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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MICHAEL GALLAGHER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR NORTHERN IRELAND MADE ON 12 SEPTEMBER 2013

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HORNER J

Framework of Judgment **Paragraphs**

A. EXECUTIVE SUMMARY

[1] The court concludes that:

(i) The applicant has persuaded the court that there are arguable grounds that there has been a breach of Article 2 of the European Convention on Human Rights on grounds 2, 6, 7 and 9 ("the grounds").

(ii) These grounds relate essentially to the failure of the authorities to act against those dissident republican terrorists, north and south of the border, who had been involved in acts of terrorism in the months leading up to the Omagh bombing because of:

(a) The alleged presence of an informer in the Real IRA ("RIRA") whose presence the authorities did not want to risk revealing;

(b) The risks that a proactive security response to deal with dissident terrorists would irreparably damage the peace process.

(iii) There is no arguable basis disclosed on the OPEN materials on the other grounds including the rationality challenge, whether considered separately or together;

(iv) The court directs that an Article 2 compliant investigation should be carried out in Northern Ireland to examine the grounds referred to above and expresses the desire that simultaneously an Article 2 compliant investigation will consider the same issues in the Republic of Ireland. It is not the role of the court to determine the precise nature of the investigation(s) but any investigation should be capable of receiving both OPEN and CLOSED material.

B. INTRODUCTION

[2] On Saturday 15 August 1998 just after 3.00 pm a massive car bomb exploded in the small country town of Omagh, Co Tyrone. The car containing the bomb was parked 330 metres from the courthouse at the junction of High Street and Dublin Road. The bomb, which is believed to have been constructed of semtex explosive, fertiliser and fuel oil, created blast temperatures in its immediate vicinity of over 1,000° centigrade. Structural damage occurred over an area of 125 metres and blast damage within a range of 500 metres. Vehicle fragments of the car carrying the bomb were found 300 metres from the explosion.

[3] Twenty-nine men, women and children and two unborn children were murdered as a consequence of the Omagh bomb exploding. Many others were grievously injured, both physically and mentally. It was a scene of utter carnage and devastation. One eye-witness described the scene thus:

> "There were bodies everywhere; it was like a war zone, a killing field."

[4] What happened on that fateful day has been the subject of condemnation and criticism from many commentators. The Prime Minister at the time, Tony Blair, described what happened as:

> "An appalling act of savagery and evil."

Professor Diarmaid Ferriter in his book, The Border, said of the Omagh outrage:

> "Beyond devastating, it was the biggest single atrocity in the history of the Troubles and the work of dissident republicans, styled the **Real IRA**, some of whom were based in the Republic. The bomb had been transported over the border and the victims came from both sides of it as well as England and Spain. Despite an extensive cross border investigation in its aftermath, no one was criminally convicted of a crime that prompted the poet, John Montague, to despair that **History creaks on its bloody hinge and the unspeakable is done again**."

The heart breaking loss of lives unlived, the grieving families and friends left behind, and the terrible injuries, both physical and mental, inflicted on those who survived the bomb and its immediate aftermath, all combine together to make the Omagh bombing such a horrific crime against humanity.

[5] The Chief Constable at the time, Sir Ronnie Flanagan, described the method of attack as follows:

> "A Vauxhall Cavalier was stolen in Carrickmacross, Co Monaghan, on 13 August 1998. Over the next two days it was fitted with false number plates and packed with explosives. At around 12:40 hours on 15 August 1998, preceded by a scout vehicle, it left the Castleblayney area of Co Monaghan and headed for Omagh, arriving there at approximately 1400 hours. At 1410 the **supervisor** in the scout vehicle spoke by mobile phone to the person believed to be the OC, then in South Armagh, and at 1414 a call was made from the bomb car to another Real IRA suspect also in South Armagh. At 1419 the bomb car contacted the scout vehicle, and at 1420 the bomb car moved into its final position in Market Street, outside SD Kells shop facing towards the courthouse. The two male occupants got out and are believed to have

> fled in the scout vehicle, waiting for them in or near the Dublin Road.
>
> There then followed bomb warning calls which were made from public telephone boxes in South Armagh to UTV in Belfast at 1429 and 1431 and to the Samaritans in Omagh (diverted to Coleraine) at 1431. The scout vehicle then made its way back across the border and by 1530 the bombers were back in Co Monaghan."

[6] The circumstances in which the warnings were given are set out in considerable detail in the judgment of Gillen J in *Breslin and others v Murphy and Daly* [2013] NIQB 35 at paragraphs [9]-[14]. They can be briefly summarised as follows. The first warning call at approximately 2:30pm was to a production assistant at UTV. She was told: "Bomb courthouse Omagh, Main Street. 500lbs explosion, 30 minutes. Martha Pope. IRA Oglanahan." She immediately informed the police. The second call was made to the same user two minutes later and another warning given:

> "Martha Pope 15 minutes, bomb Omagh Town."

[7] The final call was received about the same time by a Samaritan volunteer in Coleraine (having been diverted from the Samaritans Service at Omagh). That call had warned of a bomb which was due to explode in the centre of Omagh in 30 minutes and gave the code word "Martha Pope." When asked where the explosion was to occur he was informed, "Main Street about 200 yards from the courthouse."

[8] The code word "Martha Pope" had been used in the Banbridge bomb attack two weeks earlier and the authorities prepared for the worst. The first warning located the bomb at the courthouse in Main Street, when there is no Main Street. Police assumed the target of the attack was to be the courthouse. The third warning said that the bomb was 200 yards from the courthouse, but this did not reach the police responding to the bomb warning in time.

[9] As a consequence, the police had decided to move pedestrians 400 metres away from the courthouse for safety sake. The bomb car was positioned approximately 340 metres from the courthouse and the explosion occurred 35 minutes after the first warning call. As Gillen J (as he then was) said at paragraph [14]:

> "The barrier of time has not served to disguise the enormity of this crime, the wickedness of its perpetrators and the grief of those who must bear its consequences."

