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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY THERESA JORDAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

KEEGAN J

Introduction

[1] This is an application for leave to apply for judicial review of a decision of Mr Justice Horner ("the Coroner") who conducted an inquest into the death of Patrick Pearse Jordan ("the deceased"). The decision of the Coroner is comprised in an extensive judgment which was delivered on 7 November 2016. This judicial review is brought by the deceased's mother Theresa Jordan.

[2] I heard the matter over one full day. Counsel referred me to the relevant papers and I had the benefit of detailed skeleton arguments. I am grateful to all counsel for the economy and focus of their written and oral submissions. Mr McDonald QC SC and Ms Quinlivan QC appeared for the applicant, Mr Doran QC and Mr Skelt for the Coroner, Dr McGleenan QC and Mr Turlough Montague QC for the Chief Constable.

Background

[3] This case has been before many courts in relation to various different points. *In Jordan, Re Applications for Judicial Review* 2014 NICA 76 the Court notes that in this case there were at that time 24 judicial reviews, 14 appeals to the Court of Appeal, 2 hearings in the House of Lords and one hearing before the European Court of Human Rights. It must be observed that this case has therefore been the subject of significant legal scrutiny.

[4] This is not the first inquest into the death of the deceased. This judicial review application relates to a third inquest into his death. The first inquest in 1995 was adjourned without verdict. A second inquest in 2012 was conducted by a coroner with a jury. The verdict was quashed by Stephens J in a decision reported at

[2014] NIQB 11 and upheld by the Court of Appeal. By agreement of the parties this inquest was heard by the Coroner sitting without a jury over some 16 days from 22 February to 21 April 2016.

[5] The Coroner delivered his verdict in a detailed written judgment dated 7 November 2016. It is the verdict which is impugned in this judicial review. The judgment sets out in detail the full extent of this inquiry as it recites the evidence that was called, the transcripts read from the previous inquests, the witnesses examined and cross examined, the expert evidence, the submissions of counsel. The Coroner also refers to the relevant legal principles pertaining to the burden and standard of proof, the law of self-defence and the law in relation to Article 2 of the European Convention on Human Rights ("ECHR"). The Coroner records that after hearing the evidence he received detailed written submission from counsel for the next of kin and counsel on behalf of the police and Ministry of Defence. He states that he considered those submissions before a hearing of oral arguments in relation to them on 21 May 2016. He states that following that he read and re-read 5000 pages of evidence, together with transcripts of previous inquest together with hundreds of pages of legal authorities.

[6] The Coroner answered the questions agreed as part of the scope of the inquest in the concluding section of his judgment. At paragraph 334 the Coroner sets out his conclusion as follows:

> "The deceased was shot and fatally wounded on 25 November 1992 on the Falls Road. At the time of his death he was on a mission for PIRA. He was unarmed. The Ford Orion which he was driving had been used earlier that day to carry substances used in the making of improvised explosives, namely ammonium nitrate and sugar. At the time of the shooting the Orion car was not being used to ferry guns, explosives or other munitions. It is now impossible with the passage of time to say with any certainty what happened on that fateful afternoon. At the remove of a quarter of a century I am simply unable to reach a concluded view which is fair and just as to whether the use of lethal force was justified or not. I remain profoundly unsure as to what happened. Neither side, for the reasons I have set out, have been able to convince me that what they say did occur immediately prior to the deceased's death. On the balance of probabilities if the events did happen as PSNI contend, and as I have said I have been unable to determine that issue on the balance of probabilities, I am satisfied that Sergeant A acted in self-defence and that there was no breach of Article 2.

> However, in so far as the onus lies on the PSNI to provide a satisfactory and convincing explanation to the inquest for the use of lethal force it has failed to do so. But how precisely the deceased met his death on that fateful afternoon has not been proved to the satisfaction of this inquest and remains unknown."

