

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

| | |
|-------------------|------------|
| <i>Delivered:</i> | 14/04/2015 |
|-------------------|------------|

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Owens' (Irene) Application [2015] NIQB 29

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

and

IN THE MATTER OF DECISIONS BY THE SECRETARY OF STATE FOR
NORTHERN IRELAND

TREACY J

Introduction

[1] By this application the applicant challenges decisions of the Secretary of State for Northern Ireland refusing to disclose material relating to the murder of her brother, Bobby Moffett, to the Senior Coroner for Northern Ireland. Mr David Scofield QC and Ms Fiona Doherty QC appeared for the applicant. Mr McGleenan QC appeared with Ms Neasa Murnaghan QC on behalf of the Respondent. The court is indebted to all counsel for their excellent written and oral submissions

[2] The applicant challenges a decision made by the Secretary of State communicated to her solicitors by letter dated 13 February 2013 whereby she determined that the inviolability of the archive of the International Monitoring Commission ("the IMC") should not be waived so as to permit disclosure to the Coroner in his investigation into the death of her brother, Mr Bobby Moffett. This position was reiterated on 31 May 2013 and reconsidered by the Secretary of State for a second time after the issue of these proceedings.

Background

[3] Mr Moffett was shot dead on the Shankill Road on 28 May 2010. To date, no one has been made amenable for his murder. The applicant *asserts* that there is

public concern that this is one of a number of cases where some of those responsible for the murder may have been State agents and/or have been given some measure of protection from prosecution by State authorities.

[4] The police investigation into the murder is still open. In the absence of any evidential leads the murder investigation appears to have progressed as far as it can for the moment.

[5] In its 24th Report, submitted on 28 May 2010, the IMC dealt with the murder of Mr Moffett. The Commission, following “extensive enquiries”, reached the following conclusions in respect of his murder:

- “(a) Tension between the UVF and Mr Moffett and his family precipitated the murder (p 5, para 9);
- (b) The decision by the local brigade to attack Mr Moffett would be expected to require sanction from the UVF central command (p 5, para 11);
- (c) Mr Moffett’s murder was deliberately in the style of a “public execution” in one of the areas from which the UVF draws its strength (p 6, para 12);
- (d) The murder was committed by members of the UVF acting as such (p 6, para 13); and
- (e) Senior leadership in the UVF could have prevented the murder had it determined to do so (p 6, para 13).”

[6] The Coroner has decided to hold an inquest into Mr Moffett’s death and wrote to the IMC requesting provision of the material which grounded their 24th Report. A response dated 15 October 2010 was received from the solicitors acting for the IMC. This letter outlined the international agreement and domestic legislation establishing the IMC and the IMC’s policy on confidentiality. The letter indicated that the IMC would not be releasing any material to the Coroner. In particular 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, that the confidences they receive must be maintained.” (p 18)

[7] Following receipt of this letter the Coroner sought senior counsel's opinion, which was provided on 5 January 2011. The opinion 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".

[8] The IMC ceased operations on 31 March 2011 with its archive passing to the joint control of the UK and Irish governments. By letter dated 29 October 2012 the Coroner wrote to the applicant's solicitor in connection with the proposed inquest. He enclosed with that letter his correspondence to the IMC and the response received from their solicitor. Under cover of letter dated 8 November 2012 he provided a copy of senior counsel's opinion obtained by him and referred to in his letter of 29 October.

[9] Following receipt of the information from the Coroner, including senior counsel's opinion, the applicant's solicitor wrote to the Secretary of State ("SoS") seeking release of the IMC material relevant to Mr Moffett's murder to the Coroner. That request was refused by letter from the Secretary of State dated 13 February 2013 which states:

"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."

[10] Following further correspondence the SoS, by letter dated 31 May 2013, reiterated the previous response indicating that both governments had agreed inviolability should not be waived.

[11] Following commencement of these proceedings the decision was reconsidered by the Secretary of State and that fresh decision is now also under challenge.

