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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY IRENE OWENS  
FOR JUDICIAL REVIEW

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Before: Morgan LCJ, Weatherup LJ and Keegan J

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**MORGAN LCJ (delivering the judgment of the court)**

[1] This is an appeal against the decision of Treacy J on 14 April 2015 to dismiss the appellant's application for judicial review of decisions of the Secretary of State for Northern Ireland ("the respondent") to refuse to disclose material relating to the murder of the appellant's brother, Bobby Moffett, to the Senior Coroner for Northern Ireland ("the Coroner"). The material forms part of the archive of the International Monitoring Commission ("the IMC"). Mr Scoffield QC and Ms Doherty QC appeared for the appellant and Mr McGleenan QC and Ms Murnaghan QC appeared for the respondent. We are grateful to all counsel for their helpful written and oral submissions.

**Background**

[2] The statutory and factual background was helpfully set out by the learned trial judge and for convenience we largely repeat it here. Mr Moffett was shot dead on Shankill Road, Belfast on 28 May 2010. No one has been prosecuted in relation to his murder. The appellant's belief is that her brother's murder is one of a number of cases where some of those responsible for the murder may have been state agents and/or been given some measure of protection from prosecution by state authorities. The PSNI indicated in April 2014 that the police investigation remained

open but there were no active lines of enquiry being pursued at that time. In 2012 family members of Mr Moffett made a complaint about the investigation to the Police Ombudsman. By letter dated 6 November 2014 the Ombudsman indicated that the allegations made by the appellant were the subject of an extremely complicated and sensitive investigation spanning many years. He anticipated that the investigation would take some considerable time to conclude.

[3] The IMC reported on the murder, following “extensive enquiries”, in its 24<sup>th</sup> Report published on 15 September 2010. It concluded that the leadership of the UVF was implicated in the murder and that the murder was committed by members of the UVF acting as such. The Coroner decided to hold an inquest into the death and on 20 September 2010 wrote to the IMC requesting provision of the material grounding the 24<sup>th</sup> Report. A response, dated 15 October 2010, from solicitors for the IMC outlined the international agreement and domestic legislation governing the IMC and indicated that it would not be releasing any material to the Coroner. It stated:

“Our clients have carefully considered your request and do not consider that it is appropriate in the circumstances to waive any of the said immunities or privileges. This decision is based upon our client’s policy that, to enable them to carry out their legal functions, the confidences they receive must be maintained.”

The Coroner sought senior counsel’s opinion, which was provided on 5 January 2011, and he concluded that “the Commission is effectively immune from any attempt on the part of the coroner to compel it to produce the documents and/or information sought”.

[4] The IMC ceased operations on 31 March 2011 and its archive passed to the joint control of the UK and Irish governments. By letter dated 29 October 2012 the Coroner wrote to the appellant’s solicitor in connection with the proposed inquest, enclosing the correspondence with the IMC. Under cover of a letter dated 8 November 2012 the Coroner provided a copy of the opinion from senior counsel that he had obtained. The appellant’s solicitor then wrote to the respondent seeking release to the Coroner of the IMC material relevant to Mr Moffett’s murder. That request was refused by letter from the respondent dated 13 February 2013 which stated:

“... Article 4 of the Northern Ireland (Monitoring Commission etc.) Act 2003 (Cessation of Provisions) Order 2011 confers inviolability on the IMC archive until such time as Her Majesty’s Government with the

agreement of the Government of Ireland waive that inviolability.

Following consultation with the Government of Ireland I can confirm that it is not the case that both governments agree to waive the inviolability of all or part of the archive, whether for this particular purpose or at all.”

The appellant’s solicitor sought full reasons for the decision and details of the response of each of the Governments to the request. The respondent replied in a letter dated 31 May 2013, again referring to the inviolability accorded to the archives and stating that both governments agreed that inviolability should not be waived and therefore the position had not changed.