[7] In his concluding section the Coroner recognises that his ruling will be a disappointment to both sides. There is particular force in this observation given that the State did not satisfy the Article 2 burden. At paragraph 191 of his judgment the Coroner makes the following comments on this issue:

> "The irony is that in delaying this inquest, the PSNI who, as I have explained earlier in this judgment, bear the burden (under Article 2 of the ECHR) of providing a "convincing and satisfactory explanation" for what happened on 25 November 1992, have made the task of satisfying the burden placed upon them immeasurably more difficult. The passage of time, nearly a quarter of a century, for the reasons which I have discussed already, make the task of the fact finder more difficult. Consequently, the State, by delaying these investigations has placed itself at an inevitable disadvantage in trying to satisfy the Article 2 burden"

[8] In addition to this finding the Coroner was unable to determine whether or not the lethal force was unjustified. That is the decision at the heart of challenge. However, it is important to stress that this judicial review is not an appeal. In exercising my supervisory function I cannot substitute another decision. I can simply decide whether there is an arguable case that the Coroner has acted in an unlawful manner.

[9] Following from his ruling the Coroner was asked to consider removing anonymity for two officers M and Q. He declined that application. The Coroner was also asked to refer Officers M and Q to the DPP for consideration as to whether they had committed perjury. The Coroner has this power pursuant to section 35(3) of the Justice (Northern Ireland) Act 2002 and in this case the Coroner exercised it and referred the two officers. His ruling is contained in a separate written judgment.

Background Facts

[10] On 25 November 1992 the deceased was shot and killed at the Falls Road in Belfast by an officer of the RUC later identified as Sergeant A. The deceased was later claimed as a member of the PIRA. The broad facts were not in dispute and I extract these from the judgment as follows:

(a) The deceased was the driver of a hijacked car stopped by police in an anti-terrorist operation.

(b) He was running away and trying to escape from police when he was shot dead.

(c) He was unarmed, made no attempt to pretend that he was armed and had nothing in his possession that could have been mistaken for a firearm.

(d) He was shot twice in the back and once in the back of the left arm.

(e) He was shot by Sergeant A, who emerged from his car with a round in the breach and fired 5 shots on automatic.

(f) At the time he was shot he was about 3 yards from the hijacked car and 6 yards from Sergeant A.

(g) Sergeant A agreed that he had failed to comply with the RUC Code of Conduct governing the discharge of firearms and which he accepted applied to him in that situation.

[11] In the decision of Stephens J reported at 2014 NIQB 11 reference is helpfully made to the central issue in this case as follows at paragraph 44:

> "The central issue was whether his killing was justified. There were issues about the debriefing which essentially went to the credibility of the accounts given about how the deceased was shot and were therefore relevant to the central issue which was whether the killing was justified. An issue also arose as to whether the operation had been planned and controlled so as to minimise recourse to lethal force, the 'planning and control' issue."

Stephens J also referred to a comprehensive set of questions which should form the scope of any subsequent inquest and those are adopted by the Coroner by agreement of all of the parties.

The role of the Coroner

[12] The functions of Coroners in Northern Ireland are governed by the Coroners Act (Northern Ireland) 1959 ("the 1959 Act") and the Coroners Practice and Procedure Rules (Northern Ireland) 1963 ("the 1963 Rules"). In particular, section 31 of the 1959 Act provides as follows in relation to verdict:

"31-(1) Where all members of the jury at an inquest are agreed they shall give, in the form prescribed by rules under section 36, 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.

(2) Where all members of the jury at an inquest fail, within such reasonable time as a coroner may determine, to agree upon a verdict as a foresaid, the coroner may discharge the jury and instruct the Juries Officer for the County Court Division where the inquest is held to summon another jury in accordance with the Juries (Northern Ireland) Order 1996, and thereupon the inquest shall proceed in all respects as if the proceedings which terminated in the disagreement had not taken place (save that none of the former jurors shall be eligible to serve on it)."

The 1963 Rules provide as follows:

22(1) 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 had been proved, be confined to a statement of the matters specified in Rule 15.