Order 53 Statement

[12] The applicant sought the following relief:

- "(a) An order of certiorari quashing the Secretary of State's refusal to disclose to the Senior Coroner material from the archive of the Independent Monitoring Commission ("IMC") concerning the murder of Bobby Moffett;
- (b) A declaration that the Secretary of State's refusal to disclose to the Senior Coroner material from the archive of the IMC concerning the murder of Bobby Moffett is incompatible with the applicant's

rights pursuant to Article 2 ECHR and in breach of section 6 of the Human Rights Act 1998;

- (c) An order of mandamus compelling the Secretary of State to disclose the said material to the Senior Coroner;
- (d) An order striking down Article 4 of the Northern Ireland (Monitoring Commission etc.) Act 2003 (Cessation of Provisions) Order 2011;
- (e) Further or in the alternative a declaration that Article 4 of the Northern Ireland (Monitoring Commission etc.) Act 2003 (Cessation of Provisions) Order 2011 is *ultra vires* the Northern Ireland (Monitoring Commission etc.) Act 2003;
- (f) Further or in the alternative a declaration that Article 4 of the Northern Ireland (Monitoring Commission etc.) Act 2003 (Cessation of Provisions) Order 2011 is incompatible with Article 2 ECHR;

...”

[13] The grounds upon which this relief was sought included:

- “(a) The Secretary of State has misdirected herself in law by considering that the agreement of the Irish Government is a condition precedent to the lawful exercise of her power to waive the inviolability of the IMC archive.
- (b) Further or in the alternative, the Northern Ireland (Monitoring Commission etc.) Act 2003 (Cessation of Provisions) Order 2011 is *ultra vires* the Northern Ireland (Monitoring Commission etc.) Act 2003 insofar as it requires the agreement of the Irish Government as an absolute condition precedent to the lawful exercise of the power to waive said inviolability.
- (c) Further or in the alternative the provisions of the Northern Ireland (Monitoring Commission etc.) Act 2003 (Cessation of Provisions) Order 2011 are *ultra vires* section 2(1)(c) of the Northern Ireland

(Monitoring Commission etc.) Act 2003 because they permit prejudice to the conduct of legal proceedings.

- (d) Further or in the alternative insofar as the Northern Ireland (Monitoring Commission etc.) Act 2003 (Cessation of Provisions) Order 2011 compels the Secretary of State to withhold disclosure if the Irish Government does not agree to waive the inviolability of the archive, it is incompatible with Article 2 ECHR.
- (e) Further or in the alternative the Secretary of State's refusal to disclose to the Senior Coroner material from the IMC archive concerning the murder of Bobby Moffett is irrational.
- (f) The refusal to disclose to the Senior Coroner material from the IMC archive concerning the murder of Bobby Moffett is incompatible with the applicant's right to an effective investigation into her father's death pursuant to Article 2 ECHR and in breach of section 6 of the Human Rights Act 1998.
- (g) The Secretary of State failed to provide any or adequate reasons for her decision.
- (h) The Secretary of State's decision was unfair, unreasonable and unlawful.
- (i) In refusing to disclose the material from the IMC archive the Secretary of State has misdirected herself in concluding that disclosure of the material was not necessary for the following reasons:
 - (i) The police investigation into Mr Moffett's death is ongoing (p 22, para 18);
 - (ii) The scope of the inquest has yet to be defined and therefore the Coroner could not yet be sure that the IMC material is potentially relevant to the scope of the inquest (p 22, para 19);

- (iii) The “enhanced investigative obligation” under Article 2 does not apply in this case and therefore the inquest would be a *Jamieson* inquest (p 22, para 20);
- (iv) The inquest cannot make findings of criminal or civil liability (p 23, para 21); and
- (v) The Coroner has not explained why this material is potentially relevant to the scope of his inquest (p 23, para 21).”

Statutory Framework

[14] The IMC was set up in 2004 pursuant to an international agreement between the British and Irish Government signed in November 2003. The text of the agreement is contained at Annex II of the IMC 26th Report. Article 11 of the agreement provides:

“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 the United Kingdom.”

[15] Article 13 of the Agreement states:

“(1) Members of the Commission, staff of the Commission, persons carrying out work for or giving advice to the Commission and agents 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.”

[16] The United Kingdom empowered the IMC in domestic law by the promulgation of the Northern Ireland (Monitoring Commission etc.) Act 2003 (“the 2003 Act”). In Ireland the act was given statutory force by the Independent Monitoring Commission Act 2003. The preamble to the 2003 Act stated that it was:

“An Act to make provision in connection with the establishment under international law of an independent commission with monitoring functions in relation to Northern Ireland...”

[17] Section 1 of the 2003 Act provides for the establishment of the IMC and sets out its roles in monitoring activity by paramilitary groups; security normalisation; and in reporting on any claims that any Minister or party in the Northern Ireland Assembly was not committed to democratic means. Section 1(2) empowered the Secretary of State to:

- “(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 (c. 48);
- (c) ...
- (d) make provision about the waiver of privileges and immunities.”

[18] 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.”

