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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:-

POLICE SERVICE OF NORTHERN IRELAND

Appellant

and

OWEN McCAUGHEY & PAT GREW

Respondent

Before Kerr LCJ, Campbell LJ and Weir J

KERR LCJ

Introduction

[1] This is an appeal from the judgment of Weatherup J in which he held that the Chief Constable of the Police Service of Northern Ireland was under a continuing duty by virtue of section 8 of the Coroner's Act (Northern Ireland) 1959 and article 2 of the European Convention on Human Rights to furnish to the coroner conducting an inquest into the deaths of Martin McCaughey and Desmond Grew certain documents generated by the police investigation into their deaths.

Background

[2] Martin McCaughey and Desmond Grew were killed by soldiers on 9 October 1990. To date no inquest has been held into their deaths. There have been various reasons for the delay in the holding of this inquest, the latest of which is the issue of provision of information by the police to the coroner. That is the central issue arising in this appeal.

[3] In October 2002 the fathers of the deceased applied for judicial review of decisions of the Chief Constable and the coroner concerning the disclosure of documents for the inquests into the death of the deceased. The judicial review centred on the disclosure to the coroner of three sets of documents in the possession of the police. The first of these was a copy of the police report prepared for the Director of Public Prosecutions. The second was the direction given by the DPP that there was to be no prosecution. The third set of documents sought was unredacted copies of intelligence reports gathered by the police. The coroner had already received redacted copies of these statements from the police.

[4] In his judgment of 20 January 2004 Weatherup J held that the first document should be provided to the coroner. He concluded that section 8 of the 1959 Act and article 2 of ECHR required that it be disclosed as there was no confidentiality attaching to it and it was potentially relevant to the inquest. The learned judge considered that disclosure of such a document would not deter a police officer from being frank in the report or a member of the public from assisting police investigations. The judge refused the application in relation to the direction of no prosecution on the basis that this amounted to an attempt to discover the reasons that no prosecution had been directed. Since, *per* the decision of this court in *Re Jordan's Application* [2003] NICA 54, the DPP did not have to give reasons for a decision not to prosecute where the decision was taken before the coming into force of the Human Rights Act 1998, and the decision not to prosecute in this case was made in 1993, this document did not require to be disclosed. In relation to the third document, Weatherup J held that, as with the police report, there was a duty to disclose the unredacted copies of intelligence reports under section 8 and Article 2. He was influenced to this conclusion by the consideration that the coroner believed that the unredacted reports were potentially relevant.

[5] In the course of the hearing before Weatherup J, as before this court, one of the principal contentions of the Chief Constable was that the duty on the police under section 8 was confined to the provision to the coroner of such information as was available in the immediate aftermath of the death and that there was no continuing duty under section 8 to furnish information obtained subsequently. The judge rejected that argument in paragraph 13 of his judgment in the following terms:-

> "I am unable to accept such a limited interpretation of section 8. It relates to such information as the police are "able to obtain … concerning the death". There is no reason for that support not to extend to documents generated in the later stages of a police investigation. This is clearly intended to require the police to support the Coroner's investigation with relevant material. The contents of the police report to the prosecuting authority are potentially relevant."

[6] The judge rejected the argument made on behalf of the next of kin that the police had a duty at common law to furnish the coroner with material generated in the later stages of a police investigation. He held that the common law duty recognised in *Peach v Commissioner of Police of the Metropolis* [1986] 2ALL ER 129 was restricted to the duty to report the death to the coroner and to give information relevant to the decision to hold an inquest.

[7] Finally, the judge held that the failure to hold an article 2 compliant investigation into the deaths of the deceased from the time that the Human Rights Act came into force constituted a violation of the procedural requirement of that article that a state sponsored effective inquiry into the deaths be undertaken promptly.

The Coroners Act (Northern Ireland) 1959

[8] Coroners in Northern Ireland are appointed under section 2(1) of the 1959 Act which provides:-

> "**2.** — (1) [The Lord Chancellor may appoint] one, or more than one, coroner and deputy coroner for such district or districts and on such conditions as to numbers, remuneration, superannuation or otherwise as [the Lord Chancellor, after consultation with the Treasury may determine and may also, in exercise of his powers under section 69 of the Judicature (Northern Ireland) Act 1978, appoint coroner's officers and other officers to assist such coroners]. …"

[9] Section 8 requires the police to give to the coroner notice in writing of a death in suspicious circumstances, together with information concerning the finding of the body or the death:-

> "**8.** Whenever a dead body is found, or an unexpected or unexplained death, or a death

> attended by suspicious circumstances, occurs, the superintendent within whose district the body is found, or the death occurs, shall give or cause to be given immediate notice in writing thereof to the coroner within whose district the body is found or the death occurs, together with such information also in writing as he is able to obtain concerning the finding of the body or concerning the death."