[5] Following commencement of judicial review proceedings the decision was reconsidered and again confirmed by the respondent. The respondent wrote to the Irish Department of Justice and Equality on 9 December 2013. The letter indicated that, having weighed up the Article 2 arguments of the family in favour of disclosure and the arguments against disclosure the respondent considered that:

“The most compelling argument in favour of not waiving the inviolability is the importance of upholding the guarantee of confidentiality that was given by the IMC to all those who gave information to it. This is an important point of principle .... If that guarantee is in fact capable of being breached only a few years after being given, it would be likely to discourage others from cooperating with such Commissions in the future. Recent experience has shown that such Commissions can play an important role in the peace process, and any erosion of the confidentiality guarantees that underpin their work would greatly reduce the efficacy of those Commissions. We would argue that supporting the work of such Commissions as part of the peace process contributes to the State’s broader compliance with the Article 2 duty to protect life.

We considered whether it could be acceptable to go through the content of the IMC archive to consider whether some items seem to be confidential and sensitive, and others do not, and that therefore we could disclose the latter category. However, we rejected this approach on the basis that the guarantee

of confidentiality was an absolute guarantee, and it is not for HMG to seek to unpick that and second guess the sensitivity of information that members of the public gave to the IMC. This is especially so given that the Bobby Moffett information is relatively recent, dating from 2010. With the passage of time the balance of the arguments might change. We have weighed those arguments up against the Article 2 right to an effective investigation into the death, and have concluded that the balance lies with the principle of upholding the guarantee of confidentiality.”

[6] The letter then addressed specific arguments raised by the appellant in the application for judicial review. The respondent’s position was that the Coroner’s request for information was premature because the police investigation, the primary means of satisfying Article 2 in cases of unlawful killing, was still ongoing and, moreover, the scope of the inquest had not yet been defined, making it difficult for the Coroner to be sure that any IMC material would be relevant. Further, the respondent considered that the enhanced investigative obligation under Article 2 was not triggered because, while there may be some unsupported assertions that protected informants were involved in the murder, there had been no credible evidence presented to support those claims. Thus the respondent considered it arguable that the scope of the inquest should be limited to establishing by what means the deceased met his death and not the broader question of “in what circumstances”. Further, given that an inquest may not make findings of criminal or civil liability, the respondent would have wanted the Coroner to explain why it would be relevant to the inquest to have material on how far the murder was known about and sanctioned by the UVF. The letter concluded by seeking confirmation that the Irish position on inviolability of the IMC archives was that it should not be waived. On 9 January 2014 the Irish Department replied confirming that it remained the Irish Government’s position that the guarantee of confidentiality given to the IMC’s communications should continue to be respected.

### **International agreements and statutory framework**

*The International Monitoring Commission Agreement 2003 (“IMC Agreement”)*

[7] After the suspension of the Northern Ireland Assembly, a Joint Declaration by the British and Irish Governments of 10 April 2003 set out requirements for a normal, peaceful and secure society and identified a key impediment to such a society in Northern Ireland as being continuing acts of manifestation of paramilitarism, sectarian violence and disorder. The IMC was set up in 2004 pursuant to an international agreement between the British and Irish Governments signed on 25 November 2003 and brought into effect on 7 January 2004. The text can

be found at Annex II of the IMC's 26th and Final Report. The preamble refers to the Governments' shared commitment to the transition to a peaceful society in Northern Ireland and recalls the 2003 Agreement on Monitoring and Compliance published by the two Governments to establish an independent body to monitor certain matters and to advise the two Governments, with a view to building the necessary trust and confidence among the Northern Ireland parties. The most relevant articles provide as follows:

"ARTICLE 3

The objective of the Commission is to carry out the functions as described in Articles 4, 5, 6 and 7 of this Agreement with a view to promoting the transition to a peaceful society and stable and inclusive devolved Government in Northern Ireland.

ARTICLE 4

In relation to the remaining threat from paramilitary groups, the Commission shall -

- (a) monitor any continuing activity by paramilitary groups including:
  - i. attacks on the security forces, murders, sectarian attacks, involvement in riots, and other criminal offences;
  - ii. training, targeting, intelligence gathering, acquisition or development of arms or weapons and other preparations for terrorist campaigns;
  - iii. punishment beatings and attacks and exiling.
- (b) assess:
  - i. whether the leaderships of such organisations are directing such incidents or seeking to prevent them; and
  - ii. trends in security incidents.
- (c) report its findings in respect of paragraphs (a) and (b) of this Article to the two Governments at six-

monthly intervals; and, at the joint request of the two Governments, or if the Commission sees fit to do so, produce further reports on paramilitary activity on an ad hoc basis.