[19] Section 11 of the 2003 Act imposed a duty upon the Secretary of State to report to Parliament on an annual basis on the operation of the 2003 IMC agreement.

[20] The Secretary of State made the Northern Ireland (Monitoring Commission etc) Act 2003 (Immunities and Privileges) Order 2003 ("the 2003 Order") pursuant to the powers set out at s1 of the 2003 Act. Article 5 of the 2003 Order provides:

"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."

[21] The IMC ceased to exist on 31 March 2011, by operation of the '2011 Exchange of Notes'. Para3 of the First Note extended the non-disclosure obligations pursuant to Article 13 of the 2003 Agreement. It provided that persons engaged in work with the Commission:

"shall continue to be bound not to disclose any information obtained in the course of the performance of their functions ... 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."

[22] Para4 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.

[23] 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."

[24] The Government of Ireland committed to reciprocal obligations in paras (i) (ii) and (iii) of the Second Note.

[25] 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. The Order contained consequential and transitional provisions in Article 3. In particular,

Article 3(1) continued the effect of section 1 of the 2003 Act for the purposes of Article 4. Section 1 of the 2003 Act empowered the Secretary of State to confer immunities and privileges upon persons working with or for the IMC. Article 4 of the 2011 Order provides:

“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 31st 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 31st 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.”

[26] The Respondent helpfully summarised the key features of the statutory framework:

- a. The IMC was created by means of an international agreement.
- b. The terms of the agreement imposed an obligation on two sovereign states to ensure that nothing would be done by the IMC to prejudice the national security interests of either state, put at risk the safety or life of any person or prejudice any proceedings commenced in a court of law. (Article 13(2))
- c. The terms of the agreement contained a non-disclosure obligation in respect of any information obtained during IMC work. (Article 13(1))
- d. The agreement also made provision for privileges, immunities and inviolabilities to be conferred by domestic law. (Article 11).

- e. The international agreement was given statutory force in both the United Kingdom and Ireland by way of Acts of Parliament and the Oireachtas in 2003.
- f. The 2003 Act imposed an obligation upon the IMC to report, through the Secretary of State, directly to Parliament. (Section 11)
- g. The 2003 Act made provision for privileges and immunities and imposed a statutory obligation upon the Secretary of State to avoid the prejudicial effects outlined in Article 13(2) of the 2003 agreement. (Section 2(1),(2))
- h. The 2003 Order incorporated the inviolability provisions contained in Article 24 of the Vienna Convention with respect to the IMC archive (“inviolable at any time and wherever they may be.”)
- i. The 2003 Order made provision for waiver by the Commission of the inviolability of the archives. (Article 5)
- j. Article 9 of the 2003 Order made provision for immunity from suit and legal process for the IMC, its staff, agents and advisors.
- k. The IMC was terminated by international agreement contained in the 2011 Exchange of Notes. The agreement expressly continued the privileges, immunities and inviolabilities that had been enshrined in the 2003 Agreement. (See Note 1 paras 3 ,4 and 5)
- l. The Exchange of Notes made provision for waiver of said inviolability by way of the agreement of both governments.
- m. The 2011 Order gave effect in domestic law to the international agreement contained in the Exchange of Notes and expressly continued the immunities, privileges and inviolabilities contained in the 2003 Order.
- n. Article 4(3) of the 2003 Order made provision for the inviolability of the official archives of the IMC to be waived with the agreement of the Government of Ireland.

Applicant’s Submissions

[27] The applicant submitted that the SoS’s refusal to disclose potentially relevant IMC material to the Coroner is incompatible with the applicant’s Article 2 rights; and further or in the alternative, the decision is irrational. In addition the Secretary of State has misdirected herself in concluding that disclosure of the material was not necessary for the reasons set out at para 3(h) (i)-(v) of the amended Order 53 statement, namely:

- “(a) The police investigation into Mr Moffett’s death is ongoing (p 22, para 18);
- (b) The scope of the inquest has yet to be defined and therefore the Coroner could not yet be sure that the IMC material is potentially relevant to the scope of the inquest (p 22, para 19);
- (c) The “enhanced investigative obligation” under Article 2 does not apply in this case and therefore the inquest would be a *Jamieson* inquest (p 22, para 20);
- (d) The inquest cannot make findings of criminal or civil liability (p 23, para 21); and
- (e) The Coroner has not explained why this material is potentially relevant to the scope of his inquest (p 23, para 21).”