[10] Section 7 requires certain other persons to provide the coroner with facts and circumstances relating to the death:-

> "**7.** Every medical practitioner, registrar of deaths or funeral undertaker and every occupier of a house or mobile dwelling and every person in charge of any institution or premises in which a deceased person was residing, who has reason to believe that the deceased person died, either directly or indirectly, as a result of violence or misadventure or by unfair means, or as a result of negligence or misconduct or malpractice on the part of others, or from any cause other than natural illness or disease for which he had been seen and treated by a registered medical practitioner within twenty-eight days prior to his death, or in such circumstances as may require investigation (including death as the result of the administration of an anaesthetic), shall immediately notify the coroner within whose district the body of such deceased person is of the facts and circumstances relating to the death."

[11] Section 11 deals with the steps that the coroner must take in order to allow him to determine whether an inquest is necessary:-

> **"11. —** (1) Where a coroner is informed that there is within his district the body of a deceased person and that there is reason to believe that the deceased person died in any of the circumstances mentioned in section seven or section eight he shall instruct a constable to take possession of the body and shall make such investigation as may be required to enable him to determine whether or not an inquest is necessary.

(2) For the purposes of an investigation under sub-section (1) the coroner may view the body but shall not be obliged to do so.

(3) The coroner may, with the consent of the [Lord Chancellor], employ such persons as he considers necessary to assist him in such investigation.

(4) For the purposes of exercising his powers under this section, a coroner may direct the exhumation of any body which has been buried within his district and the consent of any other authority or person to any exhumation so directed shall not be required by any [. . .] regulations under section one hundred and eighty-one of the Public Health (Ireland) Act, 1878."

[12] Section 12 provides that where the coroner considers it necessary to hold an inquest or a post-mortem he may direct that the body shall be brought to a mortuary. In practice the coroner directs that the police assume responsibility for transporting the body and ensuring safe deposit at the mortuary.

[13] By section 13 the coroner is empowered to hold an inquest:-

"13. — (1) Subject to sub-section (2) a coroner within whose district—

(a) a dead body is found; or

(b) an unexpected or unexplained death, or a death in suspicious circumstances or in any of the circumstances mentioned in section seven, occurs;

may hold an inquest either with a jury or, except in the cases in which a jury is required by sub-section (1) of section eighteen, without a jury.

(2)… "

[14] Section 17 provides for witness summonses:-

"17. — (1) Where a coroner proceeds to hold an inquest, whether with or without a jury, he may issue a summons for any witness whom he thinks

> necessary to attend such inquest at the time and place specified in the summons, for the purpose of giving evidence relative to such dead body and shall deliver or cause to be delivered all such summonses to a constable who shall forthwith proceed to serve the same.
>
> (2) Nothing in this section shall prevent a person who has not been summoned from giving evidence at an inquest."

The Human Rights Act 1998

[15] Section 3 (1) of the Human Rights Act 1998 provides: -

> **"3.** - (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Section 3 (2) (a) of the Act provides that section 3 applies to primary and subordinate legislation whenever enacted.

[16] Section 6(1) of the 1998 Act makes it unlawful for a public authority to act in a way which is incompatible with a Convention right; there are two prescribed exceptions to this general rule:-

> "**6.** - (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if -
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

[17] Section 7 of the 1998 Act makes provision for the procedure whereby a person can make a claim that a public authority has acted unlawfully:-

> "**7.** - (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may -
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act.
>
> (2) …"

[18] Section 7 (6) of the 1998 Act provides that "legal proceedings" in section 7 (1) (b) includes (a) proceedings brought by or at the instigation of a public authority and (b) an appeal against the decision of a court or tribunal.

[19] Section 22(4) of the 1959 Act provides that paragraph (b) of section 7(1) applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section.