'15. The proceedings and evidence in 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; and

(c) the particulars for the time being required by the Births and Deaths Registration Northern Ireland Order 1976 to be registered concerning the death.

16. Neither the coroner nor the jury shall express any opinion on questions

> of criminal or civil liability or on any matter other than those referred to in the foregoing rule'."

[13] It is important to remember the particular complexion of proceedings before a Coroner. In *R v Davis* [2008] 1 AC 1128 Lord Bingham described this as follows:

> "An inquest is an inquisitorial process of investigation quite unlike a criminal trial. There is no indictment, no prosecution, no defence, no trial. The procedures and rules of evidence for a trial are unsuitable for an inquest. Above all there is no accused liable to be convicted and punished in these proceedings"

[14] The inquest is fundamentally an investigation conducted by the Coroner as inquisitor to try to find the truth, and allay suspicion and rumour. The process should not be overly adversarial. However, the inquest system in Northern Ireland has become more complicated in that it has had to deal with deaths which occurred during the Troubles. These cases involve the use of lethal force by agents of the State and so engage Article 2 of the ECHR. The substantial question to be determined is how the deceased came to his death and by virtue of Article 2 that involves the Coroner conducting an inquiry as to "how and in what circumstances the deceased came by his death."

Issues of scope and Article 2

[15] In *McCann v United Kingdom* [1995] 21 EHRR 97 the Strasbourg Court held that Article 2 gave rise not merely to a substantive obligation on the State not to kill people but, where there was an issue as to whether the State had broken this obligation, a procedural obligation on the State to carry out an effective official investigation into the circumstances of the deaths ("the procedural obligation"). In the Strasbourg cases of *Jordan v UK* [2003] 37 EHRR and *Nekova v Bulgaria* [2006] 42 EHRR 43 this procedural obligation is referred to as follows:

> "The investigation is also to 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 applicable 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 of the person or persons responsible will risk falling foul of this standard."

[16] The scope of an inquest in Northern Ireland was closely examined after the enactment of the Human Rights Act in 1998. Following from *Jordan v Lord Chancellor* [2007] UKHL 14 and *Re Brigid McCaugheys Application* [2011] UKSC 20 the inquest in this case has an extended purpose. The engagement of Article 2 is not controversial in this case and so I will not dwell any further on the jurisprudence surrounding that issue. However, I do record that Article 2 comprises the right to life and is one of the most fundamental legal rights within the panoply of Convention rights.

[17] In *R (Middleton) v Coroner for West District of Somerset* [2004] 2 AC 1182 the House of Lords set out the ingredients necessary for an Article 2 compliant inquest as follows:

> "16. 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.
>
> 19. Two considerations fortify confidence in the correctness of this conclusion. First, 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*, paragraph 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, supra*). An uninformative jury verdict will be unlikely to meet what the House in

Amin, paragraph 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.'

20. The European Court has repeatedly recognised that there are many different ways in which a State may discharge its procedural obligation to investigate under Article 2. In England and Wales an inquest is the means by which the State ordinarily discharges that obligation, save where a criminal prosecution intervenes or a public enquiry is ordered into a major accident, usually involving multiple fatalities. To meet the procedural requirement of Article 2 an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case."

[18] The form of the verdict is within the discretion of the coroner. In Northern Ireland it is clear that legacy inquests are now likely to be conducted by a judge alone. Hence the judge has to engage the parties and then focus on the scope of the enquiry necessary in the case to comply with the Article 2 obligation. The inquest must also be capable of leading to a determination of whether the use of lethal force was justified. This involves looking beyond the requirements of the rules at the circumstances of "how" the deceased met his death. In this case the parties agreed a list of questions for the Coroner and the Coroner reached his conclusion using that agreed template.

This challenge to the Coroner's verdict

[19] Following from the case of *Anisminic Ltd v Foreign Compensation Commission* [1969] 2AC 147 the verdict of a Coroner may be challenged by way of judicial review. There was no issue taken about this. The applicant has standing. I have read the affidavit of Mr Shields of 6 February 2017 which explains the timing of the application as there were difficulties with Legal Aid. There was no point taken about this. So, I turn to the substance of the challenge contained within the Order 53 Statement.