.....

#### ARTICLE 11

The Commission, its staff, property and premises, and any agents of persons carrying out work for or giving advice to the Commission shall have such privileges, immunities and inviolabilities as may be conferred or provided for in accordance with the relevant legislation of Ireland and of the United Kingdom.

....

#### ARTICLE 13

(1) Members of the Commission, staff of the Commission, persons carrying out work for or giving advice to the Commission and agents of the Commission shall be bound not to disclose any information obtained in the course of the performance of their functions as such members or persons unless such disclosure is authorised by or on behalf of the Commission.

(2) The Commission shall not do anything in carrying out its functions which might –

- i. prejudice the national security interests of the United Kingdom or of Ireland;
- ii. put at risk the safety or life of any person;
- iii. have a prejudicial effect on any proceedings which have, or are likely to be, commenced in a court of law.”

*Northern Ireland (Monitoring Commission etc.) Act 2003*

*Northern Ireland (Monitoring Commission etc.) Act 2003 (Immunities and Privileges) Order 2003.*

[8] The 2003 Agreement was implemented in the UK pursuant to the Northern Ireland (Monitoring Commission etc.) Act 2003 (“the 2003 Act”) and in Ireland pursuant to the Independent Monitoring Commission Act 2003. As indicated above, Article 11 of the 2003 Agreement allowed both Governments to grant the IMC “privileges, immunities and inviolabilities” in accordance with their respective legislation. This was done in the UK by section 1(2) of the 2003 Act which attracted the provisions of the International Organisations Act 1968, and an Order applying them to the IMC, namely the Northern Ireland (Monitoring Commission etc.) Act 2003 (Immunities and Privileges) Order 2003 (“the 2003 Order”).

[9] Section 1(2) of the 2003 Act provides:

*“1 The Monitoring Commission*

...

(2) The Secretary of State may by order-

...

(b) confer on the Monitoring Commission, in such cases, to such extent and with such modifications as the order may specify, any of the privileges and immunities set out in Part 1 of Schedule 1 to the International Organisations Act 1968;

...

(d) make provision about the waiver of privileges and immunities.”

Article 5 of the 2003 Order provides:

*“Interpretation*

2. – (1) In this Order –

...

‘the 1961 Convention Articles’ means the Articles (being certain Articles of the Vienna Convention on Diplomatic Relations signed in 1961) which are set out in Schedule 1 to the Diplomatic Privileges Act 1964.

*The Commission*

...

5. Except in so far as in any particular case any privilege or immunity is waived by the Commission, the Commission shall have the like inviolability of official archives and premises as in accordance with the 1961 Convention Articles is accorded in respect of the official archives and premises of a diplomatic mission.”

[10] Schedule 1 to the Diplomatic Privileges Act 1964 provides at Article 22 that premises of the mission shall be inviolable and the agents of the receiving State may not enter them, except with the consent of the head of the mission. It also provides that the premises of the mission and other property thereon shall be immune from search, requisition, attachment or execution. Article 24 provides that the archives and documents of the mission shall be inviolable at any time and wherever they may be.

[11] Section 2 of the 2003 Act provides:

*“2 Commission’s duty to avoid prejudicial effects*

(1) The Monitoring Commission shall not do anything in carrying out its functions which might-

- (a) prejudice the national security interests of the United Kingdom or Ireland,
- (b) put at risk the safety or life of any person, or
- (c) have a prejudicial effect on any present or future legal proceedings.

(2) The duty under subsection (1) is owed to Her Majesty’s Government in the United Kingdom.”

#### *2011 Exchange of Notes*

[12] The IMC ceased to exist on 31 March 2011 by operation of the ‘2011 Exchange of Notes’ between the two Governments. Paragraph 3 of the First Note stated that the UK Government shall extend the non-disclosure obligations provided by Article 13(1) of the 2003 Agreement with the effect that:

“... members of the Commission, staff of the Commission, persons carrying out work for or giving advice to the Commission and agents of the Commission shall continue to be bound not to



disclose any information obtained in the course of the performance of their functions as such members or persons. Domestic law remedies for breach of the non-disclosure obligations shall also remain in force, including under the Official Secrets Act 1989 as signed by all Independent Monitoring Commission members and staff.”

