[2004] NICA 29 (1) | *Ref:* **NICC5006**

Judgment: approved by the Court for handing down | *Delivered:* **10/9/04**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL FOR NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE (CROWN SIDE)

2001 No 188

IN THE MATTER OF AN APPLICATION BY HUGH JORDAN FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION TAKEN BY THE LORD CHANCELLOR

AND

2002 No 10

IN THE MATTER OF AN APPLICATION BY HUGH JORDAN FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION TAKEN BY THE CORONER

Before: Nicholson LJ, McCollum LJ and Girvan J

NICHOLSON LJ

Introduction

[1] On 25 November 1992 Pearse Jordan was shot and killed by Sergeant A of the RUC. The RUC carried out an investigation into the death and submitted a report to the Director of Public Prosecutions (the DPP) on 25 May 1993. He issued a direction on 16 November 1993 that there was to be no prosecution arising out of the death and the Coroner was informed of this on 29 November 1993.

[2] He received the case papers on 4 November 1994 and indicated that an Inquest would be held on 4 January 1995. The appellant applied successfully

for an adjournment so that the DPP could reconsider his decision not to prosecute. On 10 February 1995 after re-consideration of his decision the DPP issued a further direction that there was to be no prosecution. On 11 April 1995 the Coroner indicated that the Inquest would be resumed on 12 June 1995.

[3] The appellant commenced Judicial Review proceedings in respect of rulings of the Coroner on 26 May 1995. Judgment at first instance in these proceedings was given on 11 December 1995. The appellant appealed unsuccessfully to the Court of Appeal which gave judgment in June 1996. Leave to appeal to the House of Lords was refused by the House of Lords on 20 March 1997. The Inquest which had been adjourned pending the outcome of the application for leave to appeal was listed by the Coroner for hearing on 1 December 1997 but was adjourned again on the application of the appellant as judicial review proceedings were outstanding in respect of the availability of Legal Aid for Inquests.

[4] On 1 July 1999 the Coroner listed the Inquest for hearing on 1 November 1999 but again adjourned the hearing on the appellant's application, pending further judicial review proceedings against the Chief Constable in respect of disclosure of documents. In October 2000 the Chief Constable agreed to provide full disclosure. On 21 December 2000 the Coroner decided that a full preliminary hearing would be held on 31 January 2001 but adjourned it.

[5] Further judicial reviews were brought on behalf of the appellant against the Coroner and the Chief Constable.

[6] An application had been made by the appellant to the European Court of Human Rights (the ECtHR) on the grounds of breach of Article 2 of the Convention on 13 May 1994. On 4 April 2001 the Coroner adjourned the Inquest which had been listed for 19 April 2001 pending the decision of the ECtHR in *Jordan & Ors v UK* which was delivered on 4 May 2001. The European Court held that the United Kingdom was in breach of Article 2 in *Jordan v UK*.

[7] Following the decision of the ECtHR the Coroner proposed to hold a pre-inquest hearing on 7 June 2001. This was adjourned for a significant period on the application of the Lord Chancellor. On 9 January 2002 it was indicated to the Coroner on behalf of the Lord Chancellor that it was proposed to amend Rule 9(2) of the Coroner's (Practice and Procedure) Rules (Northern Ireland) 1963 to remove the exemption from compellability of persons suspected of causing the death of the deceased. The Coroner was also referred by counsel, inter alia, to the decision of the Administrative Court in *R v West Somerset Coroner, ex parte Middleton* (hereafter referred to as *Middleton*). He ruled that in view of this decision he would hold the inquest

on 5 February 2002 on the basis of existing Coroner's law and practice and, if Rule 9(2) was repealed before the inquest began, he would issue a witness summons for Sergeant A. The Lord Chancellor amended Rule 9 on 8 February 2002 in accord with his indication to the Coroner. The amendment came into operation on 11 February 2002.

[8] Two further judicial reviews were brought on behalf of the appellant which led to these appeals. Another judicial review was also brought by the appellant. This related to the decisions of the DPP not to give reasons for directing no prosecution of Sergeant A. It was appealed. An appellate Committee rejected an application for leave to appeal to the House of Lords on 22 June 2004.

[9] I recite this litany in order to show that the Coroner has done everything in his power to hold an Inquest. It was ultimately deferred until the House of Lords gave judgment in *Middleton*. As the deceased in *Middleton* had died before 2 October 2000 it was believe that comprehensive guidance would be given to the Coroner. At this stage there were also outstanding these appeals and the third appeal which was completed on 22 June 2004. A chronology setting out what occurred since the death of Pearse Jordan, as seen from the perspective of his father and his lawyers, can be found at pp 1-6 of the appellant's `List of Authorities'.

The scope of a Coroner's inquest before the decision in *Middleton*

[10] The leading case in England and Wales on the scope of a Coroner's inquest before Middleton was the decision of the Court of Appeal in *R v HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson* [1995] QB 1. Judgment was delivered on 25 April 1994. The headnote reads in part:-

> "*Held*, (1) that an inquest was a fact finding inquiry directed solely to establishing the identity of the deceased and how, when and where he came by his death; that `how' within the meaning of section 11(5)(*b*)(ii) and rule 36(1)(*b*) connoted `by what means' not `in what broad circumstances' the deceased came by his death; that, applying rule 42 it was not for the coroner or his jury to determine any question of civil or criminal liability, or to appear to do so, or to impute blame; that lack of care, which was more appropriately described as `neglect', was the obverse of self-neglect, and connoted a gross failure to provide adequate sustenance or medical attention whether for a person in a position of dependency, whether by reason of a mental or physical condition; that

> neglect could rarely, if ever, be a free-standing verdict and was only appropriate as ancillary to any verdict where there was a direct causal connection between the relevant conduct and the cause of death; that where the deceased had taken his own life, that had to be the verdict, and neglect could not be found to have contributed to that cause of death merely on the ground that the deceased had been given an opportunity to kill himself."

The judgment of the Court was delivered by Sir Thomas Bingham MR. In the course of stating the statutory background he referred to section 11 of the Coroners Act 1988 which governed the proceedings at the inquest, setting out subsection (5) which states:-

> "An inquisition – (a) shall be in writing under the hand of the coroner and, in the case of an inquest held with a jury, under the hands of the jurors who concur in the verdict; (b) shall set out, so far as such particulars have been proved – (i) who the deceased was; and (ii) how, when and where the deceased came by his death; and (c) shall be in such form as the Lord Chancellor may by rules made by statutory instrument from time to time prescribe."

He referred to various authorities including *R v South London Coroner, ex parte Thompson* (1982) 126 SJ 625 in which Lord Lane, giving the judgment of the court said, inter alia:-

> "… Once again it should not be forgotten that an inquest is a fact-finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts … The function of an inquest is to seek out and record as many of the facts concerning the death as [the] public interest requires."

In a passage commencing at page 25F the Master of the Rolls stated:-

"This long survey of the relevant statutory and judicial authority permits certain conclusions to be stated.

(1) An inquest is a fact-finding inquiry conducted by a coroner, with or without a jury, to establish reliable answers to four important but limited factual questions. The first of these relates to the identity of the deceased, the second to the place of his death, the third to the time of death. In most cases these questions are not hard to answer but in a minority of cases the answer may be problematical. The fourth question, and that to which evidence and inquiry are most often and most closely directed, relates to how the deceased came by his death. Rule 36 requires that the proceedings and evidence shall be directed solely to ascertaining these matters and forbids any expression of opinion on any other matter.

(2) Both in section 11(5)(*b*)(ii) of the Act of 1988 and in rule 36(1)(*b*) of the Rules of 1984, "how" is to be understood as meaning "by what means." It is noteworthy that the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but "how . . . the deceased came by his death," a more limited question directed to the means by which the deceased came by his death.

(3) It is not the function of a coroner or his jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame. This principle is expressed in rule 42 of the Rules of 1984. The rule does, however, treat criminal and civil liability differently: whereas a verdict must not be framed so as to appear to determine any question of criminal liability *on the part of a named person*, thereby legitimating a verdict of unlawful killing provided no one is named, the prohibition on returning a verdict so as to appear to determine any question of civil liability is unqualified, applying whether anyone is named or not.

(4) This prohibition in the Rules is fortified by considerations of fairness. Our law accords a defendant accused of crime or a party alleged to have committed a civil wrong certain safeguards rightly regarded as essential to the fairness of the

> proceedings, among them a clear statement in writing of the alleged wrongdoing, a right to call any relevant and admissible evidence and a right to address factual submissions to the tribunal of fact. These rights are not granted, and the last is expressly denied by the Rules, to a party whose conduct may be impugned by evidence given at an inquest.
>
> (5) It may be accepted that in case of conflict the statutory duty to ascertain how the deceased came by his death must prevail over the prohibition in rule 42. But the scope for conflict is small. Rule 42 applies, and applies only, to the verdict. Plainly the coroner and the jury may explore facts bearing on criminal and civil liability. But the verdict may not appear to determine any question of criminal liability on the part of a named person nor any question of civil liability.
>
> (6) There can be no objection to a verdict which incorporates a brief, neutral, factual statement: "the deceased was drowned when his sailing dinghy capsized in heavy seas," "the deceased was killed when his car was run down by an express train on a level crossing," "the deceased died from crush injuries sustained when gates were opened at Hillsborough Stadium." But such verdict must be factual, expressing no judgment or opinion, and it is not the jury's function to prepare detailed factual statements."