[20] Firstly the following relief was claimed *inter alia*:

(a) An order of certiorari quashing the inquest verdict.

(b) A declaration that the Coroner failed to resolve disputed issues of fact central to the determination of how the deceased died and was thereby in breach of section 31 of the Coroners (Northern Ireland) Act 1959.

(c) A declaration that the Coroner ought to have arrived at a decision on the balance of probabilities in relation to the question as to whether Sergeant A's use of lethal force was justified.

(d) A declaration that the Coroner's decision to deliver a verdict which was not capable of eliciting the essential facts or playing an effective role in the identification or prosecution of offences which may have occurred breached the applicant's Article 2 rights.

(e) A declaration that as a result of the aforementioned decisions the inquest conducted into the applicant's son's death was unfair and was conducted in breach of Article 2 of the Convention and was unlawful.

(f) An order of certiorari quashing the verdict of the Coroner for the reasons set out above, both individually and cumulatively.

[21] The Order 53 Statement sets out 26 grounds for review however in the skeleton argument they are helpfully marshalled into 6 categories which in my view properly define the issues as follows

(i) The Coroner abdicated responsibility to arrive at a verdict regarding the central issue concluding:

> "It is now impossible with the passage of time to say with any certainty what happened on that fateful afternoon."

(ii) The Coroner fell into error regarding the burden and standard of proof. This is an issue as to the legal test to be applied.

(iii) The Coroner failed to take into account and deal with ballistics evidence. This is an issue as to a factual finding.

(iv) The Coroner failed to appreciate the importance and significance of the Code of Conduct breached by Sergeant A. This is another factual finding issue.

(v) The Coroner's selective reliance on police evidence. Again, this is a factual finding issue.

(vi) Regarding Officer V the Coroner failed to reach a determination of the question whether V perjured himself.

All of these points were developed in a comprehensive skeleton filed by the applicant which formed the basis for this leave hearing in which I considered in detail alongside the oral submissions of both Mr MacDonald QC and Ms Quinlivan QC.

[22] Mr Doran QC opposed leave again by written argument but supplemented by oral submissions essentially on the ground that the challenge was misconceived. He argued that there was no mistake of law in this case. He submitted that the inquest was Article 2 compliant as that is an obligation of means and not result and that the factual findings of the coroner after 16 days of oral evidence, voluminous papers and a considered judgment could not be impugned. Mr Doran submitted that an arguable case had not been established.

[23] The core submission of Dr McGleenan QC on behalf of The Chief Constable was that there will be circumstances – as in this case – where despite exhaustive inquiries a firm conclusion cannot be reached but there is no test of exceptionality attached to this. He referred to the wording of section 31 which refers to the fact that a finding is prefaced upon particulars "so far as such particulars have been proven." Also regarding Officer V he submitted that this was a peripheral issue. He submitted that the Coroner complied with the statutory duties under section 31 of 1959 Act. Dr McGleenan also contended that in examining the Article 2 jurisprudence it is clear that while it set the standard which broadened the inquiry it did not compel a particular result. In this regard he relied on the decision of *McKerr* [2002] 34 EHRR 20 that "this is not an obligation of result but of means."

Consideration

[24] In reaching my conclusion I bear in mind the context of this case and the following matters in particular:

(i) An inquest is not a civil trial or a criminal trial. The imperative is to establish the truth and also in this case to comply with the obligations of Article 2 of the ECHR in terms of an enhanced inquiry.

(ii) It must be borne in mind that judicial review is not appeal. There is a spectrum of decisions that can be made by any fact finding judge. However, the reviewing court does not quash a decision simply because it might have reached a different conclusion or substitute its own reasoning.