[10] These misleading messages had been given as late as possible because the bombers' purpose had been to ensure "that the bomb exploded without detection": see Morgan J in *Breslin and others v McKenna and others* [2009] NIQB 50 at paragraph

[34]. The last thing the bombers wanted was to give the authorities time to deactivate the bomb because each unexploded bomb can, like a fingerprint, offer up the identity of the bomb maker. This also explains the bombers' failure to give the make and registration of the car containing the bomb which would have made locating and deactivating the bomb that much easier. The timer on the Omagh bomb was found to be a Coupatan, similar to the ones that had been used in other bomb attacks in the previous 6 months.

[11] The applicant in this judicial review, Michael Gallagher, is married to Patsy Gallagher. They lost their only son, Aiden, as a result of the explosion. Their two daughters lost their only brother. The applicant is retired now, having previously been involved in running his own business. He was instrumental in setting up the Omagh Support Self Help Group ("the OSSHG") and was elected chairperson. OSSHG operates for the benefit of victims and survivors of trauma particularly, but not exclusively, to assist those who have been bereaved or injured by the Omagh bomb. OSSHG has campaigned to have a public inquiry, preferably, a cross border one, set up to consider whether the Omagh bomb could have been prevented. The applicant's energy and industry have been immense as he has sought justice for his son and the other victims. He has been the driving force behind OSSHG.

[12] There has been another group formed by other survivors of the Omagh bomb. It is called Families Moving On ("FMO"). Some of its members used to be part of the OSSHG but left that organisation because they felt that they were being treated as victims when they should be treated as survivors. Membership of FMO is not restricted to those who suffered as a consequence of the Omagh bomb. While FMO is critical of the police performance in the aftermath of Omagh, it does not feel that a public inquiry is the answer. However, FMO does not want its views to be used by the government as a reason to deny OSSHG a public inquiry, however traumatic that may be for FMO's members.

[13] OSSHG is also determined that the Omagh bomb should not be seen to be a legacy of the "Troubles" as they are euphemistically known. The bomb came after the Good Friday Agreement ("GFA"), when the Troubles had been supposedly confined to "the dustbin of history." However, for many others the Omagh bomb was very much part and parcel of the Troubles which had brought such devastation and destruction to Northern Ireland for over 25 years.

[14] The then Prime Ministers of the United Kingdom and the Republic of Ireland, Tony Blair and Bertie Ahern, together with the Chief Constable, Sir Ronnie Flanagan, assured the survivors in the aftermath that there would be full co-operation and that "no stone would be left unturned." However, the police investigations on both sides of the border to date, have yielded little reward. Colm Murphy was prosecuted in the Republic of Ireland. Although he was convicted at first instance, he was acquitted on appeal. His nephew, Sean Hoey, was prosecuted in Northern Ireland for a number of offences arising out of Omagh but was acquitted. Seamus Daly was

also prosecuted in Northern Ireland, but his trial did not proceed and he was acquitted. To date no one has been tried and convicted for the Omagh outrage. There has been a civil claim brought where the burden of proof is "the balance of probabilities" and not "beyond reasonable doubt." In those civil proceedings a decree for damages for £1.6M was entered in favour of 12 relatives of the Omagh bomb against Michael McKevitt, Liam Campbell, Colm Murphy and Seamus Daly. Some of those identified by the authorities as being involved in the Omagh bomb have subsequently been convicted for other offending committed while furthering the aims and ambitions of the dissident republicans. For example, Patrick Joseph ("Mooch") Blair recently faced 15 counts relating to terrorism, all of which post-dated Omagh, and was convicted and sentenced to an indeterminate custodial sentence.

[15] OSSHG is bitterly disappointed at the performance of the authorities in ensuring that those responsible for the Omagh atrocity were arrested, prosecuted and held responsible for their actions. It feels that more could and should have been done to hold those responsible to account for their murderous actions.

[16] The OSSHG has other complaints which are the sole subject of this application. Firstly, it seeks, and has been granted, leave to judicially review the decision of the Secretary of State for Northern Ireland ("the respondent") who in a letter dated 12 September 2013 refused to hold a public inquiry (or any inquiry that complied with Article 2 of the European Convention on Human Rights) ("ECHR") into whether there had been a failure to investigate whether the Omagh bomb could have been prevented. Secondly, and leave has not been granted for this, whether the decision of the respondent not to establish a public inquiry was irrational. The court will need to consider this issue in due course.

[17] Whether or not the application for judicial review is successful, it is important not to forget that the responsibility for this terrible atrocity, the worst in the last 60 years of Northern Ireland's history, lies with those malevolent and evil dissident republicans who, with complete disregard for human life, planned, planted and detonated a huge bomb among shoppers in Omagh's town centre on a Saturday afternoon in August. As the Ombudsman said in her report of 12 December 2001 at paragraph 2.5:

> "The Police Ombudsman considers that the persons responsible for the Omagh Bombing are the terrorists who planned and executed the atrocity. Nothing contained in the Report or the Statement should detract from that clear and unequivocal fact."

The Coroner in his closing statement at the inquest said:

> "The Real IRA claimed responsibility for the car bomb, though they sought to pass responsibility to the police for

> the casualties. As far as I am concerned they were responsible for what happened. The bomb warnings they gave were inadequate and misleading and the self-serving statement they issued subsequently has been shown to be untrue. If you park a car containing up to 200kg of explosive in a busy shopping street, set a timer and walk away, you do not walk away from responsibility for any resultant carnage."

The same reasoning applies, mutatis mutandis, to this judgment.

[18] Finally, this is the judgment of the court only on the OPEN materials available to it. I have had oral and written submissions from Mr Southey QC on behalf of the applicant and Sir James Eadie QC on behalf of the respondent. I am grateful to them and to all the members of their respective legal teams for the well organised submissions, both written and oral, which have been addressed to this court and have provided considerable food for thought.