[11] In Northern Ireland the scope of an Inquest was considered by the Court of Appeal in *Re Ministry of Defence's Application* [1994] NI 279. I was a member of that court. The judgment was given on 17 June 1994. Lord Hutton, LCJ, at pp307 and following, set out section 31(1) of the Coroner's Act (Northern Ireland) 1959 and the relevant 1963 Rules as amended by the 1980 Rules:-

> "Section 31(1) of the 1959 Act provides:
>
> > `Where all members of the jury at an inquest are agreed they shall give, in the form prescribed by rules under section thirty-six, their verdict setting forth, so far as such particulars have been proved to them, who the

> deceased person was and how, when and where he came to his death.'

Rule 15 of the 1963 Rules, as amended by the 1980 Rules, provides:

> `The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely:—
>
> (a) who the deceased was;
> (b) how, when and where the deceased came by his death;
> (c) the particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning the death.'

Rule 16 of the 1963 Rules provides:

> 'Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in the last foregoing Rule.'

Rule 22(1) of the 1963 Rules, as amended by the 1980 Rules, provides:

> 'After hearing the evidence the coroner, or, where the inquest is held by a coroner with a jury, the jury, after hearing the summing up of the coroner shall give a verdict in writing, which verdict shall, so far as such particulars have been proved, be confined to a statement of the matters specified in Rule 15.'

Rule 23(2) of the 1963 Rules, as amended by the 1980 Rules, provides:

> 'A coroner who believes that action should be taken to prevent the

> occurrence of fatalities similar to that in respect of which the inquest is being held, may announce at the inquest that he is reporting the matter to the person or authority who may have power to take such action and report the matter accordingly.'
>
> In addition Form 22 substituted by the 1980 Rules makes it clear that the jury should no longer return one of the verdicts, such as an open verdict, or the verdict that the deceased died from natural causes, or as a result of an accident or misadventure, which was permissible under Form 22 in the 1963 Rules before they were amended by the 1980 Rules.
>
> The point that the inquest is confined to determining how the deceased came by his death and should not embark on a wider inquiry relating to the background circumstances of the death has been re-emphasised by two decisions, one in the English Divisional Court and one in the English Court of Appeal, given since the coroner gave his ruling in the present case."

He then referred to *R v HM Coroner for Western District of East Sussex, Ex parte Homberg* (1994) 158 JP 357, a decision of the Divisional Court in England and Wales. He went on to state at p309g:-

> "In his helpful consideration of the earlier authorities Simon Brown LJ stated (at 369):
>
> > `What help then is to be derived from the many authorities in this field? It is clear first that the coroner's over-riding duty is to inquire `how' the deceased came by his death and that duty prevails over any inhibition against appearing to determine questions of criminal or civil liability. Any apparent conflict between s 11 [of the Coroner's Act 1988] and r 42 [of the Coroners' Rules 1984] 'must be resolved in favour of

> the statutory duty to inquire whatever the consequences of this may be' – *R v Surrey Coroner, ex parte Campbell* [1982] QB 661 at 676. Secondly, the cases establish that although the word `how' is to be widely interpreted, it means `by what means' rather than `in what broad circumstances' – see for example *R v HM Coroner for Birmingham, ex p Secretary of State for the Home Dept* (1990) 155 JP 107. In short the inquiry must focus on matters directly causative of death and must, indeed, be confined to these matters alone (save only for ascertainment of the other specific details mentioned in r 36(1)). The recent, 11th edition of *Jervis on Coroners* [at p 223, para 12-101] puts it thus:
>
> `The question of how the deceased came by his death is of course wider than merely finding the medical cause of death, and it is therefore right and proper that the coroner should enquire into acts and omissions *which are directly responsible for the death* [emphasis added]'."

He then referred to the decision of the English Court of Appeal in *Ex parte Jamieson* [1995] QB 1 referred to earlier and cited the General Conclusion of Sir Thomas Bingham MR at pp23-24 of the report.

At p314 he stated:-

> "Therefore, when he resumes the hearing of the inquest the coroner (and also, I would add, counsel) should give careful attention to the guidance given by the two recent decisions of the Divisional Court and the Court of Appeal in England. In particular they should bear in mind that, as stated by Simon Brown LJ (at 369) –

> `… the cases establish that although the word `how' is to be widely interpreted, it means `by what means' rather than `in what broad circumstances'.

And that as stated (at 372) in his judgment, none of the purposes of an inquest would –

> `… be served by the elaborate approach to the identification of so-called secondary causes and their inclusion within the actual verdict … The duty to inquire `how' the deceased died does not to my mind properly encompass inquiry also into the underlying responsibility for every circumstance which may be said to have contributed to the death.'

I further consider that the judgments of Simon Brown LJ and Sir Thomas Bingham MR make it clear that when the Broderick Committee stated that one of the purposes of an inquest is `To allay rumours or suspicions' this purpose should be confined to allaying rumours and suspicions about how the deceased came by his death and not to allaying rumours and suspicions about the broad circumstances in which the deceased came by his death."

In the course of his judgment MacDermott LJ said at p315E:-

> "The problem-creating word is `how' in the phrase `how, when and where the deceased came by his death'. From time to time efforts are made to give some judicial definition to this word but of necessity that is done in broad or general terms.
>
> As a result several propositions can be stated. (1) As in any court the decision of a coroner's court is to be based on evidence not on allegation, conjecture or rumour. (2) That evidence must be *relevant* evidence – that is evidence which is logically probative or disprobative of some matter

> which requires proof. (3) As Dillon LJ said in *R v Poplar Coroner, ex p Thomas* [1993] QB 610 at 629 –
>
> > `… it is not the function of a coroner's inquest to provide a forum for attempts to gather evidence for pending or future criminal or civil proceedings.'"

I agreed that "how" meant "by what means" and not "in what broad circumstances".

[12] In the Matter of Inquests Touching the Deaths of Eugene Toman, James Gervaise McKerr and Others I gave judgment at first instance on 11 July 1994. This judicial review related to the `Stalker' and `Sampson' reports. The Coroner sought production of these reports "subject to the evidence contained therein being within the proper scope of an inquest." A number of affidavits were placed before me. One of the exhibits to the Coroner's affidavit of 4 May 1994 was a letter from the legal adviser to the RUC that all the statements and forensic reports in the Stalker and Sampson reports relating to the investigation into the deaths had been provided to the Coroner, subject to certain deletions made to protect the public interest.

[13] An affidavit was sworn by the then Chief Constable on 16 May 1994 in the course of which he stated:-

> "I am aware from personal consideration of contemporaneous records that there were three separate investigations into the incidents referred to (which included the death of Mr McKerr). The first two of these investigations were carried out by members of the Royal Ulster Constabulary and the third by the team headed first by Mr Stalker and finally by Mr Sampson. I have been advised by the Royal Ulster Constabulary legal adviser and believe that all copies of all the witness statements, including transcripts of interviews with witnesses, taken during the course of each of the investigations together with forensic evidence, photographs and maps have already been provided to the Coroner subject only, in the case of some of the witness statements and transcripts of interviews, to certain words, phrases or sentences being deleted in order to protect the public interest. The Coroner is, therefore, in possession of all the documentary evidence which was prepared

> in the course of the three investigations and should be in a position to identify any further evidence which came to light during the investigations carried out by the team headed first by Mr Stalker and finally by Mr Sampson. I have been advised by the Royal Ulster Constabulary legal adviser and believe that all copies of all the witness statements, including transcripts of interviews with witnesses, taken during the course of each of the investigations together with forensic evidence, photographs and maps have already been provided to the Coroner subject only, in the case of some of the witness statements and transcripts of interviews, to certain words, phrases or sentences being deleted in order to protect the public interest. The Coroner is, therefore, in possession of all the documentary evidence which was prepared in the course of the three investigations and should be in a position to identify any further evidence which came to light during the investigations carried out by Mr Stalker and Mr Sampson."

That is to say, he was asserting that all evidence directly relating to the death of Mr McKerr had been extracted from the reports and made available to the Coroner and he was claiming public interest immunity for the remainder of the material in the reports: see paragraph 11 of my judgment.

[14] At p22 of my judgment I stated that "copies of all the witness statements, including transcripts of interviews with witnesses, forensic evidence and maps were supplied to the Coroner subject to some deletions in the public interest about which the Coroner has made no complaint" and that I had "invited the Coroner to swear another affidavit in order to discover whether there was other evidence in the reports which had not been disclosed to him." The Coroner's further affidavit was available to me when I stated in my judgment that it was not disputed by counsel for the Coroner that all witness statements had been given to the Coroner. These would have included witness statements from Mr Stalker, his deputy Mr Thorburn and Mr Sampson and his deputy, Mr Shaw. Counsel for the next of kin also accepted that the material had been supplied.