(iii) In this case it was agreed by all parties that the case should be heard by a judge alone rather than a jury. There was no issue taken as to the Coroner's exercise of discretion regarding this issue pursuant to section 18(2) of the 1959 Act. The judge was sitting in his role as a Coroner and as such his decision is reviewable.

(iv) The court is exercising a supervisory function in this case regarding two elements which I paraphrase –

(1) whether the inquest was conducted in accordance with law and proper procedure; and

(2) given the subject matter, whether it complied with the Article 2 obligations.

(v) Considerable deference must be paid to a fact-finding tribunal. This is a case where the challenge is to a verdict. The decision maker has to be afforded considerable latitude to decide on the facts of the case having seen and heard witnesses unless the verdict can be categorised as unreasonable in the *Wednesbury* sense or irrational. This is a high threshold.

(vi) The issue of weight to be applied to relevant factors is clearly a matter for the decision maker and is not interfered with in judicial review see *R (on the application of Khatun) v Newham LBC* [2004] Civ 55.

(vii) The subject matter is important in any judicial review. The court must always exercise appropriate vigilance to guard against unlawful or irrational decision making. Given that Article 2 is engaged a particularly close scrutiny must be applied.

[25] In this case counsel for the applicant stressed that ground (i) was the core area of challenge. In my view the other grounds are not truly stand-alone grounds however I will deal with them as such for the purposes of this ruling. It is also apparent that the applicant claims errors of law and fact. I recognise that it may be difficult to disentangle issues of law and fact however, in my view grounds (i) and (ii) primarily relate to alleged errors of law. Grounds (iii) (iv) and (v) all essentially deal with alleged errors of fact. Ground (vi) relates to a very specific issue of the exercise of discretionary judgment in relation to prosecution of a witness and so it is peripheral to the actual inquest verdict. I will deal with each ground separately.

[26] By way of preamble I bear in mind that this Coroner heard the witnesses and considered agreed written evidence over a 16 day period after which he received legal submissions before finalising his judgment. No complaint was made about procedural fairness. That is unsurprising given the time and effort applied to this case and the engagement of the next of kin and their lawyers at every stage. There was also no argument advanced in the Order 53 Statement or the skeleton argument that this decision was *Wednesbury* unreasonable, perverse or irrational. Helpfully, it was accepted by the applicant that since 1995 the inquest procedure in Northern Ireland has been modified to remove the limit to verdict that was previously problematic as identified by the House of Lords in the *Middleton* decision. Mr McDonald frankly accepted that flowing from this, grounds 3(ii) and (iii) were not sustainable in terms to a challenge to the powers of the current inquest system.

Conclusion Ground (i)

[27] Fundamentally the applicant contends that there has been an error of law as the verdict does not comply with section 31 of the 1959 Act and also that it is not an Article 2 compliant verdict. This is a leave application and the question that I must answer is whether it is arguable that there has in fact been an error of law of this nature.

[28] The Court of Appeal decision in *Re Jordan* [2014] NICA 76 found that section 31 must be read in an Article 2 compliant way. This must reflect the principles laid down by Lord Bingham in *Middleton*. The core issue is whether there has been an error of law because the Coroner has not been able to reach a firm conclusion on the central issue. The Coroner must also act in a Convention compliant way pursuant to section 6 of the Human Rights Act 1998.

[29] This is not a case where the Coroner could not express a conclusion by virtue of some legal rule or restriction. The Coroner was able to make certain findings. However, he was unable to reach a conclusion on the central issue for the reasons he gave. The question is whether that eventuality accords with section 31 and Article 2. I find assistance in answering this question from the clear authority I have been referred to that the Article 2 obligation is one of means and not result. That principle is reiterated in Strasbourg and domestic case law and cannot realistically be challenged.