[28] The applicant argued that the Secretary of State has a duty arising from Article 2 ECHR and section 6 of the Human Rights Act 1998 to disclose the IMC material relating to the murder of Bobby Moffett to the Coroner to allow him to properly investigate the death and her decisions put her in breach of that duty and in breach of section 6 of the Human Rights Act.

[29] The applicant referred the Court to the analysis of Stephens J in the recent Jordan litigation which shows that public authorities concerned with the death have an effective obligation to provide to the Coroner all material which is potentially relevant to his inquiry and that this includes the IMC which investigated the death in detail, in whose shoes the UK Government (represented by the Secretary of State) now stands.

[30] The applicant submitted that the over-riding consideration in the refusal by the Secretary of State to disclose the material to the Coroner was “the importance of upholding the guarantee of confidentiality that was given by the IMC to all those who gave information to it.” This guarantee is expressed in the final report published by the IMC as follows:

“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 state 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.” (para 8.20, emphasis added)

[31] If the Commissioners and staff of the IMC gave an absolute, cast-iron guarantee of confidentiality the applicant submitted they were acting *ultra vires* in doing so. Although the 2003 Order provided for immunity from suit for the members of the Commission and its staff (Articles 7 & 8) and inviolability of its archives (Article 5), the Order also provided for waiver of all privileges and immunities accorded to the Commission. In addition, none of the various pieces of legislation (until the IMC ceased operations by virtue of the 2011 Order) indicated what would happen to material gathered by the IMC after it ceased to operate.

[32] Moreover, section 2 of the 2003 Act made it clear that the Commission was under a legal duty not to “do anything in carrying out its functions which might... have a prejudicial effect on any present or future legal proceedings”.

[33] The applicant therefore submitted that the purported guarantee of confidentiality provided by the IMC (and based on the immunities accorded to it in secondary legislation) could never have over-ridden the duties outlined in section 2 of the 2003 Act (even if, because of the provision of immunity from suit, there is a lack of certainty as to how those duties could be enforced).

[34] In addition, the IMC was a public authority as defined in section 6(3) of the Human Rights Act 1998 which states:

“In this section “public authority” includes –

- (a) a court or tribunal, and
- (b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.”

[35] Therefore, the applicant submitted, as a public authority for the purposes of the Act, the IMC would also have been acting unlawfully if it acted in a way which was incompatible with a Convention right. Although the immunity from suit accorded to the IMC may have been invoked to prevent reliance on Convention rights in proceedings against it, that provision (which is contained in secondary

legislation) may itself have required scrutiny for Convention compatibility. The immunity from suit accorded to the IMC and its staff has not been accorded to decisions of the Secretary of State in relation to the archive.

[36] The Applicant submitted that the Coroner has sought and been refused the disclosure of the material in the archive notwithstanding that he is the independent judicial officer with responsibility for ensuring that violent and unnatural deaths are investigated. The Coroner, and those acting on his behalf, routinely scrutinise intelligence material and material concerning national security. The usual mechanisms for application for public interest immunity (PII) also remain available.

[37] Mr Scofield contended that it is difficult to envisage a more compelling case for waiver of the inviolability of the IMC archive than a request to facilitate the investigation into a murder. That is the context for the court's consideration of the Secretary of State's decisions – and an area where, in accordance with well-established principle, the Court will exercise a particularly anxious form of scrutiny of the SoS's decisions.

[38] The applicant acknowledged that if IMC documentation is disclosed to the Coroner, onward disclosure would become a matter for him. However, applications for non-disclosure on grounds of public interest immunity or Article 2 ECHR could be made in respect of the material a layer of protection which the applicant argued does not appear to have featured in the Secretary of State's decision.

[39] Further, the applicant submitted, the IMC ceased operations 3 years ago. In its 26th Report the Commission does not comment on the need for continuation of the inviolability of its archives but notes that the context in which the IMC was set up has completely changed. In addition, there is no indication that other bodies requiring the same immunity from suit and inviolability of its archive will be set up in the near future, or at all.

[40] In relation to the reasons for the fresh decision taken by the SoS the applicant submitted that this betrays a fundamental misunderstanding of the inquest system and how it operates and that the Secretary of State has misdirected herself in concluding that disclosure of the material was not necessary for the reasons relied upon by her.

The Respondent's submissions

[41] The respondent denied that the SoS has a duty arising under Art 2 ECHR & section 6 of the Human Rights Act 1998 to disclose the IMC material to the Coroner; denied, on the evidence, that disclosure is necessary to permit the Coroner to properly investigate the death in accordance with his legal obligations. It was contended that there was no material, beyond the vaguest of assertions, that there was any involvement of state agents whether in protecting suspected perpetrators or otherwise in the murder of the deceased. Art 2 procedural obligations are twofold.