The appeal

[20] As originally conceived this appeal was confined to the interpretation, following ordinary rules of construction, of section 8 of the Coroners Act. An amended notice of appeal was filed which raised, the appellant said, the more important issues of whether section 6 and/or section 3 of the Human Rights Act and article 2 of the convention apply to the deaths of Mr Grew and Mr McCaughey, given that the deaths occurred before the 1998 Act came into force on 2 October 2000.

The appellant's arguments

Section 8

[21] For the appellant Mr McCloskey QC suggested that the two obligations imposed on the police superintendent by section 8 were interlinked. The first of these was to give immediate written notice of the death to the coroner. The second was to provide (together with the notice of the death) such information in writing "… as he is able to obtain concerning the finding of the body or concerning the death". Mr McCloskey argued that the use of the expressions 'immediate' and 'together with' clearly indicated that both duties

required to be fulfilled simultaneously and at a time proximate to the death of the deceased or the discovery of the body.

[22] Counsel accepted that much of the investigation into the death of a deceased person would normally occur after the notifications under sections 7 and 8 had been given. He also accepted that statements subsequently taken by police in the course of their investigation into the death are provided to the coroner as a matter of course but he submitted that this arrangement was not on foot of any statutory obligation to supply them. Mr McCloskey argued that the correct textual construction of section 8, giving its words their ordinary and natural meaning, does no more than oblige the police to provide the coroner with such information as they have concerning the death *at the time* that they give written notice of the death. In support of this contention he pointed out that immediacy is also the central theme of other sections of the 1959 Act. The provision of information on foot of the legislation was geared, he said, to enabling the coroner to decide whether an inquest was necessary, not to provide him with the material necessary to conduct a full blown inquiry into the deceased's death.

[23] Although he asserted that there was no statutory duty on the police to furnish information to the coroner other than that imposed by section 8, Mr McCloskey accepted that, were the police to withhold from the coroner relevant material relating to a death, this would frustrate the coroner's power to conduct an effective inquest. The police as a public authority had a responsibility to cooperate with the coroner. This was fulfilled in practice by the police providing material and information necessary to allow the inquest to take place. It was not the subject of a statutory regime, however.

Article 2

[24] The judgment of Weatherup J was delivered before the decision of the House of Lords in *Re McKerr* [2004] NI 212. It was submitted that the effect of this decision is that the procedural dimension of article 2 of the convention does not, within the regime of HRA 1998, apply to deaths which occurred before 2 October 2000. The learned judge's conclusion that there was a violation of article 2 could not survive this decision, Mr McCloskey argued.

[25] On the matter of non-retrospectivity of the 1998 Act generally, Mr McCloskey submitted that this could not be circumvented by the device of engaging public authorities in correspondence subsequent to 2 October 2000 in relation to conduct and events that had occurred before that date. In such cases it is essential to examine the reality of the situation: (Lord Slynn in *Regina –v- Lambert* [2001] 3 All E.R. 577 and Lord Woolf CJ in *Wainwright -v- Home Office* [2003] 3 All ER 943). Substance must prevail over form. The relevant act for the purpose of the 1998 Act was the death of the deceased, not a decision taken in response to a request that the death be investigated.

The respondent's arguments

Section 8

[26] For the respondent, Mr Treacy QC argued that the clear object of section 8 was to ensure that the coroner was provided with all relevant information by the police. 'Relevant information' in this context meant such information as was necessary in order to conduct an effective inquiry into the circumstances of the death. If the appellant's interpretation of the section were accepted it would be impossible, Mr Treacy contended, for the coroner to determine which witnesses were necessary, much less to carry out an effective inquiry. He submitted that, properly interpreted, section 8 imposed a continuing duty on the police and that the word "immediate" in the section was not intended as a word of limitation. Its purpose was to ensure a prompt investigation.

[27] Mr Treacy did not accept Mr McCloskey's assertion that in practice the police provided coroners with the information that they required to carry out their statutory duty. This case, he suggested, exemplified the true position. The coroner had still not been provided with the unredacted intelligence reports even though both the coroner and Weatherup J had concluded that these were necessary for a proper inquiry into the deaths of the deceased.