[30] In my view assistance is also found in the Court of Appeal judgment in this case at paragraph 112 where an analysis of *Middleton* is given as follows:

> "Ought ordinarily connotes a concept which is not without exception. Thus if for example, a second or third jury in the instant circumstances were similarly to fail to express a conclusion on the disputed factual issues at the heart of the case after further exhaustive investigation, the Coroner might properly come to the conclusion that whilst the process had been capable of producing the means to bring about a verdict, on this occasion it was simply not possible to obtain a result beyond the extent to which the jury had gone. In short a Coroner might sensibly conclude that any further inquest would simply lead to the same conclusion and accept the determination of the jury as a verdict as far as it had gone however limited that might be."

[31] I see no reason why this line should not apply to an inquest heard by a judge alone. Although the mechanics are obviously different there is the same challenge in terms of reaching a decision. That will depend on the facts of the case. Ordinarily a

conclusion will be reached however that may not be possible. The circumstances when this will arise will self-evidently be in difficult cases. However, there is no reference to an exceptionality test in *Middleton*. The English Court of Appeal case of *Stephens & Anor v Cannon & Anor* [2005] EWCA Civ 222 which was relied on by the applicant relates to an entirely different context dealing with assessment of damages and it draws on cases which are all from the field of adversarial proceedings. The inquest is an inquisitorial proceeding where the court is not actually mandated to make a determination of civil or criminal liability.

[32] In my view it is sufficient to read Lord Bingham's words in their ordinary and natural sense. Ordinarily the jury or judge will reach a firm conclusion on the central factual issues but it may not be possible and so long as an exhaustive and searching procedure has been undertaken that outcome is compliant with section 31 and Article 2.

[33] The Coroner is the fact finder in this case and considerable discretion must rest with him within the legal boundaries of section 31 and Article 2. The issue for this supervisory Court is whether the Coroner has exercised his discretion improperly in some way. The Coroner must be afforded a high degree of latitude in this regard. The applicant makes the case that the Coroner has effectively placed an impediment in his way by virtue of his reference to passage of time. The argument is made that because of this self-imposed restraint he has acted unlawfully. Reference is made to other historical inquiries in this regard.

[34] I do not consider that this inquest sets down a binding rule that because of passage of time a positive verdict can never be reached. In any event it seems to me that it is not passage of time of itself that has dictated the Coroner's ruling but rather the fact that the Coroner's assessment of certain evidence has been affected by passage of time. The applicant states that no witness relied on this as an obstacle however that argument misses the point. The undeniable fact of the matter is that passage of time will be a relevant factor in every historical case for a decision maker. There will always be an issue as to the inherent strengths and weaknesses of testimony about historical events. In some cases the evidence will be clearer than others. But the individual Coroner must evaluate the evidence in each case. This is a highly fact sensitive exercise.

[35] The particular issue in this case which the Coroner identifies was the nature of the movement of the deceased which occurred in a matter of seconds prior to the fatal shots being fired. The Coroner had to assess that at a historical reach with conflicting accounts from witnesses and experts. This was clearly a difficult task which the Coroner undertook in painstaking detail. The fact of the matter is that having conducted the exercise the Coroner could not decide where the truth lay. In order words the particulars were not proven to him. In my view it is unarguable that this is outside the range of decisions that can be reached in this type of case.

[36] Accordingly, I do not accept that an arguable case has been made out in relation to the first ground.

Ground (ii)

[37] The second ground relates to whether the Coroner erred in his application of the legal burden and standard of proof. I have read the judgment of the Coroner a number of times on this issue and in particular paragraphs 52-62 which refers to the correct burden and standard of proof. The Coroner also refers to the burden upon the State in relation to self-defence in an Article 2 case at paragraphs 173-192. I can understand that the standard of proof requires some explanation however the Coroner provides this at paragraph 60 wherein he cites Lord Carswell's ruling in *Re CD's Application* [2008] UKHL 33 as follows:

> "Although there is a single civil *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability) but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

Lord Carswell said at paragraph [28]:

> "It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically and more anxiously than in others before it can be satisfied to the requisite standard. The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place …,
>
> the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a

> tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established."