[13] Paragraph 4 of the First Note extended the privileges and immunities conferred by Article 11 of the 2003 Agreement to all persons engaged in work with the Commission prior to 31 March 2011. Paragraph 5 of the First Note provided:

“The Foreign and Commonwealth Office also has the honour to inform the Embassy of Ireland that subject to the Government of Ireland agreeing to the same the Government of the United Kingdom shall continue to respect the inviolability of the official archives of the Independent Monitoring Commission. This is subject to any waiver of that inviolability by either Government with the other.”

The Government of Ireland committed to reciprocal and materially identical obligations in the Second Note.

*Northern Ireland (Monitoring Commission etc) Act 2003 (Cessation of Provisions) Order 2011*

[14] Following from the Exchange of Notes, the Northern Ireland (Monitoring Commission etc) Act 2003 (Cessation of Provisions) Order 2011 (“the 2011 Order”) was enacted on 28 March 2011 to formally bring the work of the IMC to a close. Article 3 of the 2011 Order contained consequential and transitional provisions. In particular, Article 3(1) continued the effect of section 1 of the 2003 Act in so far as necessary for the purposes of Article 4. Articles 3 and 4 provide as follows:

*“Consequential and transitional provision*

3.—(1) Section 1 of the 2003 Act (the Monitoring Commission) continues to have effect in so far as necessary for the purposes of article 4.

.....

*Consequential and transitional provision*

4.—(1) The 2003 Order continues to have effect after 31st March 2011 in so far as it confers privileges and immunities (including any exemption) on persons in

respect of their performance of official duties on or before 31<sup>st</sup> March 2011 as members of the Commission, staff and agents of the Commission and other persons who have carried out work for or given advice to the Commission.

(2) Subject to paragraph (3), the 2003 Order continues to have effect after 31<sup>st</sup> March 2011 in so far as it confers on the official archives of the Commission the inviolability that is accorded to the official archives of a diplomatic mission in accordance with the Articles of the Vienna Convention on Diplomatic Relations 1961 which are set out in Schedule 1 to the Diplomatic Privileges Act 1964.

(3) Her Majesty's Government in the United Kingdom may at any time with the agreement of the Government of Ireland waive the inviolability of all or part of the official archives of the Commission, for a particular period of time or indefinitely and for a particular purpose or generally."

*IMC's 26th report*

[15] In its last report published on 4 July 2011 the IMC stated that it wished to describe how it had worked, assess its strengths and weaknesses, and give its view on the contribution it had made. Section 8 is entitled 'The way we worked' and describes a proactive approach aimed at contributing to the dynamic for change and being ready to challenge attitudes and accepted norms. Independence of the IMC was a key factor. Paragraph 8.9 states that to be effective the IMC needed the fullest possible access to information from both official and other sources. Paragraph 8.12 states that over seven years the IMC met with hundreds of people and their contribution was essential to its ability to make rounded assessments and offer convincing reports. The report then considered the privileges immunities and inviolabilities the two Governments had been empowered to confer on the IMC and continued:

"8.19 These immunities were fundamental to our ability to operate. They meant that we could receive material from official and private sources secure in the knowledge that no third party could force us to reveal either its origin or its contents. They also meant that we could freely express our views in our reports, subject to the requirement imposed on us not to act

prejudicially. We were able to say what we thought needed saying.

8.20 In our statement of March 2004 we said that we would observe the confidentiality of both what we learnt and who told it to us. The immunities enabled us to do this. We were clear from the start that this was essential if people were to be forthcoming with us; if they were not, we would not have access to the range of information we would need. We frequently repeated this to our interlocutors, adding that they were free to say what they liked about their exchanges with us but that we would neither confirm nor deny even that we had met them. We also repeated it in a number of reports. As a result we were able to take what we learnt fully into account and to reflect it in our reports, but in a way which did not reveal the source.