[15] Counsel for the Coroner submitted, however, that it was common practice for a senior police officer to give his view about the state of the investigation and a view of what had occurred. Counsel for the next of kin adopted his submissions. I concluded that the Coroner was seeking material about the broad circumstances in which the killings took place in order to

deal with rumours and suspicions that there was a `shoot to kill' policy; see p22 of my judgment. I referred to the relevant passages of the judgment of the Court of Appeal in Northern Ireland which I have already cited and which had been delivered after I had heard the judicial review but before I had given judgement; see pp 22 to 26 of my judgment.

[16] Having regard to the fact that it appeared to be common case on the part of the Coroner and the next of kin that all evidence directly relevant to the death had been extracted from the Stalker and Sampson reports themselves and given to the Coroner I held that the reports were not relevant to the Coroner's Inquest. I went on to state at p27 of my judgment that this was not a reflection or criticism of the Coroner, that I was satisfied that he was genuinely concerned to deal openly with the fears and suspicions that there was a `shoot to kill' policy. I concluded that "the Coroner's Court was not the forum in which this kind of issue can properly be dealt with"; see my judgment at p27. I added "I am satisfied that the Coroner has throughout these long drawn-out investigations been concerned only with the pursuit of truth and justice"; see p28 (unreported: 11 July 1994). The Coroner and next-of-kin were represented by senior and junior counsel. I was not invited to read the Stalker or Sampson reports in order to ensure that all relevant evidence had been extracted and I would have done so, if suppression of evidence had been suggested. An appeal lay from my decision to the Court of Appeal but there was no appeal.

[17] The European Court impliedly took the view that I ought to have read the Stalker and Sampson reports in order to determine whether there was anything relevant in them. The Court found that the inquest was prevented from reviewing potentially relevant material and therefore unable to fulfil any useful function in carrying out an investigation of matters arising since the criminal trial: see paragraphs 150 and 151 of the judgment.

[18] In *Re McKerr* [2004] the House of Lords also considered that I should have read the Stalker and Sampson reports for the same reason; see paragraph [44] of Lord Steyn's opinion. Again I assume that my judgment was made available to them. It follows that I was wrong and that the word "how", in its narrower meaning, must include evidence over and above evidence "directly relevant to the death", as I had interpreted the phrase. The inquests on the two persons killed with *McKerr* have been adjourned. I wish to make it clear to the Coroner that, having regard to the views expressed by the European Court and by the House of Lords, he should ignore my judgment and call for the Stalker and Sampson reports in respect of those Inquests and any others where deaths were investigated by Mr Stalker and Mr Sampson and extract any relevant information. If there is a claim for public interest immunity, it should be dealt with in accordance with the procedure appropriate to such claim.

[19] It appears to follow that the words "by what means the deceased came by his death" include the planning, briefing and carrying out of the operation leading to the death of Hugh Jordan.

[20] A fortiori; if the word "how" in section 31 of the Coroner's Act (Northern Ireland) 1959 and the Coroner's Rules made thereunder ought to be construed broadly in 2004 for the purposes of an Inquest held in 2004 on a person who died before 2 October 2000, the Coroner is entitled to call for the Stalker and Sampson reports in respect of the inquests on Eugene Toman and John Frederick Burns who were shot and killed at the same time and place as James Gervaise McKerr. Again any claim for public interest immunity can be dealt with in accordance with principle. My decision about the reports was based on my unduly narrow interpretation of "how". A public inquiry, I had thought, was necessary if the wishes of the next-of-kin were to be met.

[21] The next relevant domestic decision in Northern Ireland is *Re Bradley and Another's Application* [1995] NI 192 which related to the same Inquest as the Court of Appeal had dealt with: see [1994] NI 279 referred to at [11]. Carswell LJ held that an inquest jury's verdict should be factual, expressing no judgment or opinion. It was not the jury's function to prepare detailed factual statements. The findings required a brief encapsulation of the essential facts. A finding of justifiable homicide could not be upheld. The relatives had a sustainable grievance that the finding had been expressed just as the soldiers would have been aggrieved if the finding had been that they had no justification for firing at the deceased men. He referred, inter alia, to the decisions of the English Court of Appeal and the Divisional Court in England and the decision of the Court of Appeal in Northern Ireland mentioned at [10] and [11].

[22] Carswell LJ repeated in summary form the propositions laid down by the Court of Appeal in Northern Ireland.

1. A Coroner's Inquest is an inquisitorial process, a fact-finding process and not a method of apportioning guilt.

2. The jury are to find "how the deceased came by his death". The word "how" means "by what means" rather than "in what broad circumstances". The inquiry must focus on matters directly causative of death … it should not embark on a wider inquiry relating to the background circumstances of the death; it is not its function to provide the answers to all the questions related to the death which the next-of-kin may wish to raise; see p204. The judgment was delivered on 7 April 1995.

[23] Article 2 of the Convention was not referred to in any of the cases mentioned above and no argument was addressed to any of these courts that the Coroner's Act and Rules should be construed in accordance with our

international treaty obligations, if that could be done without straining the construction of the Act or Rules.

[24] This is not surprising in my opinion, per Lord Bingham in *Middleton*. The decision in *McCann and Others v United Kingdom* was given by the European Court of Human Rights on 27 September 1995. It was reported in 1996 at 21 EHRR 92. The headnote reads:-

> "1. General approaches to the interpretation of Article 2.
>
> (a) The Court's approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that the provisions be interpreted and applied so as to make these safeguards practical and effective. It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention. Together with Article 3, it enshrines one of the basic values of the democratic societies making up the Council of Europe. [146]-[147]
>
> (b) The exceptions delineated in Article 2(2) indicate that this provision extends to, but is not concerned exclusively with, intentional killing. The text of Article 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to `use force' which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than `absolutely necessary' for the achievement of one of the purposes

set out in sub-paragraphs (a), (b) and (c). [148]

(c) In this respect the use of the term `absolutely necessary' in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is `necessary in a democratic society' under paragraph 2 of Article 8 to 11 of the Convention. In particular, the force must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2. In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations to life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the organs of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination. [149]-[150]

2. …

3. The obligation to protect life: Adequacy of Inquest proceedings as an investigative mechanism (Art 1(1)).

(a) In the present case it is unnecessary to decide whether a right of access to court to bring civil proceedings in connection with deprivation of life can be inferred from Article 2(1) since this is an issue which would be more appropriately considered under Articles 6 and 13 of the Convention – provisions which have

not been invoked by the applicants. [160]

(b) A general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to `secure to everyone within the jurisdiction the rights and freedoms defined in [the] Convention' requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State. [161]

(c) However, in the present case it is not necessary to decide what form such an investigation should take and under what conditions it should be conducted, since public Inquest proceedings, at which the applicants were legally represented and which involved the hearing of 79 witnesses, did in fact take place. Moreover, the proceedings lasted 19 days and involved a detailed review of the events surrounding the killings. Furthermore, it appears from the transcript that the lawyers acting on behalf of the applicants were able to examine and cross-examine key witnesses and to make the submissions they wished to make. In light of the above, the Court does not consider that the alleged shortcomings in the Inquest proceedings substantially hampered the carrying out of a thorough, impartial and careful examination of

> the circumstances surrounding the killings."

At 4 the headnote deals with "Application of Article 2: general approach to the evaluation of the evidence. At 6 the headnote deals with "Application of Article 2: conduct and planning of the operation; preliminary considerations; actions of the soldiers. At 7 the headnote deals with "Application of Article 2: control and organisation of the operation.

So far as I can tell *McCann's* case was the first case in the European Court to deal in depth with inquest proceedings and to expand the scope of Article 2 so as to take into consideration "not only the actions of the organs of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination" [149]-[150] of the judgment. Thus it was only after this decision was given that it became apparent that the interpretation of the word "how" in the Coroners' Acts and Rules in England, Wales and Northern Ireland was inconsistent with our international treaty obligations.

The decision in *Middleton*

[25] Rather than tracing the development of the obligations of Coroners under Article 2 as expanded by decisions of the ECtHR and so far as Northern Ireland is concerned, culminating in the decision in *Jordan and Others v UK* on 4 May 2001, it is simpler to turn to the decision of the House of Lords in *Regina (Middleton) v West Somerset Coroner and another* [2004] 2 WLR 800 heard on February 2, 3, 4, 2004. The opinion of the appellate committee was given by Lord Bingham who had given the judgment of the Court of Appeal in *ex parte Jamieson*. The inquest related to the death of Colin Middleton who lost his own life by hanging himself in his cell in a prison in England on 14 January 1999 before the Human Rights Act came into force. As I write, it is not yet reported in 2004 Appeal cases but the opinion was given on 4 March 2004 together with *In re Sacker*, followed immediately by *In re McKerr*. The appellate committee which decided *Middleton* and *Sacker* [2004] 1 WLR 796 was differently constituted from that which decided *McKerr* [2004] 1 WLR 807.