[19] There has been much paper used and ink spilt during this application. I have read hundreds of exhibits, thousands of pages of evidence and submissions and countless authorities. I have read many of the documents more than once and made many notes as my deliberations have been necessarily interrupted by the requirement to hear other pressing cases. Where I have quoted from an article or text book or case report, I have tried to acknowledge its provenance and, where possible, provide the relevant reference. I fear that in some instances I may not have provided a reference or an acknowledgement for a direct quotation having absorbed it by a process of osmosis during my extensive deliberations. If I have done so, I apologise for my inadvertence in advance. No discourtesy is intended.

[20] I have set out in this judgment as much background detail about what was happening, how the authorities were organised and what legal powers the authorities had at that time. I consider it important that I am as transparent as possible in this OPEN judgment given that there is an accompanying CLOSED judgment to which access will be severely restricted.

[21] Finally, these proceedings provide a good example of the difficulties that will necessarily be experienced in examining Northern Ireland's troubled past, difficulties which were highlighted by Sir Paul Girvan in *Re Hughes' Application for Judicial Review* [2018] NIQB 30 when he said in a challenge to the First Minister's refusal to provide funding for an Article 2 inquest:

> "[3] … Finding the right approach in relation to dealing with the past and with past violence raises highly complex political and legal questions and requires considerable sensitivity on the part of those charged with trying to find a way forward."

C. BACKGROUND CIRCUMSTANCES TO THE OMAGH BOMBING

Dissident Republicans

[22] The Provisional IRA ("PIRA") is the terrorist wing of Provisional Sinn Fein. PIRA had been engaged in an "armed struggle", primarily in Northern Ireland, with the British State for many years during the Troubles. On 31 August 1994 it declared its first ceasefire. On 9 February 1996 that ended with its detonation of the Canary Wharf bomb. A second ceasefire began in July 1996. This was not a universally popular decision amongst its members. Some republicans were not convinced of this approach and were not prepared to abandon the armed struggle. The Continuity IRA ("CIRA") whose political wing is called Republican Sinn Fein ("RSF"), and which is largely based in the Republic of Ireland, made clear that its intention was to carry on the armed struggle. To make good that threat CIRA exploded a large bomb at South Armagh Police Station on 6 September 1996. In October 1997 several members of the PIRA Executive called for an end to the PIRA ceasefire and PIRA's continuing involvement in the peace process. They then resigned from the PIRA Executive and later formed the 32 County Sovereignty Movement ("32 CSM"), originally known as the 32 County Sovereignty Committee. The terrorist arm of the 32 CSM is known as the Real IRA ("RIRA"). Michael McKevitt and his wife, Bernadette Sands McKevitt played leading roles in 32 CSM. Finally, the Irish National Liberation Army ("INLA") which had been operating through most of the Troubles in Northern Ireland continued to function albeit intermittently. For example, INLA provided support for an unsuccessful mortar attack on Newry on 21 July 1998.

[23] The ceasefire, which commenced in July 1996, caused internal dissension within PIRA as many volunteers were not convinced of the wisdom of the peaceful approach. Some of them were prepared to transfer their allegiances to groups who were not going to accept the end of the armed struggle. The other dissident terrorist groups in turn provided a warm welcome for those who wanted to fight on against the British State. The dissident republicans, who were members of RIRA, strongly rejected the 1996 Mitchell principles which underlined the GFA and to which all parties to the peace process had been required to sign up.

[24] The GFA was concluded on 10 April 1998. Before and after that date there were various terrorist attacks carried out by dissident republicans. These attacks included an explosion in Enniskillen on 24 January 1998. There was a vehicle borne bomb attack in Moira on 20 February 1998. This was followed by a bomb attack in Portadown on 23 February 1998. These last two attacks were assessed as being the responsibility of CIRA with assistance from other individuals and/or groups. In March 1998 the security assessment was CIRA and its supporters had accessed sufficient weaponry and expertise to permit it to sustain a prolonged terrorist campaign. In March 1998 the security assessment was that the 32 CSM (RIRA) may have been planning major car bomb attacks in Northern Ireland. Further, there were

signs of CIRA and RIRA becoming closer and there was evidence of increased co-operation between the two groups. On 10 March 1998 there was a mortar attack on Armagh which was assessed to be the responsibility of those who had carried out the Moira and Portadown attacks in February. On 23 March 1998 an improvised explosive device ("IED") was defused in Londonderry and responsibility was claimed by CIRA. Further mortar attacks took place on 24 March 1998 in Forkhill which bore similarities to previous attacks on Armagh City. In early April 1998 CIRA/RSF was assessed to have been involved in the failed explosive device in Banbridge on 6 January 1998 and the explosion in Enniskillen on 24 January 1998. Further, it is thought that the attacks on Moira, Portadown, Armagh and Forkhill were the product of CIRA and RIRA co-operation. RIRA was assessed at that stage as having the capacity to maintain a significant military campaign with adequate personnel with engineering and quarter mastering experience, together with capable planners and access to large stocks of PIRA terrorist material. There was a further attack on Belleek on 9 May and that was followed by a mortar attack at Newry on 21 July 1998 and bomb at Banbridge on 1 August 1998. This was described by the Daily Telegraph as the latest in the series of increasingly reckless attacks perpetrated by republicans opposed to the Peace Process. There was evidence at the civil trial that the phones of Colm Murphy and Seamus Daly who were found to have been responsible for the Omagh bombing had also been used in the bomb attacks on Banbridge and Lisburn. I will return to this later in the judgment. In the six months prior to the Omagh bombing there were 24 attacks by dissident republican terrorists at various locations in Northern Ireland.

[25] In a document entitled the Chief Constable's Statement of January 2002 it is stated at paragraph 2.3:

> "In August 1998, therefore, the security forces across the Province were alert to the risk of terrorist attacks. There was, however, no intelligence to suggest any particular town was at immediate risk. Special Branch officers, in particular, were devoting major efforts to countering the threat. In July and August alone they handled 2,375 intelligence reports on possible terrorist and related activity. In the five months before, during and after the Omagh bomb, over 50 separate covert and specialist operations against suspected active dissident republican terrorists were mounted, some lasting several weeks."

[26] The problems presented to the authorities from the actions of dissident republicans in the months leading up to August 1998 should not be underestimated.