Article 2

[28] Mr Treacy submitted that the decision of the House of Lords in *McKerr* could be distinguished on the basis that it was concerned with the duty of the Secretary of State to conduct an article 2 compliant investigation where an inquest had already taken place, whereas in the present case no inquest has been held. He relied on the decision of this court in *Jordan v The Lord Chancellor and the Coroner* [2004] NICA 30 which, he said, recognised that section 3 of the Human Rights Act obliges the court to interpret section 8 of the 1959 Act compatibly with convention rights. If, contrary to his primary submission, section 8 did not, on conventional construction, impose a continuing duty on the police to supply relevant information to the coroner, Mr Treacy argued that section 8 was capable of such an interpretation and, applying section 3 of the Human Rights Act, should be interpreted in that way so as to fulfil the procedural requirements of article 2.

Interpretation of section 8 – ordinary rules of construction

[29] The language of section 8 is derived (for the most part) from earlier legislation. Section 22 of the Coroners (Ireland) Act 1846 is in the following terms:-

> "XXII. And be it enacted, that when any dead body shall be found, or any case of sudden death, or of death attended with suspicious circumstances, shall occur in any district, the sub-inspector of the constabulary of such district, or the constable or sub-constables acting in and for the place where such dead body shall be found or such death happen, shall give or cause to be given immediate notice thereof to the coroner of such district, together with such information as he or they shall have been able to obtain touching the finding of such dead body or such death; and the said coroner shall, if upon the receipt of such or other sufficient notice and information he shall deem it necessary to hold an inquest upon such dead body, issue his precept to the sub-inspector of such district, or in his absence to the head or other constable acting for him, to summon a sufficient number of persons to attend and be sworn as jurors upon such inquest at the time and place specified in such precept; and the said coroner shall issue a summons for every witness whom he shall deem necessary to attend such inquest at the time and place therein specified, for the purpose of giving evidence relative to such dead body; and he shall deliver or cause to be delivered all such summonses to the constable or some one of the sub-constables acting in or for the place where such inquest is to be held, who shall forthwith proceed to serve the same."

[30] This provision is largely replicated in sections 8 and 17 of the 1959 Act. One change to the wording of the two Acts should be noted. Whereas the duty to provide the coroner with information provided for in the 1846 Act is such as the police "have been able to obtain", in the 1959 Act the superintendent must supply such information as "he *is* able to obtain". On one view, this might suggest that the 1846 Act required that only information already obtained before notification of the death be supplied, whereas the 1959 Act called for the provision of information that had been obtained after notification. We do not consider that such an interpretation would reflect the legislative intention, however. We believe that the more instructive guide to interpretation is to be found in the juxtaposition of the obligation to give notice in writing of the finding of the body etc. with the duty to give information on what the police superintendent had discovered about the death. The use of the phrase 'together with' appears to us to contemplate the simultaneous supply of the notification and the information.

[31] That conclusion is reinforced by the consideration that the purpose of section 8 and other provisions such as sections 7 and 11 is to allow the coroner to receive without delay information that will enable him to decide whether to hold an inquest rather than to provide him with the material on which any inquest will be conducted. That the information should be restricted in this way may appear strange in light of the nature of a modern inquest but one must remember that before the Human Rights Act came into force, the scope of an inquest was circumscribed. In *R v HM Coroner for North Humberside ex parte Jamieson* [1995] QB 1 it was held that an inquest was a fact-finding inquiry directed solely to ascertaining the identity of the deceased, the time and place of death and how, in the sense of 'by what means', the deceased met his death. This approach to the capacity of pre HRA inquests has been followed consistently in this jurisdiction also. Given this somewhat limited scope, it is perhaps unsurprising that the major question was not what the inquest would disclose, but whether one should be held at all.

[32] Having said that, it is important to recognise how vital is the material supplied by police to the proper functioning of the coroner's court. Even within the limited scope of a pre HRA inquest the repository of much of the information about deaths that require the holding of an inquest will usually be the police. It cannot be satisfactory that information beyond that provided immediately after the death is supplied to the coroner on the basis of an understanding or an informal arrangement. It appears to us that if the coroner is to carry out his statutory function effectively he must have the power to require the production of relevant information from those who have it. But we cannot accept that section 8 of the 1959 Act is effective to achieve this. The interpretation of the provision advanced by Mr McCloskey appears to us to be inescapable, however unsatisfactory we find that to be.