First, there is the obligation to establish an effective judicial system by which unexplained deaths can be investigated. The provision of a legal system that allows for an open and independent investigation of the death will satisfy this requirement. The police investigation in the present case is extant and a prosecution remains possible. The applicant can have recourse to the courts to establish any civil liability for the death, if appropriate. In addition, the inquest will be available in this case. In cases such as the present, where the Respondent argues there is no credible evidence of state involvement, the availability of prosecution mechanisms, civil proceedings and inquests have been held to satisfy the first of the Art 2 procedural obligations (eg. *Humberstone* [2010] EWCA Civ 1479 at para 67).

[42] The second type of Art 2 investigative obligation arises in cases where there is duty to proactively investigate because there is credible evidence suggesting a possible breach of the state's substantive obligation to protect life. This arises in a much narrower category of cases eg deaths in custody or whilst under the control of state authorities. In these cases Art 2 requires that an enhanced investigation takes place. The respondent submitted that this situation does not arise in the present case. Accordingly, the Respondent submitted that the only relevant Art 2 procedural obligation in this case is to have in place appropriate mechanisms to allow for investigation. This obligation has been met in the instant case.

[43] Contrary to the applicant's submission, the IMC did not have any specific statutory obligation to provide information to a Coroner analogous to that imposed upon the PSNI by section 8 of the Coroner's Act (NI) 1957. The Respondent argued that the contention that some general obligation arises from the application of Art 2 is misconceived. The IMC was held not to be subject to the terms of section 6 HRA 1998 in *Re Tolan* NIQB 29 at para [39]. On that analysis the respondent submitted any disclosure obligation based on section 6 of the HRA must fail because the IMC was not a public authority pursuant to section 6(3)(b). The Respondent contended that the SoS acting as custodian of an archive of materials created in connection with proceedings in parliament, cannot be fixed with a duty of disclosure that could never have been imposed upon the IMC. Such an obligation would run counter to the terms of the international agreement entered into by the Governments of the UK and Ireland in March 2003.

[44] The respondent contended that in any event there is no basis for a finding that the decision to maintain confidentiality in the archive was a breach of the applicant's Art 2 rights. Mr Larmour at para 29 of his affidavit avers that the confidentiality guarantees given by the IMC were "given pursuant to an international agreement to further the Art 2 imperative of ending communal violence in NI". The Respondent submitted that the confidentiality of the IMC archive is an act done in furtherance of the State's substantive obligations pursuant to Art 2.

[45] The respondent recalled that the 2003 Act expressly imposed a duty upon the IMC to avoid prejudicial effects. Section 2(1)(b) provides that the IMC "shall not do anythingwhich mightput at risk the safety or life of any person". This

mandatory statutory duty the respondent says reflects the proper discharge of the State's obligations pursuant to Art 2 ECHR. Both the Art 2 rights and the need to protect the lives of those who have spoken to the IMC specifically engages issues of a fundamental and substantive Art 2 nature. The respondent submitted that the applicant's speculative assertions of a possible breach of Art 2 procedural obligations cannot trump the protections put in place – by treaty and statute – to prevent lethal attack upon those who assisted the IMC.

[46] As to the rationality challenge the respondent submitted that the carefully considered evaluation of the request to release the materials to the Coroner is evidenced by the affidavit made by Mr Larmour. The Secretary of State took reasonable steps to acquaint herself with the particular subject matter, and then carried out a rational evaluative judgment. Accordingly, it was submitted that the SoS State went to appropriate lengths to ensure that she was properly informed and that the decision reached was unimpeachable. Further the impugned decision of the SoS, it was submitted, reflects the centrality of confidentiality to the important work of the IMC. The court was referred in this connection to paragraph 8.20 - 8.21 of the 26th Report where the IMC recorded that:

“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

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.”

[47] The respondent submitted that the logic of maintaining the inviolability of materials which were given to the IMC on an express guarantee of confidentiality – the clearest of legitimate expectations – is unimpeachable. Relatedly it was further submitted that to act now in a manner contrary to those express commitments would breach expectations that are likely to have binding public law effects. If those who provided information to the IMC in relation to the murder of Mr Moffett sought to prevent the disclosure of that material on the basis of the express guarantees they were given it is entirely conceivable, the respondent contended, that the Court

would find that they enjoyed an enforceable substantive legitimate expectation of confidentiality. Further the provision of confidentiality guarantees – subject to the possible exceptional use of a waiver provision - it was submitted were plainly *intra vires* the 2003 Act and the 2003 Order.