[27] The report for the Policing Board from Jones and Evans dated April 2003 summarised the situation in 1998 in Northern Ireland as follows:

> "The strategic intelligence picture for 1998 clearly illustrates a fluid situation, whereby terrorists were migrating from one group to another as a consequence of Sinn Fein's support for the GFA on 18 April 1998. It was an unsettled time with strong indications that Dissident Republican groups were prepared to actively support each other primarily to establish their own credibility, capability and resistance to aspects of the developing peace process.
>
> It is of significance that on Tuesday 18 August 1998 the Real Irish Republican Army (RIRA) issued two statements, the first claiming responsibility for the Omagh attack, blaming the security forces for failing to respond to their warnings adequately and apologising to the casualties. The second claiming to have intended to attack a **commercial target**."

The ties between those terrorists who had renounced violence and those who remained committed to the armed struggle, whether of blood or friendship, remained strong. These close connections ensured that dealing with terrorist activity continued to be fraught with risk. A security clamp down had the potential to imperil the whole peace process. On the other hand, a light touch approach might mean that those committed to violence were able to pursue their terrorist objectives unimpeded. The task of balancing these competing interests was an onerous one and it is one to which I will have to return later on in this judgment.

[28] As noted, many of the attacks in 1998 represented the combined efforts of CIRA and RIRA such as the attack on Lisburn on 30 April 1998 and the attack on Belleek on 9 May. Members of INLA had provided occasional assistance such as the vehicle borne improvised explosive device ("VBIED") which was used to attack Newtownhamilton in South Armagh. Indeed, there is some evidence that the Omagh bombing was a product of RIRA and CIRA co-operation with RIRA building the bomb and CIRA picking the target and placing the bomb: see the statement of David Rupert, a US citizen, who penetrated CIRA and gave evidence in the Republic of Ireland for the State in the trial of Michael McKevitt, a leading dissident republican.

The authorities

[29] Sir Peter Gibson's Review of Intercepted Intelligence in relation to the Omagh bombing of 15 August 1998 ("the Gibson Review") provides helpful information and an insight into the responsibilities of the various arms of the authorities, that is the police, the army, MI5, MI6 and GCHQ. I will refer to MI5, MI6 and GCHQ collectively as the intelligence services. The police took the lead role and were responsible for the gathering of intelligence on all threats to national security. These

included threats from both republican and loyalist terrorists. It directed intelligence operations to counter those threats. The Special Branch ("SB") was the intelligence gathering organisation. The CID was the operative branch that investigated crime. They were intended to be complementary branches whose "operations have the common objective of securing the convictions of individuals in the prevention of acts of terrorism." This did not always work out and the Police Ombudsman in her report of 12 December 2001 was highly critical of SB. She concluded, inter alia, that insofar as the prevention of the Omagh bomb was concerned that:

(a) SB did not have detailed written Force policies and procedures for the management and dissemination of intelligence for the rest of the Force;

(b) These deficiencies were longstanding; and

(c) In the absence of written policies individual SB officers made decisions about when information should be made available to other officers.

[30] GCHQ assisted the RUC in providing signals intelligence ("Sigint") to assist it in performing its national security role. In reviewing John Ferris's book, "The Enigma", Mark Urban said:

> "Of all the branches in this hidden world the collection of signals intelligence, Sigint, have generally been regarded as the most clever and zealous, the Jesuits of this priesthood, government communications headquarters ("GCHQ") in Cheltenham as its holy of holies."

[31] SB provided GCHQ with detailed targeting information which allowed GCHQ to respond appropriately to existing and new intelligence requirements and challenges. There were regular contacts at desk level between SB and GCHQ. By 1998 the dissident republicans were well aware that their communications were not secure. This meant that they used a variety of means to make identification difficult. They rarely identified either themselves by name or the name of the person whom they were calling. Their language was guarded and code words were used. At this time voice identification was considered to be imprecise.

[32] There were three Regional Commanders of the RUC at Belfast, North (Ballykelly) and South (Portadown). Omagh came within the North region. A Tasking and Co-ordination Group ("ATCG") had sole responsibility for taking action in the South region.

[33] The Chief Constable, Sir Ronnie Flanagan, was helped by his Assistant Chief Constables who included:

(a) Assistant Chief Constable Crime ("ACC Crime") who was Head of the CID; and

(b) the Assistant Chief Constable ("ACC") who was Head of SB.

There was a Deputy Head of SB and a Regional Head of SB South. This was considered to be the most important region in the fight to control republican terrorism. It was the first terminal to receive secure emails from GCHQ.

[34] The Director and Co-ordinator of Intelligence ("DCI") had responsibilities which included:

(a) The provision of an effective reporting service to ministers and officials in the NIO;

(b) The provision of high level policy, direction and advice relating to intelligence activity in Northern Ireland;

(c) Provision of support for the Chief Constable of the RUC and the General Officer commanding Northern Ireland on intelligence matters.

[35] There was also a small team of intelligence analysts known as the Assessments Group ("AsGp") who provided a wide range of strategic intelligence reports for the government. In 1997, following the Walker Report recommendations a central Intelligence Management Group ("IMG") was created at RUC HQ which was responsible for the collation, analysis and distribution of all RUC intelligence. In February 1998 a Memorandum of Understanding was agreed between IMG and AsGp outlining their respective roles in the assessment and dissemination of intelligence. One of the pivotal responsibilities of IMG was to make sure that RUC intelligence was passed to AsGp for assessment and onward dissemination.

[36] From October 1996 SB South had formed the South Armagh Project Team which collated and assessed all information relating to PIRA in South Armagh so as to prevent further attacks by that group and it reported to the Head of SB South. By August 1998 there was a Project Team with a Duty Officer who received intelligence from all sources. Any intelligence was shared with the Head of SB and the Regional Head would report to him on a daily basis. At the weekends however such reports were usually not delivered until Monday.

[37] There is no doubt that there was tension between SB and CID because of their competing requirements. SB had concerns that divulging sensitive material to CID would result in a trusted source who provided useful intelligence being compromised. Sir Peter Gibson did consider that there was some basis for considering that the management of intelligence outside SB needed to be strengthened. On the other hand, CID officers were upset at what they saw as a refusal of SB to disclose all the relevant material which had the potential to help their investigations and bring to justice those responsible for criminal and terrorist offending.