[33] It is a basic principle of legal policy that law should serve the public interest. We consider that urgent consideration should therefore be given to the need to provide coroners with statutory power to require the police to provide information necessary for the proper conduct of an inquest. It is likely that the police will be legally obliged to provide information in relation to deaths occurring after 2 October 2000 because the inquest will normally be the means by which the state complies with its obligation under article 2 of ECHR. In relation to deaths that have occurred before that date, however, there is, in our opinion, a real danger that, if the coroner is unable to require the police to supply relevant information, the efficacy and integrity of the inquest system will be imperilled.

[34] It was suggested that the coroner could obtain the information by judicious use of his section 17 powers but we do not believe that this would be an effective or efficient way to collect the information that a coroner would require in order to ensure that an effective inquest into the death took place. It

would be necessary for the coroner to issue a subpoena to secure the attendance of the police and the production of relevant material and then to adjourn the inquest while that material was considered. Even greater delays than already exist in the inquest system would ensue if the first time a coroner was to be provided with information was at the inquest hearing itself.

[35] The Lord Chancellor has powers under section 2 (1) of the 1959 Act to appoint coroner's officers to assist in investigations. No such officer has been appointed in recent years. Leckey and Greer in *Coroners' Law and Practice in Northern Ireland* deal with this situation in paragraph 2-31 where they observe

> "In Northern Ireland only police officers are empowered to investigate deaths reported to coroners, and this is the position even when no criminal offence is suspected. The particular officer assigned to the investigation acts, in effect, as a coroner's officer for the particular case."

[36] These arrangements are predicated on the mutual understanding that the police will provide information to the coroner relevant to a death which may be the subject of an inquest. There is no expectation on either side that the coroner should conduct a parallel investigation, for example, by questioning witnesses whom the police have interviewed. That the police had hitherto considered themselves under an obligation to provide relevant information to the coroner was not disputed by Mr McCloskey. This is in itself a valuable indicator of the practical requirements of an effective inquest system.

[37] We are reinforced in our view as to the need for legislation to correct the current anomalous position by our conclusion that no duty to supply information arises at common law. We agree with Weatherup J's observation that the reference in the judgment of Fox LJ in *Peach v Commissioner of Police of the Metropolis* to the duty of the police to convey all material "touching the cause and circumstances of the death" should be construed as his understanding of the position under the statutory provisions to supply information for the purposes of the inquest. We were not referred to any authority that would support the claim that the police are under a common law duty to supply information for the purpose of the inquest.

The Human Rights Act

[38] The issue of retrospectivity in relation to the conduct of inquests where the death had occurred before the coming into force of HRA on 2 October 2000 was dealt with by the House of Lords in *Re McKerr*. In that case Jonathan McKerr sought an order compelling the Secretary of State for Northern Ireland to hold an effective investigation into the circumstances of his father's death. Gervaise McKerr had been shot dead on 11 November

1982 by members of the Royal Ulster Constabulary. Between 1982 and 1994, criminal proceedings were brought against the police officers, which led to their acquittal; a police investigation was conducted by two different police forces in England; and an inquest was opened but later abandoned. An application was made to ECtHR invoking article 2. That court found that there had been a violation and awarded the applicant compensation in respect of frustration, distress and anxiety. The government paid the sum awarded but stated that it did not propose to take any steps to hold a further investigation into the death. The applicant sought judicial review on the ground, inter alia, that the Secretary of State for Northern Ireland's continuing failure to provide an article 2 compliant investigation was unlawful and in breach of s 6 of the 1998 Act. That application was dismissed on the basis that the 1998 Act did not have retrospective effect. The claimant appealed to the Court of Appeal, which allowed the appeal holding that the obligation to hold an investigation, which complied with the requirements of article 2, was a continuing one. The Secretary of State appealed. He submitted that s 6 of the 1998 Act was not applicable to deaths occurring before HRA came into force.

[39] The House of Lords held that there was no obligation to hold an article 2 compliant investigation into a killing which occurred before the 1998 Act came into force since that obligation was triggered by the occurrence of a violent death and did not exist in the absence of such a death. This central conclusion is encapsulated in the following passage from the opinion of Lord Nicholls:-

> "[17] In the present case the question of retrospectivity arises in the context of section 6 of the 1998 Act and article 2 of the convention. It arises in this way. Section 6 of the Act creates a new cause of action by rendering certain conduct by public authorities unlawful. Section 7 (1) (a) provides a remedy for this new cause of action. A person who claims a public authority is acting in a way made unlawful by section 6(1) may bring proceedings against the authority if he is a victim of the unlawful act. Thus, if the Secretary of State's failure to arrange for a further investigation into the death of Gervaise McKerr is unlawful within the meaning of section 6(1), these proceedings brought by his son fall squarely within s 7; if not, not.