[48] In relation to the applicant's argument that none of the relevant statutory provisions indicate what should have happened to material gathered by the IMC *after* it ceased to operate the respondent submitted that there are repeated references in the 2003 Order and the Diplomatic Privileges Act 1964 to the "archive" of materials. This is clearly a reference to the documents and records created by the IMC while it was in existence. The future management of these archived materials was also expressly addressed in Article 4(2) of the Northern Ireland (Monitoring Commission etc.) Act 2003 (Cessation of Provisions) Order 2011.

[49] The respondent thus submitted that the decision of the SoS to maintain the inviolability of the archive was expressly provided for in legislation and there is accordingly no proper basis for a *vires* challenge in these circumstances.

[50] In relation to the applicant's claim that the SoS had misdirected herself in the five respects set out in the amended Order 53 statement these were all challenged. The first issue on which it is alleged that the Secretary of State misdirected herself is the acceptance of the advices that the police investigation into Mr Moffett's death is ongoing. The respondent pointed out that Mr Larmour deposed that enquiries were made with the PSNI, and the Respondent was advised that the investigation '*remains ongoing*'. The Applicant's argument that the investigation is 'effectively at an end' is clearly based, the respondent contended, on the view expressed by the applicant's solicitor to the effect that Mr Moffett's family at some unspecified date were told that "*the investigation ... had progressed as far as it could.*". It was contended that the SoS is entitled to accept the advices given to her by the police. Further, it was submitted that the assertion made by the applicant's solicitor is not necessarily contradictory to, nor should be given greater weight than, the advices given to the Secretary of State by the police.

The Scope of the Inquest

[51] The second and third 'misdirection' relate to the Respondent's consideration of the fact that the scope of the inquest has yet to be defined but is not yet an 'enhanced investigation'. In response the court was reminded that Mr Larmour stated "the Coroner's request is premature, on the grounds that the inquest is still at a very early stage, and until its scope has been defined, **it is open to question, whether the Coroner could be confident that the IMC material is potentially relevant.**" This the respondent argued is no more than a common-sense proposition, it is correct that the inquest is at an early stage and it is correct that the Coroner has not defined scope. Mr McGleenan submitted that if, as seems likely, the Coroner conducts a *Jamieson* type inquest then the broad circumstances of the death will not fall within

the scope of the inquest. If at some future time the Coroner rules that such matters are directly within the scope of the inquest then this particular issue can be revisited.

[52] The SoS refuted the suggestion that she misunderstood the nature of the coronial inquest process. The respondent SoS did not accept that it is only when full disclosure is made that the Coroner will be able to rule – in any way- on the scope of his inquiry. In this connection Mr McGleenan submitted that as the Supreme Court uncritically noted in *McCaughey* [2011] UKSC 20 at paragraph 9, the Coroner can quite properly determine scope on a preliminary basis. Such an approach, subject to ongoing review, can assist interested parties in ensuring that all relevant materials are placed before the Coroner. In the present case the Coroner has made no ruling on scope and it was submitted the SoS has committed no legal error by noting that fact.

[53] In relation to the SoS's understanding that currently there is no "enhanced investigative obligation" under Article 2 in connection with Mr Moffett's inquest Mr McGleenan submitted that there is no material before the Court that indicates whether the Coroner does consider that there are credible allegations of state involvement in this death; nor is there evidence that the Coroner has accepted or rejected the argument that the Article 2 enhanced investigative obligations apply. In those circumstances he submitted that there is nothing objectionable about Mr Larmour's averment at paragraph 20 of this affidavit that:

"if the Article 2 enhanced investigative obligation does not apply, then it would be arguable that the scope of the inquest should be limited to establishing by what means the deceased met his death..."

This is not a misdirection but an accurate statement of the legal position in cases where Article 2 is not engaged because a death is the result of an unlawful criminal act without any involvement of the state.