The headnote in *Middleton* reads:

> "The deceased, a prisoner serving a long custodial sentence, hanged himself in his prison cell. His family alleged that the Prison Service knew that he was a suicide risk and should have put him on a suicide watch. At the inquest the coroner directed the jury by reference to section 11(5) of the Coroners Act 1988 and rule 36 of the Coroners

Rules 1984 that their findings were confined to the identify of the deceased and to how, when and where he came by his death, and that they could express no opinion on any other matter. He further directed them that, since rule 42 prohibited an inquest verdict being framed in such a way as to appear to determine any questions of criminal liability on the part of a named person or civil liability, they could not return a verdict of neglect. However the coroner suggested that, if they wished, they might give him a note, which would not be published, indicating any matters they wished him to consider in deciding whether to exercise his power under rule 43 to make a report to the appropriate authority. The jury found that the deceased had killed himself while the balance of his mind was disturbed. They also handed the coroner a note containing factual conclusions indicating that the Prison Service had failed in its duty of care to the deceased. The coroner refused the family's request that the note should be appended to the inquisition. The claimant, the deceased's mother, sought judicial review of the coroner's direction and of his refusal to publish the note. The judge, concluding that private communications between coroner and jury were inappropriate and setting out part of the jury's note in his judgment, granted a declaration that by reason of the restrictions on the verdict the inquest was in adequate to meet the state's procedural investigative duty under article 2, as scheduled to the Human Rights Act 1998. On appeal by the Secretary of State, who had intervened in the proceedings as an interested party, the Court of Appeal concluded that where a coroner was aware that an inquest was to be the means by which the state satisfied its procedural obligation under Article 2 the jury should be permitted to make a finding of systemic, but not individual, neglect. They granted a declaration accordingly and allowed his appeal in part.

On the Secretary of State's appeal -
Held, (i) that, having regard to the jurisprudence of the European Court that the investigation required by article 2 was to ensure the accountability of

state agents for deaths occurring under their responsibility, and to be capable of leading to a determination of whether force used was justified or protection afforded to life was adequate and to identification of those involved, the inquest, as the means by which the state sought to discharge its investigation obligation, ought ordinarily to culminate in an expression of the jury's conclusion on the central, factual issues in the case (see post, para 13, 16-20).

(2) That since the 1988 Act and 1984 Rules required the inquest to be directed solely to ascertaining the identity of the deceased, and how, when and where he came by his death, since 'how' in section 11(5)(b)(ii) and rule 36(1)(b) was narrowly interpreted to connote 'by what means' and, where the deceased was found to have taken his own life that was the appropriate verdict and reference to neglect was permissible only in the most exceptional circumstances, the short verdict in traditional form, while enabling the jury in some cases to express their conclusion on the central issue canvassed in the evidence, would not enable them do so in others, and that, accordingly, the current regime did not meet the requirements of article 2 in those cases (post, paras 30-32).

(3) That the scheme as enacted should be respected save to the extent that a change of interpretation was necessary to comply with the state's obligations expressed in the Convention; that such a change required a broader interpretation of 'how' in section 11(5)(b)(i)(ii) and rule 36(1)(b) to connote 'by what means and in what circumstances'; that it was for the coroner to consider in the particular case the form of verdict, whether short, narrative or in answer to questions put by him, which would elicit the jury's factual conclusion on the central issues so long as the prohibition on attributing criminal or civil liability in rule 42 was not infringed and that on extraneous expressions of opinion in rule 36(2) was respected (post, paras 34-48).

> (4) Allowing the appeal in part and setting aside the declaration, that the jury's verdict given in accordance with the current regime did not express their conclusion on the central issues whether the deceased should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent his suicide and, to meet the procedural obligation, the jury should have been permitted to express their conclusion on those issues; that the power to report under rule 43 was exercisable by the coroner not the jury and his invitation to provide the note was unnecessary and in appropriate since it derogated from the public nature of the inquest; but that since the jury's conclusions had been published and no further inquest was sought, declaratory relief was not necessary."

At paragraph [2] Lord Bingham stated:

> "The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life."

At paragraph [3] he stated:

> "The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated."

At paragraph [4] he stated:

> "It is, or may be, necessary to consider three questions.

(1) What, if anything, does the Convention require (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving, or possibly involving, a violation of article 2?

(2) Does the regime for holding inquests established by the Coroners Act 1988 and the Coroners Rules 1984, as hitherto understood and followed in England and Wales, meet those requirements of the Convention?

(3) If not, can the current regime governing the conduct of inquests in England and Wales be revised so as to do so, and if so how?"

At paragraph [10] he dealt with *Jordan v UK* 37 EHRR 52 as follows:-

"Jordan v United Kingdom 37 EHRR 52 arose from the fatal shooting of a young man by a police officer in Northern Ireland. The court found a violation of article 2 in respect of failings in the investigative procedures concerning the death. The court held:

'105. The obligation to protect the right to life under article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. 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. What form of investigation will achieve those purposes may vary in different

> circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures ...
>
> 107. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.'

There was argument whether the inquest, which had been opened but not concluded, would satisfy the state's investigative obligation, but the court concluded that, on the facts of this case, it would not:

> '128. It is also alleged that the inquest in this case is restricted in the scope of its examination. According to the case law of the national courts, the procedure is a fact-finding exercise and not a method of apportioning guilt. The Coroner is required to confine his investigation to the matters directly causative of the death and not to extend

his inquiry into the broader circumstances. This was the standard applicable in the *McCann* inquest also and did not prevent examination of those aspects of the planning and conduct of the operation relevant to the killings of the three IRA suspects. The Court is not persuaded therefore that the approach taken by the domestic courts necessarily contradicts the requirements of article 2. The domestic courts accept that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about. The Court agrees that a detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary. Whether an inquest fails to address necessary factual issues will depend on the particular circumstances of the case. It has not been shown in the present application that the scope of the inquest as conducted so far has prevented any particular matters relevant to the death being examined.

129. None the less, unlike the *McCann* inquest, the jury's verdict in this case may only give the identity of the deceased and the date, place and cause of death. In England and Wales, as in Gibraltar, the jury is able to reach a number of verdicts, including 'unlawful death'. As already noted, where an inquest jury gives such a verdict in England and Wales, the DPP is required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. In this case, the only relevance the inquest may have to a possible prosecution is that the Coroner may send a written report to the DPP if he considers that a criminal offence may have been committed. It is not apparent however

> that the DPP is required to take any decision in response to this notification or to provide detailed reasons for not taking any further action. In this case it appears that the DPP did reconsider his decision not to prosecute when the Coroner referred to him information about a new eye witness who had come forward. The DPP maintained his decision however and gave no explanation of his conclusion that there remained insufficient evidence to justify a prosecution.
>
> 130. Notwithstanding the useful fact-finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of article 2.'

The court held (para 142) that the Northern Irish inquest procedure fell short of what article 2 required because (among other shortcomings) it "did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed."

At paragraph [16] he stated:-

> "It seems safe to infer that the state's procedural obligation to investigate is unlikely to be met if it is plausibly alleged that agents of the state have used lethal force without justification, if an effectively unchallengeable decision has been taken not to prosecute and if the fact-finding body cannot express its conclusion on whether unjustifiable force has been used or not, so as to prompt reconsideration of the decision not to prosecute. Where, in such a case, an inquest is the instrument by which the state seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's

> conclusion on the central issue is required." (My emphasis).

At paragraph [18] he stated:-

> "… a verdict of an inquest jury (other than an open verdict, sometimes unavoidable) which does not express the jury's conclusion on a major issue canvassed in the evidence at the inquest cannot satisfy or meet the expectations of the deceased's family or next-of-kin. Yet they, like the deceased, may be victims. They have been held to have legitimate interests in the conduct of the investigation (Jordan 37 EHRR 52, para 109), which is why they must be accorded an appropriate level of participation: see also R (Amin) v Secretary of State for the Home Department [2003] 3 WLR 1169. An uninformative jury verdict will be unlikely to meet what the House in *Amin*, para 31, held to be one of the purposes of an article 2 investigation: 'that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others'." (My emphasis).

His reference to Amin's case is relevant in that Amin's nephew, Zahid Mubarek ("the deceased") was murdered in March 2000 before the Human Rights Act was in force: see [2003] UKHL 51. There is a most helpful resumē of European cases in *Amin*, as well as reference to English decisions.

> "The second consideration is that while the use of lethal force by agents of the state must always be a matter of the greatest seriousness, a systemic failure to protect human life may call for an investigation which may be no less important and perhaps even more complex: see Amin, paras 21, 41, 50 and 62. It would not promote the objects of the Convention if domestic law were to distinguish between cases where an agent of the state may have used lethal force without justification and cases in which a defective system operated by the state may have failed to afford adequate protection to human life."