8.21 We are convinced that this was essential to our work. Our concern was not over those in official positions with whom the necessary trust could be built up, as indeed it was. We needed and secured a much wider range of sources than that. Paramilitaries themselves, victims, community groups and other members of the public often spoke to us extremely frankly. We do not think this would have happened without the promise of complete confidentiality which this made possible.”

## **The issues in the appeal**

### *The vires of the 2011 Order*

[16] The appellant contended that the 2011 Order was *ultra vires* on a number of different bases. The cessation of the Commission was provided for in sections 12(3) and (4) of the 2003 Act which state:

*“12 Short title, commencement and repeals*

...

(3) Sections 1 to 3 and 11 of this Act, and sections 30A, 47B and 51B of the Northern Ireland Act 1998, shall cease to have effect at the end of such day as the

Secretary of State may by order made by statutory instrument appoint.

(4) An order under subsection (3) may include such consequential provision (including provision amending or repealing an enactment) and such transitional provision as the Secretary of State thinks fit."

It was submitted that a reference to consequential and transitional provisions were "sweeping-up words" which should be strictly limited in scope. The authority for that proposition is Daymond v South West Water Authority [1976] AC 609. That was a case in which there was a power to charge for the provision of services actually received by customers in section 30 of the Water Act 1973. The Secretary of State subsequently made an Order which purported to extend the charging power to those who lived in the locality of the area in which such services were provided on the basis that it was incidental or consequential upon the purpose of the Act. The Order was challenged as *ultra vires*. Unsurprisingly the House of Lords rejected the construction that the incidental or consequential provision created a charging power outside the scope of that defined by the Act. What the case demonstrates is that it is necessary to look at the statutory context in order to assess the extent of a consequential or transitional provision.

[17] In this case the statutory context is that the 2011 Order is designed to facilitate the cessation of the Commission and to deal with those matters which are consequential upon that. One of the consequences that flows from the cessation of the Commission is the need to address the privileges and immunities for which provision is made in section 1(2)(b) of the 2003 Act. Making such provision for the future does not contradict the underlying purpose of section 12 of the 2003 Act which is to facilitate the cessation of the Commission in an orderly fashion.

[18] The next question is to ascertain whether the 2011 Order in addressing the privileges and immunities does so in a manner which can properly be said to be consequential upon the statutory purpose of the 2003 Act. The 2003 Act is silent as to how the privileges and immunities conferred on the Commission and its archive should be addressed on the cessation of the Commission. The 2011 Order continues the inviolability which had been given effect by the 2003 Order and continues the provision for waiver albeit that the power of waiver is to reside with Her Majesty's Government in the United Kingdom with the agreement of the Government of Ireland. The consequential provisions, therefore, follow faithfully the structure of the underlying Act and the Order made under it and in our view fall clearly within the scope of the empowering provision. Indeed the empowering provision is plainly intended to be wide in that power is given to amend or repeal an enactment. In other circumstances it may be necessary to determine just how extensive the consequential provisions in this Act are.

[19] The final point in respect of the *vires* of the 2011 Order concerns Article 4(3) which provides that the government may at any time with the agreement of the Government of Ireland waive the inviolability of all or part of the official archives of the Commission. The power of waiver had been provided to the Commission by Article 5 of the 2003 Order. The Commission had been established as a result of an international agreement between the Government of Ireland and Her Majesty's Government and one can see the force of the proposition that the archive should consequently be held by both governments. There is certainly authority to establish that a public authority may not adopt a policy by which its treatment of applications can be dictated by agreement with another government body and the Secretary of State cannot lawfully surrender or release any statutory power that he has so as to purport to exclude its future exercise either by himself or his successor (see R v Secretary of State for the Home Department ex p Fire Brigade Union [1995] 2 AC 513). This is not such a case because here each government had entrusted the judgement on inviolability and waiver to the Commission. We consider, therefore, that there is considerable support for the proposition that consequent upon the cessation of the Commission the implementation of this international agreement in both the Republic of Ireland and the United Kingdom is in accordance with law. We do not consider, however, that it is necessary to come to a concluded view on this point since it is clear that the Secretary of State made an independent decision to protect the inviolability of the archive and her determination was not, therefore, affected by the views of the Government of Ireland.