> [20] … article 2 may be violated by an unlawful killing. The application of section 6 (1) of the 1998 Act to a case of an unlawful killing is straightforward. Section 6(1) applies if the act, namely, the killing, occurred after the Act came into force. Section 6(1) does not apply if the unlawful killing took place before 2 October 2000. So much is clear.
>
> [21] The position is not so clear where the violation comprises a failure to carry out a proper investigation into a violent death. Obviously there is no difficulty if the death in question occurred post-Act. The position is more difficult if the death occurred, say, shortly before the Act came into force and the necessary investigation would fall to be held in the ordinary course after the Act came into force. On which side of the retrospectivity line is a post-Act failure to investigate a pre-Act death?
>
> [22] In my view the answer lies in appreciating that the obligation to hold an investigation is an obligation triggered by the occurrence of a violent death. The obligation to hold an investigation does not exist in the absence of such a death. The obligation is consequential upon the death. If the death itself is not within the reach of section 6, because it occurred before the Act came into force, it would be surprising if section 6 applied to an obligation consequential upon the death. Rather, one would expect to find that, for section 6 to apply, the death which is the subject of investigation must itself be a death to which section 6 applies. The event giving rise to the article 2 obligation to investigate must have occurred post-Act."

[40] The *McKerr* decision was considered by this court (Nicholson LJ, McCollum LJ and Girvan J) in *Re Jordan's application* [2004] NICA 30. That case involved two appeals against the dismissal of applications by the next of kin of Pearse Jordan for judicial review of the decision of the coroner to conduct the inquest into his death on the basis of the existing coroners' law and practice in Northern Ireland and of the failure of the Lord Chancellor to introduce the necessary legislation to ensure that the inquest system in Northern Ireland complied with article 2 of the Convention. In an obiter

passage Girvan J distinguished *McKerr* on the basis that it dealt with a case where an inquest had not commenced. In *Jordan* the inquest had started but had been adjourned a number of times, principally to await the outcome of judicial review applications. On this subject Girvan J said:-

> "[13] From the speeches in *McKerr* we must conclude that the House has definitively ruled that the obligation to carry out an article 2 compliant investigation did not apply where the death had occurred before the Act came into force. That case, however, was not dealing with a situation which applies in the present case where there was an ongoing and incomplete inquest in respect of the deceased which falls to be completed subsequent to the commencement of the Human Rights Act. The ongoing inquest falls to be conducted in accordance with domestic law but the question[s] which arise are how is the domestic law to be interpreted and applied and whether section 3 of the Human Rights Act 1998 has the effect of leading to a re-interpretation of the Coroners Act (Northern Ireland) 1959 in relation to the nature of the inquest to be conducted."

[41] One might observe that whether an inquest has been begun or not, it must be conducted according to the domestic law that applies at the time either of its commencement or resumption. Girvan J, however, concluded that the fact that the inquest was to be resumed after the coming into force of HRA meant that the relevant sections of the Coroners Act should be interpreted in a way that complied with the convention. He referred to the decisions of the House of Lords in *R (Sacker) v the West Yorkshire Coroner* [2004] 1WLR 794 and *R (Middleton) v West Somerset Coroner* [2004] 2WLR 796. These cases were heard by a differently constituted chamber of the House of Lords at the same time as the argument was proceeding in *McKerr*. Both cases related to inquests into the deaths of persons who had died in suspicious circumstances before the HRA came into force. In neither case was the question raised as to the retrospective application of the Human Rights Act 1998 and Convention. In *Middleton* the House of Lords held that an inquest, being the means by which the state ordinarily discharged its procedural obligation to investigate under article 2 of the convention, ought generally to culminate in an expression of the jury's conclusion on the disputed factual issues at the heart of the case.