He summarised the historical and statutory background to the Coroners Act 1988 and the Coroner's Rules 1984 at paragraphs 22 to 27. At paragraph 28 he stated:-

28. Remarkably, as it now seems, the Court of Appeal made no reference to the European Convention in *Ex p Jamieson*, and the report does not suggest that counsel referred to it either. Counsel for Mrs Middleton criticised the reasoning of that decision, but it appears to the committee to have been an orthodox analysis of the Act and the Rules and an accurate, if uncritical, compilation of judicial authority as it then stood. Thus emphasis was laid on the function of an inquest as a fact-finding inquiry (page 23, conclusion (1)). Following *R v Walthamstow Coroner, Ex p Rubenstein* (19 February 1982, unreported), *R v HM Coroner for Birmingham, Ex p Secretary of State for the Home Department* (1990) 155 JP 107 and *R v HM Coroner for Western District of East Sussex, Ex p Homberg* (1994) 158 JP 357, the Court of Appeal interpreted "how" in section 11(5)(b)(ii) of the Act and rule 36(1)(b) of the Rules narrowly as meaning "by what means" and not "in what broad circumstances" (page 24, conclusion (2)). It was not the function of a coroner or an inquest jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame (page 24, conclusion (3)). Attention was drawn to the potential unfairness if questions of criminal or civil liability were to be determined in proceedings lacking important procedural protections (page 24, conclusion (4)). A verdict could properly incorporate a brief, neutral, factual statement, but should express no judgment or opinion, and it was not for the jury to prepare detailed factual statements (page 24, conclusion (6)). It was acceptable for a jury to find, on appropriate facts, that self-neglect aggravated or contributed to the primary cause of death, but use of the expression "lack of care" was discouraged and a traditional definition of "neglect" was adopted (pages 24-25, conclusions (7), (8) and (9)). Where it was found that the deceased had taken his own life, that was the appropriate verdict, and only in the most extreme circumstances (going well beyond ordinary negligence) could neglect be properly found to have contributed to that cause of death (pages 25-26, conclusion (11)). Reference to neglect or self-neglect should not be made in a verdict unless there was a clear and direct causal connection between the conduct so described and the cause of

> death (page 26, conclusion (12)). It was for the coroner alone to make reports with a view to preventing the recurrence of a fatality (page 26, conclusion (13)). Emphasis was laid on the duty of the coroner to conduct a full, fair and fearless investigation, and on his authority as a judicial officer (page 26, conclusion (14)).”

I have pointed out earlier at [24] that the expansion of the interpretation of Article 2 of the Convention of the European Court commenced with *McCann v UK* (judgment given in September 1995, 17 months after the decision in *ex parte Jamison)*. I also note that he stated: “…. It appears to the committee to have been … an accurate, if uncritical, compilation of judicial authority as it then stood (my emphasis).

At paragraph 34 he stated:-

> “It is correct that the scheme enacted by and under the authority of Parliament should be respected save to the extent that a change of interpretation (authorised by section 3 of the Human Rights Act 1998) is required to honour the international obligations of the United Kingdom expressed in the Convention.”

At paragraph 35 he stated:-

> “Only one change is in our opinion needed: to interpret ‘how’ in section 11(5)(b)(ii) of the Act and rule 36 (1)(b) of the Rules in the broader sense previously rejected, namely as meaning not simply ‘by what means’ but ‘by what means and in what circumstances’.” (My emphasis).

At paragraphs 36 and 37 he stated:-

> “36. This will not require a change of approach in some cases, where a traditional short form verdict will be quite satisfactory, but it will call for a change of approach in others: paras 30-31 above. In the latter class of case it must be for the coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury's conclusion on the central issue or issues. This may be done by inviting a form of verdict expanded beyond those suggested in form 22 of Schedule 4 to the Rules. It may be done, and has

(even if very rarely) been done, by inviting a narrative form of verdict in which the jury's factual conclusions are briefly summarised. It may be done by inviting the jury's answer to factual questions put by the coroner. If the coroner invites either a narrative verdict or answers to questions, he may find it helpful to direct the jury with reference to some of the matters to which a sheriff will have regard in making his determination under section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976: where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the death. It would be open to parties appearing or represented at the inquest to make submissions to the coroner on the means of eliciting the jury's factual conclusions and on any questions to be put, but the choice must be that of the coroner and his decision should not be disturbed by the courts unless strong grounds are shown.

37. Prohibition in rule 36(2) of the expression of opinion on matters not comprised within sub-rule (1) must continue to be respected. But it must be read with reference to the broader interpretation of "how" in section 11(5)(b)(ii) and rule 36(1) and does not preclude conclusions of fact as opposed to expressions of opinion. However the jury's factual conclusion is conveyed, rule 42 should not be infringed. Thus there must be no finding of criminal liability on the part of a named person. Nor must the verdict appear to determine any question of civil liability. Acts or omissions may be recorded, but expressions suggestive of civil liability, in particular 'neglect' or 'carelessness' and related expressions, should be avoided. Self-neglect and neglect should continue to be treated as terms of art. A verdict such as that suggested in para 45 below ('The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so') embodies a judgmental conclusion of a factual nature, directly relating to the circumstances of the death. It does not identify any individual nor does it address any

> issue of criminal or civil liability. It does not therefore infringe either rule 36(2) or rule 42."

At paragraph 50 he stated that:-

> "In this appeal no question was raised on the retrospective application of the Human Rights Act 1998 and the Convention. They were assumed to be applicable. Nothing in this opinion should be understood to throw doubt on the conclusion of the House in In re McKerr [2004] 1 WLR 807." (My emphasis).

Their Lordships were, therefore, aware of the point taken in *re McKerr* and the effect of that decision. Yet they applied Section 3 of the Human Rights Act. Either it was available to them or it was not. Article 2 of the Convention was relied on in *Amin* as requiring an independent public investigation with the family legally represented. At paragraph [33] Lord Bingham stated that it was very unfortunate that there was no inquest in *Amin.*

[26] *R (Sacker) v West Yorkshire Coroner* was heard at the same time as *Middleton*. Lord Hope gave the opinion of the same Appellate Committee. The decision was given on the same day. The claimant was the mother of Sheena Creaner who died on 7 August 2000. An inquest was held from 9 to 12 October 2001. The headnote reads:-

> "The deceased hanged herself in her prison cell while on remand. Her mother, the claimant, alleged that the Prison Service knew that she was a suicide risk and had failed to carry out the proper preventative procedures. At the inquest the claimant requested the coroner to give the jury an opportunity to add to their verdict that death had been contributed to by neglect. The coroner refused and directed the jury that, pursuant to section 11(5)(b)(ii) of the Coroners Act 1988 and rules 36 and 42 of the Coroners Rules 1984, they were to confine their conclusions to how, when and where the deceased came by her death, that they were not to express any opinion on any other matter and that they should not frame their verdict so as to appear to determine any question of criminal liability on the part of a named individual or of civil liability. The jury returned a majority verdict that she had killed herself. The coroner announced, pursuant to rule 43, that he intended to report certain matters relating to the deceased's management in prison to

> the appropriate authority so as to prevent similar fatalities. The claimant sought judicial review of the coroner's refusal to leave the issue of neglect to the jury on the ground that his decision rendered the inquest ineffective to satisfy the state's investigative procedural duty under article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998. The judge refused permission to proceed with her claim and, on the claimant's appeal, the Court of Appeal concluded that since a rider of neglect should have been left to the jury the inquisition would be quashed and a fresh inquest ordered. They accordingly granted permission and allowed the appeal.
>
> On the coroner's appeal-
>
> *Held*, dismissing the appeal, that the scheme for the conduct of inquests, enacted by and under the authority of Parliament, was to be respected save to the extent that a change of interpretation was required to honour the state's international obligations under the Convention; that the 1998 Act indicated that the word 'how' in section 11(5)(b)(ii) of the 1988 Act and rule 36(1)(b) of the 1984 Rules should now be interpreted, not as connoting 'by what means' but as bearing the broader meaning 'by what means and in what circumstances'; that, since the coroner was unable to invite the jury to consider the issues on such a basis, the inquest had been unable to address the state's positive obligation under article 2 to take effective operational measures to safeguard life, and since the inquest could not identify the causes of the deceased's death, any steps which could have been, but were not, taken to prevent it, and any precautions which ought to have been taken to avoid or reduce the risk to other prisoners, the appropriate course was to order a new inquest."

At paragraph [21] he discussed the inquest which the Coroner conducted and referred to *ex parte Jamieson* and the interpretation of "how" given in that case.

At paragraphs [27] to [29] he stated:-

"27. As Lord Bingham of Cornhill, giving the opinion of the Appellate Committee, has explained in *R v H M Coroner for the Western District of Somerset, Ex p Middleton* [2004] UKHL 10, paras 34-35, the scheme for the conduct of inquests which has been enacted by and under the authority of Parliament must be respected, save to the extent that a change of interpretation is required to honour the international obligations of the United Kingdom under the Convention. The word "how" in section 11(5)(b)(ii) of the 1988 Act and rule 36(1)(b) of the 1984 Rules is open to the interpretation (my emphasis) that it means not simply "by what means" but rather "by what means and in what circumstances". The provisions of section 3 of the Human Rights Act 1998 indicate that it should now be given the broader meaning, with the result that a coroner will be able to exercise his discretion in the way Lord Bingham has indicated in paras 36 and 37 of the opinion in that case.