#### *Article 2 of the Convention*

[20] There was no substantial disagreement about the general principles to be derived from Article 2 of the Convention. There is a positive obligation upon the state to take appropriate steps to safeguard the lives of those within their jurisdiction. The state must put in place an appropriate legal and administrative framework to deter the commission of offences against the person backed up by law enforcement machinery for the prevention and punishment of breaches. As well as this substantive element of the obligation there is also a procedural obligation upon the state to investigate deaths whether they occur at the hands of state agents, private persons or persons unknown. The obligation extends to all cases of death other than from natural causes. The essential purpose of the investigation is to secure the effective implementation of the domestic laws which protect the right to life and to ensure the accountability of those responsible. It also enables the facts to become known to the public and in particular to the relatives of any victims.

[21] The obligation of the state to initiate an investigation arises once the matter has come to its attention. It is not dependent upon a formal complaint or suggestion about a particular line of enquiry or investigative procedure. The investigation must be adequate and capable of leading to a decision as to the identification and punishment of those responsible as described in Hugh Jordan v UK [2003] 37 EHRR 2 at paragraph [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.”

[22] Although the IMC reported directly to Parliament and was probably not, therefore, a public authority for the purpose of section 6 of the Human Rights Act 1998, there was no dispute about the fact that the Secretary of State was a public authority and required to act in accordance with Article 2 of the Convention. The 2011 Order is secondary legislation and could not justify any failure to act in accordance with that requirement. Essentially, therefore, the appellant contends that the requirement of effectiveness imposed upon the state requires the Secretary of State to examine the archive and to make disclosure to the Coroner of any documents that he might consider relevant to his enquiry.

[23] The respondent's position is essentially encapsulated in a submission dated 27 November 2013 after the issue of the judicial review proceedings prepared for the Secretary of State which subsequently formed the basis of the replying affidavits and the respondent's submissions. In March 2013 the respondent replied to the appellant confirming their position of 13 February 2013 that both governments had agreed that the inviolability of the archive should not be waived. The submission noted that the IMC played a significant part in supporting and enabling historic changes throughout its term. Its independence was vital in gaining the confidence of all those they worked with and was clearly illustrated in what they delivered. The confidentiality of its records was also guaranteed in the course of all of the IMC's work.

[24] The passage on legal advice noted that the legislation provided the UK government with discretion to waive the inviolability for a particular period of time or indefinitely and for a particular purpose or generally with the agreement of the Government of Ireland. In examining the position of the UK government the submission stated:

"On the one hand, having made a commitment to dealing with the past the papers of the IMC might assist with truth recovery in many areas and we ought to assist with inquests wherever possible. On the other hand, we believed that if we did decide to release (in any form) that would set a precedent for all future requests and we believe that the IMC papers are - and probably will remain for a number of years - very sensitive. Some of the information could be politically destabilising and the release of papers could also have implications in terms of the capacity of Governments to establish such bodies in the future".

[25] The submission noted that given the potentially toxic nature of the papers and risks to the rather fragile political relations within the Executive the decision in February 2013 was that inviolability should not be waived. It was recognised, however, that the balance may change and that there ought to be review of the decision periodically in consultation with the Irish government. After the launch of the judicial review proceedings the Secretary of State was invited to reach a fresh independent decision on disclosure before seeking the view of the Irish government.

[26] Addressing the arguments for and against disclosure the submission said:

"The most compelling argument in favour of not waiving the inviolability is the importance of upholding the guarantee of confidentiality that was given by the IMC to all those who give information to it. This is an important point of principle not only in relation to this Commission, but also other such Commissions, including any Commissions set up in the future. If that guarantee of confidentiality is in fact capable of being breached only a few years later, it would be likely to discourage others from cooperating with such Commissions, which can play an important role in the peace process, thus reducing those Commissions' effectiveness. We would argue that supporting the work of such Commissions as part of the peace process is part of the state's broader compliance with the Article 2 duty to protect life."

The submission then went on to rule out examining the archive in order to identify some disclosable materials for broadly the same reason. It was noted, however, that with the passage of time the balance of the arguments might change.

