here. In the circumstances I will not address that issue further.

[45] Mr Scoffield drew attention to the judgment of Morgan LCJ in In Re Hoy [2016] NICA 23. That was a case about Article 3 of the Convention where, at [34] Morgan LCJ, delivering the judgment of the court considered that civil remedies could be part of providing adequate scrutiny. At [39] the court also said that the procedural obligation under that article "can be satisfied compendiously". See also Mulhern v The Attorney General [2016] NIQB 59 where Maguire J held that Article 2 obligations can be met in a number of ways. See also Al-Saadoon v Secretary of State for Defence [1016] EWHC 773. At paragraph [113] Leggatt J said the following:

> "I have come to the clear conclusion that the prospect that an inquiry would be able to answer those questions by questioning witnesses to answer those questions is remote and insufficient to justify the substantial costs that even an inquisitorial inquiry would involve."

See also paragraph [114].

[46] One must take into account not only the financial costs involved as adverted to above but the human cost. To bring back for a public hearing in an inquest

civilian and retired police witnesses to give evidence about these tragic events and the difficult questions around them will inevitably be unwelcome and in many cases positively distressing. Many may have legitimate health grounds for refusing to attend.

[47] Mr Scoffield submitted that the applicant was in effect asking the court to substitute its decision on this matter for that of the Attorney General. He submitted that, on the contrary, the court should show a high degree of deference to the decision of the Attorney.

[48] As I have said before it seems to me that the term deference is inappropriate in dealing with the approach of the judiciary to executive decisions. It has more than one meaning in English. Chambers English Dictionary defines it as: "a deferring or yielding in judgment or opinion: respectful compliance: submission". Its use is misplaced in my view in this context as designed at times to stimulate a judge or court to take a different view from the Executive just so as not to be seen to be submissive. It seems to me that the proper approach between the different arms of the State is one of mutual respect.

[49] As it happens in this case I do not have to reach any decided view on the extent of the discretion to be accorded to the Attorney on behalf of the State here. What is clear from Regina (Lord Carlile) v Secretary of State for the Home Department [2014] UKSC 60 is best summarised from the headnote:

> "That where Convention rights were adversely affected by an executive decision the court was obliged to form its own view of the proportionality of the decision; that, although proportionality was ultimately a matter for the court, that did not entitle it to substitute its own decision for that of the primary decision-maker, or simply to frank the decision without itself considering it."

It seems to me that even if I apply heightened scrutiny to this decision of the Attorney and do not accord him the extent of discretion that his counsel argues for I nevertheless come to the conclusion that he was justified in his decision

[50] The conclusion he reached as set out in the pre-action letter from his office of 27 March 2015 is summarised as follows:

> " a. The circumstances surrounding your application have already been the subject of a detailed examination by the PONI. The Attorney does not consider that your submission of the material provided made the holding of an inquest advisable.

> b. The Attorney, having taken into account the case of Janowiec, remains of the opinion that Article 2 of the Convention does not require proceedings to be added for the purposes of establishing historical truth.
>
> c. The Attorney has not been provided with any evidence which would suggest that the identification of punishment of those responsible could be achieved if a fresh inquest was directed."

[51] Having carefully considered the applicant's case herein it seems to me that that conclusion cannot be condemned on public law grounds or otherwise.

[52] Out of caution it is reinforced by the point made on behalf of the Attorney that he can always revisit his decision if relevant evidence were to come to light from further police investigations or the civil action.

[53] In deference to the grant of leave I would add a few more observations. While there may be cases where an Article 2 obligation is revived even though it is unlikely to advance the goal of successful prosecution of the immediate perpetrators of the unlawful death, such cases are not likely to be common and are not likely to warrant a renewed inquest. If they involve the alleged misconduct on the part of the police then the Police Ombudsman would be, as he was here, appropriate to address the issues.

[54] I am very pessimistic that an inquest held at this time would succeed in securing any significant accession of information compared to that which the Ombudsman obtained. That is always possible, it must be accepted, but it was within the discretion of the Attorney to conclude that it was not likely in this case.

[55] While the existence of civil proceedings brought by the family will not, indeed, necessarily cure a duty of compliance with Article 2, nevertheless it is relevant as giving a further opportunity to seek documents and call witnesses. It is true that the power to subpoena witnesses in a civil action will not lead to a right of the plaintiff to cross-examine the witness under subpoena. In an inquest situation such a witness might be compelled. But the chances of a witness, even a police officer guilty of an error of judgment or negligence or conceivably something worse, let alone a perpetrator, making a concession because he is being cross-examined rather than examined in chief is a very slight one which the State is entitled to conclude does not justify the financial and human cost of a further inquest.

[56] For all the reasons outlined above I conclude that the decision of the Attorney was a lawful one. The application is refused.