[38] Once intercept material reached RUC HQ and SB South, any onward transmission was the subject of strict conditions imposed by GCHQ. These were:

(i) Designed to provide support to Special Branch while at the same time protecting GCHQ's capabilities, sources and methods;

(ii) They were also to make sure that GCHQ complied with its legal obligations and in particular section 4(2)(a) of the Intelligence Services Act 1994;

(iii) Any onward disclosure by RUC HQ or SB South was subject to a set procedure which "sanitised" the intelligence so as not to reveal its source. The release of intelligence, which it was intended should be acted upon, had to be requested by GCHQ and in a form of words cleared with GCHQ.

[39] This approach, which was adopted by SB, was described as being "cautious" by Sir Peter Gibson and was the subject of detailed consideration by the Police Ombudsman for Northern Ireland ("PONI") in the report which followed referrals in 2010 and 2013. PONI considered that SB acted lawfully in its interpretation of the governing legislative framework at the time and that consequently the "cautious" approach it had adopted was a lawful one.

[40] There is nothing which has been brought to my attention to suggest either that Sir Peter Gibson or PONI erred in their understanding of what was a reasonable and lawful approach to the handling of GCHQ's Sigint.

Intelligence gathering and sharing

[41] The role of intelligence gathering had been the subject of careful consideration over the years. Sir Patrick Walker, a senior MI5 officer, who served as Director General before retiring in 1992 had produced a report as far back as 1980 which, inter alia, reported on the interchange of intelligence between SB and CID and the relationship between these two departments of the RUC. He had noted the roles of SB and CID were close, but sometimes uneasy. There was an element of competition, which while acceptable when their respective functions overlapped, should not be allowed to interfere with the effective conduct of business. He sought to set out ground rules given the "fundamentally different attitude to agent and informant handling." These were, inter alia:

(a) Wherever possible, an agent in a subversive organisation recruited by CID should be handed over to SB;

(b) When (a) is not possible, the agent should be handled jointly by CID and SB;

(c) Unless there are exceptional circumstances reporting intelligence should be on SB 50's (that is brief summaries of the intelligence received from an agent);

(d) All proposals to effect arrests, other than those arising directly out of an incident, must be cleared with SB to ensure no agents, either RUC or army, are involved and he recommended specifically that "all arrest lists be cleared by Regional HSB's."

[42] There can be no doubt that a proper and thorough criminal investigation requires different pieces of evidence, intelligence and Sigint to be fitted together to form a coherent whole. It is obviously wrong to concentrate on an isolated piece of information without considering that information, in context, alongside other evidential clues. But it can never be good practice to try and stitch together disparate, irrelevant and inconsequential pieces of evidence and then stand back and claim that when considered together, they form a mosaic, a complete picture. Evidence which is going to be relied upon has to be relevant and/or cogent and/or probative. The respondent is surely right to make the point that the sum of zero plus zero will always be zero. Evidence of no worth can rarely, if ever, amount to anything by being added to other worthless evidence or being considered alongside such evidence. While irrelevant and worthless pieces of evidence are a distraction, the assembly of probative and cogent information to form as complete a picture as possible is a necessity. The applicant has correctly emphasised the importance of collating, assessing and acting upon the totality of the available evidence and intelligence.

[43] It is therefore necessary to consider the claims that have been made that there was a failure on the part of the authorities to access all the intelligence and that too often decisions were made on the basis of an incomplete picture of all the intelligence which was available. It is a criticism that is easily made but it repays close examination by the court given that the court at this stage only has to decide whether it is arguable that the consideration of all the pieces of intelligence together would have had a good prospect of preventing the Omagh bomb: see paragraph 25 of *R (ex parte Amin) v Secretary of State for the Home Department* [2003] UKHL 51. In the instant case the applicant expressly makes the case that there was a patent failure on the part of the authorities "to join up the dots", to link pieces of evidence together to form a whole picture and that this failure on the part of the authorities was directly or indirectly responsible for the failure to prevent the Omagh bombing.

Disruption

[44] It was a central part of the applicant's case that the authorities should have taken steps to disrupt those terrorists who were planting bombs on both sides of the border, although primarily in Northern Ireland, in the months leading up to the Omagh bombing. Disruption necessarily requires not only that the identities of the terrorists are known, and this is obviously an issue to be considered further, especially in the CLOSED judgment, but also, it places an onus on the applicant to spell out exactly what disruptive activities were available lawfully to the authorities to take. However, there was a singular failure on the part of the applicant to explain

exactly what or how such disruption would take place except in the most general of terms.

[45] In answer to a specific question about the nature of the disruption that would have prevented the Omagh bombing, the applicant responded thus:

> "Firstly, it would have been possible to take action against those suspected of involvement with dissidents perhaps?
>
> Secondly, it would have involved more intensive policing such as roadblocks."

[46] The applicant's skeleton argument stated that it was impossible to be more specific. There was no further useful elaboration in the course of the applicant's oral submissions.

[47] Ideally, the applicant should have set out what legal powers the authorities had and how he contends those powers could have been used by the authorities to disrupt those persons suspected of being responsible for the bombing campaign being waged in the months before Omagh and how the consequence of the use of those legal powers against those involved in these illegal activities would have been to create circumstances where there was a good prospect of preventing the Omagh bombing taking place at all. The case law makes it clear that any steps to be taken by the authorities to disrupt terrorists have necessarily to be lawful ones. In *Bljakaj and others v Croatia* (2014) 38 BHRC 759, for example, at paragraph [122] the court said:

> "When examining whether the domestic authorities complied with those positive obligations, it must be borne in mind that they have to be interpreted in such a way as not to impose an excessive burden on the authorities (see para 105, above). In particular, due regard must be paid to the need to ensure that the police exercise their powers to control and prevent crime in a manner which **fully respects the due process** and other guarantees which legitimately place restraints on the scope of their action to investigate crime and to bring offenders to justice, including the guarantees contained in arts 5 and 8 of the convention..." (emphasis added)

[48] The respondent says with some force that if the applicant is going to make the case that disruption would have prevented the Omagh bombing, or would have had a good prospect of preventing the Omagh bombing, then the court could reasonably have expected as a minimum:

(a) Identification of the perpetrators responsible for the Omagh bomb explosion;

(b) Identification of the disruption measures which it is alleged ought to have been taken;

(c) The likely connection between the relevant measure(s) and prevention;

(d) Insofar as the measure(s) identified would have required the exercise of police powers or other inclusive law enforcement measure (e.g. arrest, searches, surveillance etc), it would also be necessary to identify the target of the measure and the lawful basis for the exercise of police powers;

(e) An explanation as to how the attack on Omagh was foreseeably imminent if the relevant disruption measures were not taken.