[54] As to the applicant's further criticism of the SoS's decision on the basis that it was considered that the Coroner has not explained why this material is potentially relevant to the scope of this inquest Mr McGleenan asserted that this comment belies a fundamental misunderstanding of how an inquest operates. The averment made by Mr Larmour is an accurate statement of fact. The Coroner has not ruled, nor explained, whether the UVF state of knowledge of Mr Moffett's killing is relevant to his inquest. The respondent submitted that it is important to note that the Applicant has not sought to establish that the disclosure of the IMC material is necessary to permit the Coroner to properly investigate the death. Nor it was argued has the Applicant established that in not producing the archived material the Secretary of State would be violating the duty not to "*do anything in carrying out its functions which might... have a prejudicial effect on any present or future legal proceedings*". Whilst the Respondent accepts that it is a matter for the Coroner to determine the final scope of the inquest in due course, that does not mean that the Respondent is presently

under a wide-ranging and free-standing duty, at this stage to disclose confidential material that has not been established as being potentially relevant.

Criminal or civil liability

[55] As to the fourth “misdirection” identified - that the SoS erred when she considered that the inquest cannot make findings of criminal or civil liability - the respondent referred to Rule 16 of the Coroners (Practice and Procedure) (Northern Ireland) Rules 1963 which prohibits the coroner and the jury from expressing any opinion on questions of criminal or civil liability. Although the Coroner and jury are not prevented from finding facts directly relevant to the cause of death which may assist in highlighting a conclusion that criminal liability may exist, this does not undermine her conclusion that the Coroner has failed to articulate why or how the IMC material may potentially be relevant to the scope of his inquest. This is particularly the case in an inquest wherein the Coroner is charged with discovering by what means the deceased met his death, rather than the much wider task of assessing the circumstances which led to his death in terms of concluding in a manner which might impact on civil or criminal liability. The respondent submitted that there is no evidential basis to sustain the claim that the SoS misdirected herself in making the impugned determination.

[56] Turning to the incompatibility argument the respondent submitted the applicant has raised an issue - which does not arise in the present proceedings - about the consequences if there is a disagreement between the two governments about waiver of inviolability. Such a circumstance it is contended is clearly governed by the terms of Article 4(3) of the 2011 Order. There must be agreement between the United Kingdom government and the Irish government before waiver of inviolability can occur. Waiver of inviolability can in practice only occur with the agreement of the Irish government. This is what is required by the terms of the 2003 Agreement and by the provisions of the 2011 Order.

[57] The applicant’s challenge in grounds 3 (a) (b) and (d) of the Order 53 statement is apparently predicated the respondent asserted on the concern that the Irish government has a veto to the Secretary of State’s decision. The affidavit evidence establishes that the SoS considered that the decision was a matter for her discretion, weighing up and balancing all of the factors. Mr Larmour deposed that the Secretary of State made her own decision and thereafter consulted with the Irish Government. Given that she had decided not to waive the inviolability and the Irish government agreed with her, there was it was submitted no need for her to address whether she could or would act in a manner that was contrary to their views.

Prejudice to legal proceedings

[58] As to the applicant’s contention that the provisions of the Northern Ireland (Monitoring Commission etc.) Act 2003 (Cessation of Provisions) Order 2011 are *ultra vires* section 2(1) (c) of the Northern Ireland (Monitoring Commission etc.) Act

2003 because they permit prejudice to the conduct of legal proceedings the respondent submitted it is unsustainable. The presumption of the continued protection of the inviolability of the IMC archive, as enshrined in Article 4(2) of the 2011 Order is tempered by the explicit provision at Article 4(3) that there can be circumstances when this inviolability can be waived. It is conceivable that in certain circumstances, prejudice to the conduct of legal proceedings theoretically could permit the exercise of the power at 4(3) and lead to the UK and Irish governments to agree to the waiver. The two governments committed to this approach when they made the original IMC agreement in 2003. The fact that this conclusion was not reached on this occasion does not advance the argument that the 2011 Order is *ultra vires*.

[59] Further the respondent argued that there is no basis for the contention that “proceedings” will be prejudiced by the failure to disclose the archive material held by the IMC. The IMC report which addresses this issue is in the public domain. It can be deployed at the inquest if the Coroner so permits.

[60] Mr McGleenan argued the applicant had “cherry picked” the provision at s. 2(1)(c) of the 2003 Act which enjoins the IMC not to do anything which might prejudice legal proceedings, without acknowledging that this provision was preceded at s. 2(1) (b) with the duty not to do anything that might put at risk the safety or life of any person. He contended that primacy must be given to the protection of life, over speculative assertions of prejudice which may or may not be caused to the conduct of an inquest.

Discussion

[61] When the IMC declined the Coroner’s request for the material grounding their 24th Report they explained in correspondence set out above that they did not consider it appropriate in the circumstances to waive any of the statutory immunities or privileges. This decision was based on their policy that, “to enable them to carry out their legal functions, that the confidences they receive *must* be maintained.”