[27] In terms of the Article 2 arguments advanced by the appellant it was suggested that the request for disclosure might be premature given that the police investigation was still ongoing and that the circumstances of the murder were being considered by the Police Ombudsman of Northern Ireland. The appellant criticised this argument because the PSNI had indicated in correspondence that they had no new leads in the case and the investigation was effectively stalled. There was, however, an exhibit within the papers to indicate that the Ombudsman had commenced an investigation in October 2012 into the murders carried out by the UVF of Mr Moffett and four others which was continuing in November 2013 and was still likely to take some considerable time to conclude in November 2014. The appellant's solicitor had written to the Coroner on 23 October 2012 indicating that they anticipated that it may well be some time before they were in a position to proceed with the inquest because of the Ombudsman's investigation.

[28] The submission also argued that the enhanced investigative obligation under Article 2 has not been triggered in this case and that submission was also advanced in oral argument. We do not accept that public authorities within the state are entitled to retain information which should be disclosed as part of the positive duty on the part of the state to investigate deaths until it is clear that an enhanced investigative duty is triggered. The report of the IMC indicates that they had carried out extensive enquiries and reached the conclusion that paramilitaries directed and were involved in the murder of Mr Moffett. On any view such material has the potential to be relevant to the investigation of the Coroner and any justification for withholding the information must be convincing. The Coroner can only make a determination on the scope of the inquest once he gathers in and rules upon all potentially relevant information (see Hugh Jordan's Application [2014] NICA 76 at paragraph [22]).

[29] The last point raised in the submission was that the Coroner might be asked to explain why the material was relevant given that the inquest could not make findings of criminal or civil liability. We do not consider that this point has merit. Although the Coroner cannot make findings directly on civil or criminal liability the inquest is able to express its findings on the central issues even if succinctly (see R (Middleton) v West Somerset Coroner and another [2004] 2 AC 182).

[30] The parties to the Belfast/Good Friday Agreement reaffirmed their total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues, and their opposition to any use or threat of force by others for any political purpose, whether in regard to this agreement or otherwise. It was necessary, therefore, to find some confidence building measure to ensure that those then participating in the democratic process remained so committed. The IMC was a mechanism by which the state delivered its positive obligation to identify those involved in the commission of terrorist offences while at the same time



reassuring the public that those involved in government had committed to exclusively peaceful means.

[31] The last report of the IMC from which relevant extracts are set out at paragraph [22] above demonstrated the importance of confidentiality in the ability of the Commission to carry out its work and indeed that was accepted by the appellant. The appellant criticised the Commission insofar as it gave rise to any understanding that confidentiality would be preserved at all costs since it was apparent that the Commission itself under the legislation by which it was established could and in some cases may have had to make a disclosure. That was also implicit in the consequential provisions which allowed the governments to waive inviolability.

[32] We accept, therefore, that there was a need to balance the obligation of confidentiality arising from the establishment of the IMC as a means of protecting the public and the state and the obligation of disclosure flowing from the investigative obligation in Article 2. We also accept that it was material to take into account the effect of disclosure on future arrangements which may become necessary to reinforce the commitment to peaceful and democratic means in this jurisdiction.

[33] The submission to the Secretary of State accepted that she had a discretion to access the archive and in appropriate circumstances to release information from it. The form in which that might have been done would depend upon its content. The decision not to examine the archive at this stage reflected the fact that the inquest was necessarily at an early stage given the extent of the Ombudsman's investigation. The outcome of that investigation may have an impact upon the nature of the issues to be examined at the inquest and the extent to which the archive may be a material source of assistance. In our view the Secretary of State's response can properly be regarded as a postponement of a decision to examine the archive until further relevant material becomes available. We are satisfied from the terms of the submission dated 27 November 2013 that the reason for the non-disclosure was the need to respect the confidentiality of the archive. Having regard to the importance of the confidentiality of the archive, which was acknowledged by the appellant, we do not consider that the approach of the respondent was the result of misdirection or irrational. We further do not accept that it gave rise to a breach of Article 2 of the Convention. We acknowledge, however, that the decision may need to be revisited when the Ombudsman's report becomes available.

## **Conclusion**

[34] For the reasons given we dismiss the appeal.