[49] The very general nature of the submission made on behalf of the applicant by his legal team has meant that the court has necessarily had to look carefully at the powers given to the authorities to prevent terrorist activities. It has done this reluctantly far preferring the applicant to have identified those legal powers that the authorities could and should have used, but feels that it has been a necessary, if time consuming exercise, if it is to reach a fair and just result. It also has to recognise that the test at this stage is arguability.

[50] In the successful civil claim arising out of the Omagh bombing brought against some of those responsible for it, reliance was placed on the expert evidence of Lisa Purnell who prepared a detailed report entitled 'Cell site analysis linked to Dissident Republican activity in Northern Ireland' in which she analysed mobile phone activity to and from a series of telephone numbers around the time of the bomb attacks in Newry (1 April 1998), Lisburn (30 April 1998), Newry Courthouse (13 July 1998), Banbridge (1 August 1998), Omagh (15 August 1998) and on the day the car used in the Omagh bomb was stolen. This evidence was admitted at the trial and was based upon material supplied by Vodafone, BT Cellnet, the RUC and AGS in 1998 and 1999. The data from the mobile phone companies was supplied following meetings with their representatives in March 1999. The civil trial was told that Lisa Purnell had used computer software to analyse the data and to create the chronology of phone usage and graphics which appeared on her cell site analysis report.

[51] Assistant Chief Constable Martin avers that this information "was therefore not available to the RUC prior to the bomb and no cell site analysis had been carried out in relation to mobile phone usage related to the earlier attacks until after the Omagh bomb." ACC Martin goes on to say that he does not accept that "cell site analysis and information existed prior to the Omagh bomb which could be expected to have alerted the authorities to a real and immediate risk of the bomb attack in Omagh on 15 August 1998 and which could have enabled the bomb to be prevented."

[52] But what Assistant Chief Constable Martin does not attempt to explain in his affidavit is:

(a) When this data was first sought from each of the phone companies;

(b) If the data was first sought before the Omagh bombing, whether the phone companies agreed to supply it voluntarily;

(c) If the phone companies did not agree to supply the data voluntarily, whether the authorities had power to compel the supply of data and whether that power was used;

(d) If the data was not sought after the first bomb, and indeed after any of the other bombs leading up to Omagh, what was the reason for the failure to do so;

(e) If the analysis of phone usage was only produced after the Omagh bombing, what is the reason for such a delay;

(f) Had any other analysis been carried out by Lisa Purnell or any other person, by or on behalf of the authorities, whether in Northern Ireland or the Republic of Ireland, at any earlier date in respect of the phone traffic before or after any of the other earlier incidents, and if not, why not?

[53] There are many unanswered questions which go to the heart of what steps could have been taken to identify those responsible for the bombings and attempted bombings in 1998 and why those steps were not taken until after the Omagh bombing. Many of these give rise to plausible arguments about why the authorities appeared to be on the back foot and their failure to respond proactively to the threat from dissident republicans.

[54] For example, there was evidence before the court in the civil claim that Colm Murphy and Seamus Daly were involved in the planning and execution of the Omagh bomb. The trial judge in the civil claim (*Breslin and others v McKenna and others* [2009] NIQB 50), Morgan J as he then was, was satisfied as follows:

> "[268] I have indicated in paragraph 246 that I am satisfied that the fifth named defendant [Colm Murphy] obtained the Morgan phone, 980, the day before the Omagh bomb. I am satisfied that the fifth named defendant's registered phone and that phone were used in the bomb run. I am satisfied that the fifth named defendant was at the time an active member of the Continuity IRA and that this was a joint operation between that organisation and the Real IRA. Against that background the only reasonable inference is that the fifth

> named defendant provided the phones for the Omagh bomb attack knowing full well the nature of the attack which was going to be conducted. He also has not answered the case against him. … I consider in any event that the case against him is overwhelming and that he is liable to the plaintiffs in trespass.
>
> [269] In relation to the sixth named defendant [Seamus Daly] … I have further found at paragraph [263] that the evidence indicates that the 213 phone which is registered to the sixth named defendant was used by him on 29 April 1998 and 30 April 1998 in circumstances which at the very least are consistent with a scouting operation on 29 April 1998 and the movement of the bomb on the following day. This evidence is supportive of the evidence linking the sixth named defendant to the phone which was used on the bomb run. The sixth named defendant has chosen to provide no answer to the case against him. The matters with which this evidence is concerned are matters which are within the knowledge of the sixth named defendant and are matters about which he would be expected to give evidence. In my view his failure to give evidence in light of the material against him further supports the case against him and I am satisfied that there is cogent evidence that he is liable in trespass to the plaintiffs."

[55] The same cell site analysis provides prima facie evidence of the involvement of not just Murphy and Daly but of many others in the bombings that so disfigured 1998 in the months leading up to Omagh:

(i) There is evidence that Oliver Treanor (Traynor), Liam Campbell and Thomas Hoey were all involved in the Newry railway line hoax.

(ii) There is evidence that Sean Hoey, Liam Campbell, Thomas Hoey, Oliver Treanor, Michael Brennan Snr, Joe Fee, Jim Fee and Seamus McKenna were involved in the Lisburn bomb and the dress rehearsal for it the day before.