[62] The central importance of this confidentiality was expressly and emphatically underlined by the IMC at paragraph 8.20 - 8.21 of its 26th Report:

“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

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."

[63] The decisions of the SoS, in the circumstances of this case, to maintain the inviolability of materials which were given to the IMC on the "promise of complete confidentiality" have convincing and compelling force. It was the immunities in the international agreement, subsequently implemented in domestic legislation both in the UK and Ireland, that allowed the IMC to publicly promulgate that they would observe the confidentiality of what they learnt and who told them. That is why the IMC was able to make their March 2004 statement to that effect and is reflected in the passages from their 26th Report just set out.

[64] The confidentiality guarantees given by the IMC were, as Mr Larmour avers, "given pursuant to an international agreement to further the Art 2 imperative of ending communal violence in Northern Ireland". Maintaining the confidentiality of the archive is as the respondent contended an act done in furtherance of the state's obligation pursuant to Art 2.

[65] The 2003 Act imposed a duty to avoid prejudicial effects. Section 2(1)(b) expressly required that the IMC "shall not do anything ... which might ... put at risk the safety or life of any person". Maintaining confidentiality in order to protect the lives of those who assisted the IMC reflects the proper discharge of the substantive positive obligation pursuant to Art 2 of the Convention.

[66] In the context of Northern Ireland any decision other than that arrived at by the SoS would have been a grave betrayal of those who assisted the vital work of the IMC and of the IMC itself who because of the immunities felt able to give promises of complete confidentiality. Once the seal of the archive is broken and that confidence betrayed those who assisted the IMC will be exposed to the fear and real risk of retribution. The risk to those affected by the disclosure inevitably increases even if the disclosure is limited to certain individuals. If the material had been provided to the Coroner disclosure beyond him and his team would be a matter for the Coroner subject to appropriate procedures. Special counsel may be required to represent the next of kin if PII is claimed. Those affected by the disclosure may have to be put on notice so that they can if they wish make representations with the assistance of a lawyer if necessary. The final outcome on the scale of disclosure would not be known until the end of the process including any appeal. In this scenario the inquest would inevitably be delayed for perhaps a substantial period

while the process of disclosure is exhaustively examined by instructed solicitors and barristers.

[67] For the SoS to have acted in a manner contrary to the express commitments given by the IMC to obtain information in the public interest that would or might not otherwise have been provided would breach expectations that are likely to have binding public law effects. If those who provided information to the IMC in relation to the murder of Mr Moffett sought to prevent the disclosure of that material on the basis of the express guarantees they were given it is entirely conceivable, as the respondent contended, that the Court might find that they enjoyed an enforceable substantive legitimate expectation of confidentiality.

[68] Even if there might exist in some case exceptional circumstances where the SoS could lawfully consider breaching the imperative to maintain confidentiality a procedure would in fairness have to be devised to give affected individuals advance notice of what was intended. This would be required to allow them the opportunity to make representations and to challenge an adverse decision in the courts as a breach of their Art 2 rights and legitimate expectation.

[69] Violating the integrity of the archive could have far-reaching deleterious consequences for the UK government. For example the ability of the State to agree other ad hoc bodies to further the peace process should the need arise would be undermined, perhaps fatally, if enforceable and reliable guarantees of confidentiality cannot be provided. Indeed, disclosure in the present case could have implications for some of the other bodies already established to take forward the peace process whether in respect of decommissioning weapons or locating the so called disappeared.

[70] It seems particularly undesirable that the adverse consequences adverted to above could result from what I accept are wholly speculative assertions as to possible breaches of the Art 2 procedural obligations in this case. In the circumstances of this case any decision to waive privilege would raise very serious issues about the substantive and procedural legality of such a course.

[71] In any event no basis has been established for impugning the decision of the SoS which I am satisfied was rational and lawful. I do not accept that the refusal to disclose the archive to the Coroner involved a breach of Art 2 not least because the claim is founded on little more than assertion. If the applicant's argument were well founded then presumably the police investigating the murder would be entitled as well to demand the archive as part of their investigation. I also reject the contention of the applicant that the SoS misdirected herself or otherwise acted irrationally or unlawfully and find no basis in any of the applicant's submissions for interfering with the impugned decisions. The decisions reached are in my view wholly compatible and harmonious with the international agreement establishing the IMC, the legislation implementing that agreement, the legislation maintaining the confidentiality of the archive and the promises of confidentiality given by the IMC to

those who on that basis assisted it. For these reasons the application must be dismissed.