28. The coroner in this case did not have an opportunity of inviting the jury to consider the issues in the way which Lord Bingham has now identified. This deprived the inquest of its ability, when subjecting the events surrounding Ms Creamer's death to public scrutiny, to address the positive obligation that article 2 of the Convention places on the State to take effective operational measures to safeguard life: *Osman v United Kingdom* (1998) 29 EHRR 245, paras 115-116. The inquest was not able to identify the cause or causes of Ms Creamer's suicide, the steps (if any) that could have been taken and were not taken to prevent it and the precautions (if any) that ought to be taken to avoid or reduce the risk to other prisoners. The most convenient and appropriate way to make good this deficiency is, as the Court of Appeal did, to order a new inquest.

29. It should be noted that, although the inquest took place after 2 October 2000 when the relevant provisions of the Human Rights Act 1998 came into operation, the death occurred before that date. The respondent's contention in her claim for judicial review that this was a case of an ongoing breach of article 2 has not been challenged at any stage in these

> proceedings. But there has been no decision on the point, and nothing that has been said in this opinion should be taken as having had that effect."

[27] In *Sacker* (as in *Middleton*) Section 3 was applicable or it was not. The right to use Section 3 cannot be conferred by the parties or assumed by a court, if it is not entitled to do so. The Appellate Committee held that it was applicable. If so, I am content to follow those decisions as binding on me and to distinguish *ex parte Jamieson* and *Re Ministry of Defence's Application*, decisions of the Court of Appeal of England and Wales and Northern Ireland. But I am also prepared to hold that they have been implicitly overruled or would have been explicitly overruled, if the Appellate Committee had taken the view that they were not able to rely on Section 3, I will return to this point later in my judgment.

[28] In *re McKerr* the headnote reads in part:-

> (1) That the Convention was not part of domestic law save in so far as it was incorporated into the 1998 Act and had not been part of domestic law as so incorporated before the Act had come into force on 2 October 2002; that the Act was not generally retrospective and the obligation under section 6(1) and article 2 of the Convention to carry out a proper investigation into a violent death had not applied to the death of the applicant's father before 2 October 2002; and that, since there had been no breach of the obligation before that date, there could be no continuing breach thereafter.
>
> (2) That it was inappropriate, in an area regulated by legislation, for the courts to impose a common law obligation on the state corresponding to that in article 2 of the Convention, especially since the effect would be to impose positive human rights obligations on the state as a matter of domestic law in advance of the date on which a corresponding positive obligation had arisen under the 1998 Act."

Lord Nicholls stated at paragraph 17:-

> "17. In the present case the question of retrospectivity arises in the context of section 6 of the Act and article 2 of the Convention. It arises in this way. Section 6 of the Act creates a new cause

> of action by rendering certain conduct by public authorities unlawful. Section 7(1)(a) provides a remedy for this new cause of action. A person who claims a public authority is acting in a way made unlawful by section 6(1) may bring proceedings against the authority if he is a victim of the unlawful act. Thus, if the Secretary of State's failure to arrange for a further investigation into the death of Gervaise McKerr is unlawful within the meaning of section 6(1), these proceedings brought by his son fall squarely within section 7; if not, not."

At paragraph 23 he stated:-

> "23. I refer briefly to the court decisions on this point. There have been several cases where everyone concerned appears to have assumed that section 6 of the Human Rights Act could apply to a failure to investigate a death which took place before the Act came into force. These include two decisions of your Lordships' House: *R (Amin) v Secretary of State for the Home Department* [2003] 3 WLR 1169 and *R (Middleton) v Coroner for the Western District of Somerset* [2004] UKHL 10. In none of these cases, so it seems, was this point the subject of argument. So they do not assist."

At paragraph [50] to [52] Lord Steyn stated:-

> "50. The retrospectivity issue now arises. Mr McKerr's case is founded on section 6 of the 1998 Act. Leaving aside proceedings taken at the instigation of a public authority, which are not under consideration, it is now settled law that section 6 is not retrospective: section 22(4) of the 1998 Act; *R v Lambert* [2002] 2 AC 545; *R v Kansal (No. 2)* [2002] 2 AC 69; *Wilson v First County Trust Ltd (No. 2)* [2003] 3 WLR 568 (HL). Mr McKerr's father was killed in 1982. The 1998 Act came into force on 2 October 2000. The Court of Appeal held that there is a continuing breach of Article 2 which requires to be addressed by the Government: para 13. In my view the Attorney-General has demonstrated that this reasoning cannot be sustained. The Government may have been in breach of its obligations under international law before 2 October 2000 to set up a prompt and effective investigation.

But those treaty obligations created no rights under domestic law, not even after the right to petition to Strasbourg was created by the United Kingdom Government in 1966. The very purpose of the 1998 Act was "to bring home rights" which were previously justiciable only in Strasbourg: The Government White Paper, October 1997 (Cm 3782). That appears, in any event, to be the consequence of the rule enunciated by the House of Lords in the *International Tin Council* case that an unincorporated treaty can create no rights or obligations in domestic law: *J. H. Rayner (Mincing Lane) Limited v Department of Trade and Industry* [1990] 2 AC 418. As Lord Hoffmann has pointed out this rule has been affirmed by the House in *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 and in *R v Lyons* [2003] 1 AC 976, and in particular in the leading judgment of Lord Hoffmann in the latter case: para 27. The later decisions rest, however, on the pivot of the *International Tin Council* decision.

51. Since the *International Tin Council* decision is regularly cited in our courts, a brief reference to its reception in subsequent jurisprudential analysis may not be out of place. In doing so I acknowledge that the point has not been the subject of argument. A comprehensive re-examination must await another day. But distinguished commentators have criticised what has been called the narrowness of the decision in the House of Lords: see the criticism of Sir Robert Jennings in his 1989 F.A. Mann Lecture ((1990) 39 ICLQ 513, at 524-526); and of Dame Rosalyn Higgins, "The Relationship between International and Regional Human Rights Norms and Domestic Law", in *Developing Human Rights Jurisprudence,* 1993, Vol. 5, 16-23. The latter writer observed (at 20):

> '… international law is part of the law of the land. Some rights contained in international human rights treaties are not the produce of inter-State contract, but antedate any such multilateral agreement. The treaty is merely the instrument in which a rule of general international law is repeated. It bears repetition in an international

> instrument, partly because relatively 'new' rights may also be included, and partly because the treaty may involve procedural undertaking for the States Parties. But none of that changes the character of a given right as an obligation of general international law. Freedom from torture, freedom of religion, free speech, the prohibition of arbitrary detention, should all fall in that category. As such - and even were these rights not already secure through a separate domestic historic provenance - they would be part of the common law by virtue of being rules of general international law.'

There is also growing support for the view that human rights treaties enjoy a special status: Murray Hunt, Using Human Rights Law in English Courts, 1998, pp 26-28. Commenting on *Lewis v Attorney General of Jamaica* [2001] 2 AC 50 Mr Justice Collins commented that 'it may be a sign that one day the courts will come to the view that it will not infringe the constitutional principle to create an estoppel against the Crown in favour of individuals in human rights cases': *Foreign Relations and the Judiciary* 2002, 51 ICLQ 485, at 497. That is not to say that the actual decision in the *International Tin Council* case was wrong. On the contrary, the critics would accept the principled analysis of Kerr LJ in the Court of Appeal that the issue of the liability of member states under international law is justiciable in the national court, and that under international law the member states were not liable for the debts of the international organisation: see Mr Justice Lawrence Collins, *op cit,* at 497.

52. The rationale of the dualist theory, which underpins the *International Tin Council* case, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. A

critical re-examination of this branch of the law may become necessary in the future."

At paragraph [69] and [70] Lord Hoffman stated:-

> "69. Your Lordships' House have decided on a number of occasions that the Act was not retrospective. So the primary right to life conferred by article 2 can have had no application to a person who died before the Act came into force. His killing may have been a crime, a tort, a breach of international law but it could not have been a breach of section 6 of the Act. Why then should the ancillary right to an investigation of the death apply to a person who died before the Act came into force? In my opinion it does not. Otherwise there can in principle be no limit to the time one could have to go back into history and carry out investigations. In *R (Wright) v Secretary of State for the Home Department* Jackson J. was prepared to accept the possibility of investigations into breaches of article 2 'during the 50-year period between the UK's accession to the Convention and the coming into force of the [1998 Act]'. But that was because he regarded an international law right under the Convention as a necessary (and sufficient) springboard for a domestic claim on the basis of a 'continuing breach'. In my opinion, however, the international law obligation is irrelevant. Either the Act applies to deaths before 2 October 2000 or it does not. If it does, there is no reason why the date of accession to the Convention should matter. It would in principle be necessary to investigate the deaths by state action of the Princes in the Tower.
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> 70. I therefore agree with the opinion of Silber J in *R (Khan) v Secretary of State for Health* [2003] EWHC 1414 (Admin) that the duty to investigate under article 2 did not arise in domestic law in respect of deaths before 2 October 2002. In the Court of Appeal in that case ([2003] EWCA Civ 1129), Brooke LJ, giving the judgment of the Court, disagreed. He said 'we do not believe the court at Strasbourg would look at the matter in this way.' I daresay it would not. But that is because the court would be concerned with the international obligations of the United Kingdom and

> not with the extent to which the 1998 Act was retrospective."