(iii) There is evidence of the involvement of Peter Campbell, Gerald McMullan and Oliver Treanor in the Newry Courthouse bomb.

(iv) Colm Murphy, Joe Fee, Michael Brennan Jnr, Anthony Cunnane, Seamus Daly, Seamus McKenna, Peter Campbell, Jim Fee and Micky Brennan Snr were strongly suspected of being involved in the activity leading up to the Banbridge bomb.

(v) Seamus Daly, Peter Campbell, Joe Fee, Colm Murphy, Liam Campbell, Oliver Treanor, Michael Brennan Snr and Jnr, Shanty Brady were among those the authorities strongly suspected of being involved in the car theft which facilitated the transport of the bomb over the next few days to Omagh.

(vi) Colm Murphy, Seamus Daly, Oliver Treanor, Shanty Brady, Paul Kelly, Liam Campbell, Joe Fee, Anthony Donegan, John Fee and Peter Campbell are all strongly suspected of being involved in the events leading up to the Omagh bomb.

[56] As can be demonstrated from the cell site analysis there is clear evidence that many of those suspected of being involved in the Omagh bomb and the theft of the car for the Omagh bomb were also suspected of being involved in these prior incidents such as Liam Campbell, Peter Campbell, Colm Murphy, Oliver Treanor, Seamus Daly, Seamus McKenna, Sean Hoey, Joe Fee and others. It also appears that despite the evidence of their involvement in early terrorist activity, no effective steps were taken to disrupt their future activities.

Legal Powers of the authorities

[57] At the time of the Omagh bomb on 15 August 1998 the police enjoyed various legal powers under the Police Act 1997, the Prevention of Terrorism (Temporary Provisions) Act 1989 (the "PTA 1989") and the Northern Ireland (Emergency Provisions) Act 1996 (the "EPA 1996") to assist them in combatting the terrorist threat which faced Northern Ireland.

[58] Part IV of the PTA 1989 deals with "Powers of Arrest, Stop and Search, Detention and Control of Entry." It permits a constable under section 14 to arrest without warrant a person whom he has reasonable grounds for suspecting to be guilty of offences under PTA 1989 and/or a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism.

[59] The person arrested under this section can be detained for up to 48 hours but this can be extended. There are also powers to obtain a search warrant under section 15 to authorise entering premises for the purpose of searching for and arresting the person and to search the person detained. There are powers to photograph him and to take fingerprints. There are powers for a Justice of the Peace to issue a search warrant in respect of a terrorist investigation and this is provided for in Schedule 7 to the PTA 1989.

[60] Under the EPA 1996 powers of arrest, search and seizure etc are dealt with under Part II these include:

(a) The power of a constable to enter and search any premises or other place for the purpose of arresting a person "where that person is or where the constable has reasonable grounds for suspecting him to be": see section 17.

(b) The power of a constable to arrest without warrant any person who he has reasonable grounds to suspect is committing, has committed or is about to commit a scheduled offence or an offence under the EPA 1996 which is not a scheduled offence: see section 18(1).

(c) A constable for the purpose of arresting a person under this section has the power to enter and search premises or other place where that person is or where the constable has reasonable grounds for suspecting him to be and the constable may seize anything which he has reasonable grounds to suspect is being, has been or is intended to be used in the commission of a scheduled offence or an offence under the EPA 1996 which is not a scheduled offence: see sections 18(2) and 18(3).

(d) The power given to any member of Her Majesty's forces on duty to arrest without warrant, and detain for not more than four hours, any person who he has reasonable grounds to suspect is committing, has committed or is about to commit any offence. In carrying out that arrest a member of Her Majesty's forces may enter and search any premises or other place where that person is or, if there are reasonable grounds for suspecting that that person is a terrorist who has committed an offence or has committed an offence involving the use or possession of an explosive substance or firearm, where there are reasonable grounds for suspecting him to be. Further, any member of Her Majesty's forces may seize, and detain for not more four hours, anything which he has reasonable grounds to suspect is being, has been or is intended to be used in the commission of any offence under section 26 or 27 of the EPA 1996: see section 19.

[61] Section 20(1) gives to any member of Her Majesty's forces on duty or any constable the power to enter any premises or other place other than a dwelling house for the purpose of ascertaining –

(a) Whether there are munitions unlawfully at that place;

(b) Whether there is a transmitter at that place; and may search the place for any munitions or transmitter with a view to either seizing the munitions or the transmitter: see section 20.

[62] Under section 20(4), a member of Her Majesty's forces or constable carrying out any such search referred to in paragraph [61] above who reasonably believes it is necessary to do so for the purpose of effectively carrying out the search or of preventing the frustration of its object may require any person who when the search begins is on, or during the search enters, the premises or other place where the

search is carried out to remain in, or in a specified part of, the premises or require any person who is not resident in the place of search to refrain from entering and use reasonable force to secure compliance with any such requirement: section 20(4).

[63] Under section 20(6) any member of Her Majesty's forces on duty or any constable may stop any person in any public place and search him for the purpose of ascertaining whether he has any munitions unlawfully with him or any transmitter with him and, with a view to exercising these powers, search any person not in a public place who he has reasonable grounds to suspect has any munitions unlawfully with him or any transmitter with him and search any person entering or found in a dwelling house entered under section 20(2): see section 20(6).

[64] Section 20(7) gives power to a member of Her Majesty's forces or a constable empowered by any provision of the EPA 1996 to search any premises or other place or any other person to seize munitions or a transmitter found in the course of the search.

[65] There is a power to enter premises to search for someone believed to be unlawfully detained: see section 23.

[66] There is a power given to a member of Her Majesty's forces or a constable when they are empowered to search premises to examine any document or record found in the course of the search: see section 24(1).

[67] Under section 25 any member of Her Majesty's forces on duty or any constable may stop any person in order to question him for the purpose of ascertaining that person's identity and movements or what he knows concerning any recent explosion or any other recent incident endangering life or concerning any person killed or injured in any such explosive incident: see section 25. The refusal to co-operate can lead to a summary prosecution.