[38] In relation this ground I am unconvinced that the Coroner fell into legal error or that there was a procedural error in this case regarding the burden and standard of proof. As such I do not consider that there is an arguable case that the Coroner has made a legal error as claimed on this ground.

Ground (iii)

[39] The ballistics evidence was contained in an agreed note dated 24 October 2012. It was produced by Mr Boyce and Mr Greer at the inquest in 2012. It was read at this inquest by agreement. The ballistics evidence was then interpreted by the experts who gave evidence at the hearing principally Professor Pounder and Dr Cary. There were clearly differing views about the core issue of whether the deceased had turned to face Sergeant A and his position when the fatal shots were fired. The Coroner did not specifically reference the agreed note however that does not mean he disregarded it. In his submission Mr Doran makes the point that there was one single reference to the document in the next of kin submissions.

[40] The point being made is really as to the Coroner's interpretation of evidence. It is obvious that the Coroner had difficulty in reaching a firm conclusion on the expert evidence. The evaluation of the evidence is a matter of judgment. The Coroner provides an overall analysis of this part of the evidence at paragraph 297 of his judgment.

[41] Accordingly, I do not consider that an arguable case has been made out that the Coroner disregarded the ballistics evidence.

Ground (iv)

[42] At paragraph 201 of his ruling the Coroner sets out the terms of the Code of Conduct. He also states that "PSNI accept that in opening fire Sergeant A did not comply with the Code". The Coroner records that in his interview immediately afterwards Sergeant A disputed this but he subsequently accepted the breach but justified it by reference to the prevailing conditions - see paragraph 202. The Coroner heard from this witness and he assessed his evidence in detail in his judgment. At paragraph 212 the Coroner states that he found Sergeant A to be a credible witness. This is clearly an area within the exclusive purview of the decision maker. It is a matter of judgment as to how this issue is assessed.

[43] I do not consider that it is arguable that this is a ground of judicial review.

Ground (v)

[44] The Coroner also analyses the evidence of the call sign witnesses and explains his conclusion in his judgment. Again the Coroner had the benefit of hearing from a number of witnesses. That enabled him, alongside his consideration of the voluminous papers, to form his view. The point being made is perhaps that it was wrong to believe some police witnesses and not others. However, that is an unsustainable argument. These are matters of judgment and within the discretion of the fact finder.

[45] I do not consider that an arguable case has been made out on this ground.

General Conclusion (iii) (iv) (v)

[46] In truth the only way these grounds could succeed were if I were to permit an irrationality challenge. The threshold for this is extremely high and in my view it is unarguable that the Coroner's decision lacks logic or is perverse. I cannot see the basis for this given that the Coroner had all relevant material before him and made decisions that were open to him on the facts. This may not have been the outcome the applicants wished for but that is not an automatic foundation for judicial review. Regarding the third, fourth and fifth broad areas of challenge I am far from being convinced that there is any arguable case for a judicial review.

Ground (vi)

[47] The sixth area of challenge relates to Officer V. I understand the point that the conduct of Officer V was part and parcel of the case however the decision on this matter is within the discretion of the Coroner to take forward as he sees fit. I note that in this case that the Coroner did make a reference to the Public Prosecution Service in relation to the evidence of some of the witnesses. However, I do not consider it is arguable that he should be challenged in relation to his decision in relation to Officer V. This was a matter within the discretion of the Coroner. I do not consider that an arguable case has been made out on this ground.

Overall Conclusion

[48] I am acutely aware of the importance of the inquest system which is a vehicle for trying to uncover the truth in cases such as this which involve the use of lethal force by the State. Article 2 also imposes a clear procedural obligation. However, there is a difference between the means of investigation and the result or verdict.

[49] I have considered all of the arguments looking at this decision as a whole. I have had the benefit of detailed submissions and comprehensive information about this case. The applicant has had the benefit of an enhanced inquiry and I cannot see that an arguable case has been established for review of the Coroner's verdict for the reasons I have given.

[50] Accordingly, for the reasons I have given the application must be dismissed.