[29] It is, therefore, clear that the next-of-kin cannot obtain an Article 2 compliant inquest on a person who died before 2 October 2000 by reference merely to the fact that the United Kingdom is in breach of its international treaty obligations or other arguments that have been rejected in *McKerr.* We are all bound by *McKerr*.

It appears to me, however, that Mrs Middleton would have obtained another inquest if there had not been a full and satisfactory investigation at the inquest on her son. Lord Bingham concurred with Lord Hope in ordering a fresh inquest on Sheena Creaner. An order for a public inquiry was made in *Amin*.

[30] No one suggests that by giving the word 'how' in the Coroners' Act 1988 or in the corresponding legislation in Northern Ireland the meaning given to it in *Middleton* and in *Sacker*, there will inevitably be an Article 2 compliant inquest.

[31] As I stated at paragraph [27], I propose now to examine whether the House of Lords in *Middleton* and *Sacker* would, if Section 3 was not available to them, overrule *ex parte Jamieson* and *the Ministry of Defence's* Application. This may seem presumptuous on my part. But there are reasons for doing so.

The reasoning in *Middleton* is, I suggest, compelling in itself. If I am right that *McCann* was the first case in which the European Court comprehensively spelt out the "procedural" obligations of Article 2, and if I am correct in stating that cases such as *Osman* and the large number of cases on inquests from Northern Ireland which went to Europe (in which judgment was given on 4 May 2001), surely by that time we were aware that our Coroners' Acts and Rules fell far short of compliance with Article 2, were a narrow interpretation of "how" to be maintained.

I refer only to *R v Lyons* [2003] 1 AC 976. The headnote reads in part:

> "Held, dismissing the appeal, that the Convention was an international treaty and as such did not confer rights on individuals enforceable in domestic law; that although there was a presumption in favour of interpreting English law in a way which did not place the United Kingdom in breach of the obligations of the Crown under the Convention, where was an express and applicable provision of domestic statutory law it was the duty of the courts to apply it even if that

would involve the Crown in the breach of an international treaty …"

At paragraph [13] Lord Bingham said:

> "It is true, as the Attorney General insisted, that rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their files of application they should be seen as complementary and not as alien or antagonistic systems. Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law. I would further accept, as Mr Emmerson strongly contended, with reference to a number of sources, that the efficacy of the Convention depends on the loyal observance by member states of the obligations they have undertaken and on the readiness of all exercising authority (whether legislative, executive or judicial) within member states to seek to act consistently with the convention so far as they are free to do so."

At paragraphs [26] to [28] Lord Hoffman said:

> "26 What, then, is the effect of the ECHR rulings upon the question of whether the appellants' convictions are safe? The Convention is an international treaty made between member states of the Council of Europe, by which the High Contracting Parties undertake to `secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of this Convention'. Article 19 sets up the ECHR `to ensure the observance of the engagements undertaken by the High Contracting Parties'. It has jurisdiction under article 32 to decide `all matters concerning the interpretation and application of the Convention'. And by article 46 the high contracting parties undertake `to abide by the final

judgment of the court in any case to which they are parties.'

27 In other words, the Convention is an international treaty and the ECHR is an international court with jurisdiction under international law to interpret and apply it. But the question of whether the appellants' convictions were unsafe is a matter of English law. And it is firmly established that international treaties do not form part of English law and that English courts have no jurisdiction to interpret or apply them: *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 (the *International Tin Council* case). Parliament may pass a law which mirrors the terms of the treaty and in that sense incorporates the treaty into English law. But even then, the metaphor of incorporation may be misleading. It is not the treaty but the statue which forms part of English law. And English courts will not (unless the statute expressly so provides) be bound to give effect to interpretations of the treaty by an international court, even though the United Kingdom is bound by international law to do so. Of course there is a strong presumption in favour of interpreting English law (whether common law or statute) in a way which does not place the United Kingdom in breach of an international obligation. As Lord Goff of Chievely said in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 283: `I conceive it to be my duty, when I am free to do so, to interpret the law in accordance with the obligations of the Crown under [the Convention].'

28 But for present purposes the important words are `when I am free to do so'. The sovereign legislator in the United Kingdom is Parliament. If Parliament has plainly laid down the law, it is the duty of the courts to apply it, whether that would involve the Crown in breach of an international treaty or not."

At paragraph [33] he said:

> "If the encroachment had been by a judge-made rule of common law or a judicial implication in a statute which did not expressly address the question, it would in theory have been open to the court to say that the previous common law rule or judicial interpretation had been wrong and that the law should rather be understood in a sense which conformed to the judgment of the ECHR. For example, in the present case, even if there had been no section 434(5), the chances are that before the *Saunders* case the courts would have construed the statute as impliedly making the answers admissible. That was the view of the Court for Crown Cases Reserved in relation to the investigatory powers conferred by the Bankrupt Law Consolidation Act 1849 (12 & 13 Vict c 106) (see *R v Scott* (1856) Dears & B 47) and this decision has been followed in many cases concerned with individual or corporate insolvency: see, for example, *R v Erdheim* [1896] 2 QB 260. If the question had remained a matter of judicial decision, it would have been open to the court after the Saunders case to say that the decision in *Scott's* case was wrong and that the powerful dissenting judgment of Coleridge J should be preferred to Lord Campbell CJ's judgement on behalf of himself Alderson B, Willes J and Bramwell B. In that case, the appellants would have had the benefit of the declaratory theory of judicial decision-making by which the new interpretation would be treated as stating what the law had always been."

Jordan is an unusual case. But for the fact that a new inquest had been ordered in *Sacker*, it may well have gone to Europe. So might *Middleton* if Mrs Middleton had for good reason sought a new inquest on her son. The Committee of Ministers has not yet completed its deliberations about the package of measures proposed by the Government under Article 46 of the Convention. A death which occurred in 1992 at the hands of the State still has a pending inquest. It is my view that if all the cases on inquests in the European Court had been decided before *ex parte Jamieson* and the *Ministry of Defence's Application* were decided, a broad construction, rather than a narrow one, would have been given to the word `how' in the Coroners' Act and Rules.

[32] The two applications for judicial review with which I am now concerned relate, firstly, to a decision of the Lord Chancellor to amend only Rule 9(2) of the Coroners' Rules. It was argued before Kerr J that this was inadequate as, in particular, he failed to amend the Rules so as to enable the jury, as in England and Wales, to return a verdict of Unlawful Killing. It was argued that such a verdict would force the hand of the DPP to initiate a prosecution, which he had declined to do in 1993 and 1995, or to give reasons for his refusal to prosecute, which would be amenable to judicial review.

[33] Kerr J dealt with the arguments presented to him as follows:-

> "Two principal arguments were advanced for the applicant. The first was that the Lord Chancellor had been guilty of inordinate delay in introducing an amendment of Rule 9(2)".

He dealt with this argument at pp 5-7 of his judgment, concluding that the response of the Government of the United Kingdom to the judgment of the European Court was not unduly delayed. The amendment came into operation on 10 February 2002. This first argument was not pursued before the Court of Appeal. I agree entirely with Kerr J's treatment of it and merely state, for the record, that counsel rightly abandoned the argument before us.

[34] The second argument was that the inquest jury should have the power to return a verdict of unlawful killing. Kerr J stated at p11 of his judgment:-

> "I do not consider that the theoretical possibility of an inquiry by the [Police] Ombudsman should deter the Coroner from performing the function that [the] ECtHR clearly expected the inquest to perform. It does not follow, however, that in order to establish the facts relevant to the lawfulness of the forces that caused Mr Jordan's death a verdict of Unlawful Killing must be available to the jury."

He referred to paragraph 128 of *Jordan v UK* and commented that the European Court accepted that a procedure which does not include a "method of apportioning guilt" is not, on that account alone, incompatible with Article 2.

[35] This second argument was pursued before the Court of Appeal. It was pointed out that the hearing of the appeal had been adjourned to await the outcome of the decision of the House of Lords in *Middleton* which was given on 11 March 2004. Reliance was placed on the passage in the opinion of Lord Bingham at paragraph [16]:-

> "It seems safe to infer that the State's procedural obligation is unlikely to be met if it is plausibly alleged that agents of the State have used lethal force without justification, if an effectively unchallengeable decision has been taken not to prosecute and if the fact-finding body cannot express its conclusion on whether unjustifiable force has been used or not, so as to prompt reconsideration of the decision not to prosecute. Where, in such as case, an inquest is the instrument by which the State seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's conclusions on the central issues is required."

It was submitted that a determination on the lawfulness of the force by an inquest jury was not a method of apportioning guilt and did not fall foul of Rule 16 of the Coroners' Rules. Reliance was placed on the English Rules which also prohibit the framing of a verdict which would appear to determine criminal liability on the part of a named person. Form 22 of the English Rules provided for a number of findings including that "(c) In the case of murder, manslaughter or infanticide it is suggested that the following form be adopted: CD was killed unlawfully."