[42] Girvan J set out the competing arguments as to the possible impact of section 3 of HRA on the conduct of a resumed inquest into the death of someone killed before the coming into force of the Act:-

> "[19] Section 3 of the Human Rights Act obliges the court, so far as it is possible to do so, to read and give effect to primary and subordinate legislation in a way which is compatible with the Convention rights. The 1959 Act and the rules made thereunder are both subordinate legislation. Mr Morgan argued that section 3 is not relevant in this context because the applicant can point to no breach of any Convention right in the light of the decision in *McKerr*. *McKerr* he argues, establishes that article 2 is not engaged. Mr Treacy QC on the other hand argues that section 3 is of general application. Inquests frequently involve on occasions the investigation of deaths engaging or potentially engaging article 2 and the conduct of such inquests involves the requirement for an article 2 compliant investigation. "How" accordingly falls to be interpreted in a way which is article 2 compliant to ensure that those deaths are properly investigated. This has the effect, he argues, of establishing a principle of construction that must apply in all cases where the term "how" falls to be interpreted. Once an interpretation is arrived at in relation to a statutory provision to ensure that it is Convention compliant the implication of that is that the statutory provision falls to be interpreted in that way in all situations."

[43] The learned judge then considered a number of decisions in which the question of retrospectivity either arose or was potentially in issue and continued:-

> "[22] What *Wilson* and the other cases on retrospectivity indicate is that where actions were taken before the Act came into force and where vested or contractual rights were acquired on the basis of the pre-existing law it would be unfair for those rights or the consequences of the actions to be upset by retrospective application of section 3. Lord Rodger in his speech in Wilson noted a distinction between enactments dealing with procedure and enactments conferring vested rights. As pointed out in *Republic of Costa v Erlanger* [1876] 3 Chan 62 at 69 Mellish LJ stated:

> "No suitor has any vested interest in the course of procedure nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done."
>
> Applying section 3 to the conduct of inquests so as to widen the ambit of the inquiry in line with the law set out in *Middleton* would not interfere with any vested rights and would merely affect the procedure of an inquest which has only really started. Accordingly, in my view there is no reason why section 3 should not apply in the context of the present case to lead to a reinterpretation of the word "how" in the statutory provision.
>
> [23] I do not read *McKerr* as precluding this approach. In *McKerr* there was no question of an ongoing incomplete inquest. Lord Rodger stated that the next of kin in that case had no right to an investigation deriving from an article 2 Convention right. What the next of kin in the present case have is a right to an inquest under the Coroners Act (Northern Ireland) 1959. The coroner must conduct that inquest in accordance with domestic law but the domestic law duties of the coroner and the jury fall to be interpreted in a manner which is consistent with the Convention. This conclusion is in accordance with the decisions in *Middleton* and *Sacker* though the point was not argued in those terms."

[44] The effect of Girvan J's judgment was to declare that Mr Jordan was entitled to have the inquest into the death of his son conducted in compliance with article 2, notwithstanding that the death occurred before 2 October 2000. This was to be achieved by requiring the Coroners Act to be interpreted in a manner that complied with the convention. The flaw in this approach, in our opinion, is that section 3 only applies where convention rights are in play. Neither the appellant in *Jordan* nor the respondents in the present appeal have access to convention rights in the domestic setting because of the non-retrospective effect of HRA. Section 3 is not triggered unless compatibility with convention rights is in issue. It was not in issue here, nor was it in *Jordan*, because the deaths involved occurred before the Act came into force. This much is clear not only from the passage from the opinion of Lord Nicholls in *McKerr* quoted above but also from the opinions of other members

of the Appellate Committee. Lord Hoffmann put in bluntly, "Either the Act applies to deaths before 2 October 2000 or it does not". He held that it did not. But if Girvan J's approach was followed, the Act would be applied to deaths occurring before that date. Lord Rodger of Earlsferry put it thus:-

> "… the right to an investigation under the Act is confined to deaths which, having occurred after the commencement of the Act, may be found to be unlawful under the Act."

Finally Lord Brown of Eaton-under-Heywood expressed the same concept in this way: -

> "[91] The duty to investigate is, in short, necessarily linked to the death itself and cannot arise under domestic law save in respect of a death occurring at a time when article 2 rights were enforceable under domestic law, *i.e.* on and after 2 October 2000."

[45] We are satisfied that section 3 of the 1998 Act does not apply in the present circumstances. There was therefore no obligation to hold an article 2 compliant investigation into the deaths of the deceased. It follows that the appeal must be allowed and the application for judicial review must be dismissed.