It was further pointed out that Stanley Burton J had stated at first instance in *Middleton*:-

> "It is not the function of a Coroner or his jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame. The principle is expressed in Rule 42 of the Rules of 1984. The rule does, however, treat criminal and civil liability differently; whereas a verdict must not be framed so as to appear to determine any question of criminal liability on the part of a named person, thereby legitimating a verdict of unlawful killing provided no one is named, the prohibition on returning a verdict so as to appear to determine any question of civil liability is unqualified applying whether anyone is named or not." He went on to say: "It may be accepted that in case of conflict the statutory duty to ascertain how the deceased came by his death must prevail over the prohibition in rule 42."

The relevant passage in Jervis on Coroners at paragraph 16.18 was cited to the court, as was a passage from the recently published `Death Certification and Investigation in England and Wales and Northern Ireland' in which it was stated:-

> "If, for example, they [coroners] find that a reason offered in evidence for an action relevant to the death – for example a claim of self-defence in a shooting case – does not stand up in the face of evidence overall, they should be able to say so in their narrative and analytical outcome and should not be deterred from doing so by the possibility that some might see in their finding on implication of fault or liability. If, conversely, the judgment is that the reasons for the action appear sound the finding should make that clear."

Conclusions to a Verdict of Unlawful Killing

[36] Rule 16 of the Rules on Inquests and Post-Mortem Examinations (1963 SR&C No 199) provides:-

> "Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability …".

As Sergeant A fired the fatal shots which killed Pearce Jordan a verdict by the Coroner's jury of "Unlawful Killing" would involve a breach of this Rule. In the package of measures presented to the Committee of Ministers the British Government did not propose to abrogate or amend Rule 16. Accordingly it is my view that unless the Human Rights Act 1998 requires the Court to deal with this subordinate legislation under Section 3, so as to render it invalid, or Article 2 of the Convention applies, so as to override the Rule, a verdict of unlawful killing is not open to the Coroner's jury in this appeal.

I share the view of Kerr J that, if the jury is entitled to make findings of fact and reach conclusions of fact on the central issue in this case, namely, whether the force used was unjustified, a verdict of "unlawful killing" is unnecessary. It may be argued that this is a "semantic" difference. But it prevents a breach of rule 16.

There is a difference between *Middleton* and this case, irrespective of whether the former was overborne by *McKerr*, as contended by counsel for the Lord Chancellor.

First of all, there was a judicial review in this case by the appellant of the refusal of the DPP to give reasons other than in the most general terms for his decision not to prosecute Sergeant A. Kerr J dismissed the application. The Court of Appeal dismissed the appeal in its judgment of 12 December 2003. The Appellate Committee of the House of Lords refused leave to appeal to the House of Lords on 22 June 2004.

In the course of my judgment in the Court of Appeal I referred at paragraph [16] to the statement made by the Solicitor-General in the House of Commons on 5 March 2002. She stated, inter alia:-

> "Inquest proceedings in relation to the death of Pearse Jordan are currently live. Once the proceedings have been completed, the Director of Public Prosecutions for Northern Ireland will (my underlining) give further consideration to whether any prosecution should follow."

This is a different situation from that envisaged by Lord Bingham in *Middleton*. In that case at paragraph [16] he referred to an "effectively unchallengeable decision … taken not to prosecute". In this case, following a report from the Coroner under Article 6 of the Prosecution of Offences (Northern Ireland) Order 1972 the Director of Public Prosecutions, who is entrusted with decisions whether to prosecute or not, will (my emphasis) review his previous decision not to prosecute. I wholly subscribe to the view that he is immune to political pressure. He has not committed himself to giving reasons for refusing to prosecute – see the statement of the Attorney-General set out at paragraph [15] of my earlier judgment. If he decides not to prosecute and refuses to give reasons, he will be subject to judicial review. I said at paragraph [29] of my judgment in that appeal and I repeat that I consider that he would be obliged to give reasons.

I respectfully agree with Kerr J; the Coroner is correct in deciding to refuse to leave to the jury a verdict in the form of a "lawful" or "unlawful" killing or an open verdict, as he has stated. Kerr J gave his judgment on both applications before the decisions in *Middleton* and *McKerr*. The decision of Carswell LJ in *Re Bradley and Anothers' Application* [1995] NI 192 on this issue is relevant to the decision of Kerr J. But I now consider that the jury has a wider fact-finding role than Carswell LJ indicated. My change of view comes as a result of the decisions of the European Court and of the House of Lords.

[37] Before this Court reliance was placed by the appellant on the decision in *Middleton* by which, it was argued, *ex parte Jamieson* was overruled. It was also contended that the Government had publicly indicated its reliance upon an inquest as the means of delivering the Article 2 compliant investigation required by the European Court. The Committee of Ministers was duty-

bound to ensure that this was carried out and a verdict was a necessary concomitant of compliance. Uptil now the Lord Chancellor had failed to ensure compliance with Article 2 or had misdirected himself as to the meaning of the judgment of the European Court and of the effect of the decision in *Middleton*. In any event the Government was committed to comply with Article 2 in its "package of measures" to the Council of Ministers. The Committee of Ministers are still deliberating about "the package". More than three years have passed since the decisions of the European Court in *Jordan and Others v UK*. Our courts cannot wait.

[38] Counsel on behalf of the Lord Chancellor submitted that the decision in *McKerr* meant that the appellant had no Article 2 rights under the relevant sections of the Human Rights Act 1998. As a matter of domestic law there was no breach of Article 2 because Pearce Jordan died before 2 October 2000. The Government had publicly indicated its reliance upon an inquest as the means of delivering an Article 2 compliant investigation.

The procedure proposed by the Lord Chancellor was capable of determining the lawfulness of the use of lethal force without the necessity, for a verdict. As Sergeant A discharged the shots which killed Pearce Jordan, a verdict of unlawful killing was, inevitably, a verdict directed against him.

The Coroner would report the findings of the jury to the DPP in accordance with Article 6 of the Prosecution of Offenders (Northern Ireland) Order 1972. The DPP would reconsider his decision not to prosecute in the light of the findings at the inquest and the recommendations of the Coroner.

The Coroner would be entitled to investigate with the jury the planning, briefings, and the operation which led to the death of Pearse Jordan because the investigation "by what means Jordan met his death" was wide enough to encompass these matters. Counsel for the Coroner argued that such an investigation was not permitted by the decisions in *ex parte Jamieson* and the *Ministry of Defence's Application*.

[39] I have already indicated that I am prepared to construe the phrase "by what means the deceased met his death" more widely than I did in 1994 and accordingly hold that the Coroner may investigate the planning and carrying out of the operation by the security forces which led to the death of Pearse Jordan. If Section 3 of the Human Rights Act can be used in the interpretation of the word "how" in the English and Northern Irish Coroners' Acts and Rules in respect of an Inquest carried out on or after 2 October 2000, well and good. There are certainly no causes of action or vested rights involved in Inquest proceedings such as were recognised as a bar to the use of Section 3 in *Wilson v First County Trust Ltd (No 2)* [2003] 3 WLR 481 and *McKerr* was concerned with Sections 6 and 7. It may be that the Convention rights of an individual do not have to be engaged, when applying Section 3, provided that

Convention rights in general apply. It is certainly incongruous that the Coroner should change his interpretation of legislation after 2 October 2000, dependent on when the death took place. There was no argument in *McKerr* about Section 3 and, presumably, those who decided *McKerr* were aware of the decision of their colleagues that it did apply. But if Section 3 does not apply, I repeat that I consider the appellate committee in *Middleton* and *Sacker* would have expressly overruled the decision of the English and Northern Irish Courts of Appeal for the reasons which I have expressed. I have, therefore, implicitly rejected the arguments of counsel for the Coroner on the narrowness of the form of inquest which the Coroner should carry out.

[40] If the word "how" in the Coroners' Acts and Rules continues to bear the narrow meaning which it had before the European Court expanded its interpretation of Article 2, it will be necessary in my view for the Lord Chancellor at least to amend the meaning of "how" retrospectively, in order to comply with his obligations to the Committee of Ministers in a number of the Inquests ruled on by the European Court. I can envisage endless processions to that Court. Such processions cannot raise the esteem in which the Government or the Courts of the United Kingdom are held.

[41] The second challenge of the Appellant is to the Coroner's decision of 9 January 2002 in the course of which he decided that he would not leave to the jury the right to bring in a verdict of "unlawful killing" and would apply existing Coroner's law and practice. I have already agreed with Kerr J that the Coroner was right to decide not to allow a verdict of unlawful killing although the jury could make findings of fact on the central issues involved in the death of Pearse Jordan. As I have indicated I consider that the Coroner should apply the Coroner's law and practice as at 2002. Kerr J reached the same conclusion. But he did not have the decisions of the House of Lords to consider although he did have the decision of the Administrative Court in *Middleton*. I consider that "how" should be interpreted as meaning:-
"By what means and in what circumstances". If I am wrong in this I give the wider meaning of "by what means" which I have indicated.

[42] In consequence I would dismiss these appeals.