[68] Under section 26 any member of Her Majesty's forces on duty or any constable may enter premises if he considers it necessary to do in the course of operations for the preservation of the peace or the maintenance of order, or if he is authorised to do so by the Secretary of State.

[69] Under section 27 the Secretary of State when he considers it necessary to do so for the preservation of the peace and the maintenance of order may, by order, direct that any highway specified in the order shall either be wholly closed or be closed to such an extent, or diverted in such manner, as may be specified.

[70] It will be noted from the above that some powers require authorisation from, for example, a Justice of the Peace before they can be exercised, some powers can be exercised only if it is necessary e.g. section 26(1) of the EPA 1996.

[71] The circumstances in which various members of the authorities are permitted to exercise the various powers given to them may differ. For example, "expedient" has a different meaning from "necessary." Furthermore, "reasonable grounds for suspicion" under section 14 of the PTA 1989 is different again and requires that the party seeking to propound the arrest as lawful must prove:

(a) That the arresting constable genuinely formed the requisite suspicion in his own mind; and

(b) That there were reasonable grounds for that suspicion.

[72] Valentine's Commentary on "expediency" in the context of section 44(3) (now repealed) of the Terrorism Act 2000 which relates to powers of stop and search is worthy of consideration. He said that the use of expedient in the context of preventing acts of terrorism under section 44(3):

> "…did not mean that an authorisation can be made only if the decision-maker has reasonable grounds for considering that the powers were necessary and suitable, in all the circumstances, for the prevention of terrorism. "**Expedient"** had a meaning quite distinct from "**necessary"**. Parliament appreciated the significance of the power but had thought it an appropriate measure to protect the public against the grave risks posed by terrorism, provided the power was subject to effective constraints. Although the constable did not need to have any suspicion before stopping and searching a member of the public, that could not, realistically, be interpreted as a warrant to stop and search people who were obviously not terrorist suspects. It was to ensure that a constable was not deterred from stopping and searching a person whom he did suspect as a potential terrorist by the fear that he could not show reasonable grounds for his suspicion: *R (Gillan) v Metropolitan Police Commissioner* [2006] 2 AC 307. In *Gillan v United Kingdom* [2010] 50 EHRR 1105, the ECtHR took a different view. The authorisation could be given for reasons of "**expediency"** rather than "**necessity"**. Once given, it was renewable indefinitely. The temporal and geographic restrictions were no real check. Above all, the court was concerned at the breadth of the discretion given to the individual police officer, the lack of any need to show reasonable suspicion, or even subjectively to suspect anything about the person stopped and searched, and the risks of discriminatory use and of misuse against demonstrators and protestors in breach of article 10 or 11 of the Convention. In particular,

> in the absence of any obligation on the part of the officer to show a reasonable suspicion, it is likely to be difficult if not impossible to prove that the power was improperly exercised. Hence, the applicants' ECHR art. 8 rights had been violated. But it cannot be concluded from *Gillan* that the Strasbourg court would regard every "**suspicion-less"** power to stop and search as failing the Convention requirement of lawfulness: *R (Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79."

[73] Prior to February 1999, the Police had no statutory power to enter a person's home or car or other premises in order to place a bugging device. This changed on 22 February 1999 with the coming into force of the Police Act 1997. This was a direct response to the comments of the House of Lords in general and Lord Nolan in particular in his judgment in *R v Khan (Sultan)* [1997] AC 558 where he said:

> "There is only one further word which I would add. The sole cause of this case coming to your Lordships' House is the lack of a statutory system regulating the use of surveillance devices by the police. The absence of such a system seems astonishing, the more so in view of the statutory framework which has governed the use of such devices by the Security Service since 1989, and the interception of communications by the police as well as by other agencies since 1985. I would refrain, however, from further comment because counsel for the respondent was able to inform us, on instructions, that the government proposes to introduce legislation covering the matter in the next session of Parliament."

[74] The Police Act 1997 was intended to bring police powers into line with that of the intelligence services whose activities have been governed by the Security Service Act 1989 and the Intelligence Services Act 1994 respectively.

[75] Up until that time the use of covert listening devices was governed by Home Office guidelines. These permitted the use of covert listening devices on the authority of a senior police officer. However the bugging of private conversations was necessarily a breach of Article 8 of the European Convention of Human Rights in that it was not carried out "in accordance with the law." Furthermore, the law in Northern Ireland at the material time was not sufficiently clear or accessible to give the citizen an adequate indication as to the circumstances in which the authorities were in power to resort to such methods: e.g. see *Malone v United Kingdom* 7 EHRR 14 paras 66-67.

[76] The relevant Acts relating to the intelligence services were:

(a) The Security Service Act 1989 (the "1989 Act") which placed MI5 on a statutory footing; and the Intelligence Services Act 1994 (the "1994 Act") which placed MI6 and GCHQ on a statutory footing.

(b) Under the 1989 Act the functions of MI5 included the protection of national security (section 1(2)) and to act in support of police forces in the prevention and detection of serious crime (section 1(4)).

[77] Sections 5 and 6 of the 1994 Act covered the issue of warrants and the authorisation of actions by the intelligence services. Section 4 of the Security Service Act 1989 appointed a Security Service Commissioner who, inter alia, had the function of keeping under review the exercise by the Secretary of State of his powers so far as they related to applications made by MI5 under sections 5 and 6 of the 1994 Act: see also paragraph 4 of Schedule 4 to the 1994 Act.

[78] These sections give to the Secretary of State (or, in certain circumstances, senior civil servants) statutory powers to issue warrants authorising entry on, or interference with property or wireless telegraphy by the intelligence services if necessary as specified in Section 5 of the 1994 Act, including that it is necessary in the interests of national security/to protect national security. No entry on or interference with property or with wireless telegraphy is unlawful if it is authorised by a warrant issued by the Secretary of State. Blackstone's Criminal Practice 2021 at D.1.4 states:

> "…Information required to form a reasonable suspicion is of a lower standard than that required to establish a prima facie case. Prima facie proof must be based on admissible evidence whereas reasonable suspicion may take into account matters which are not admissible in evidence or matters which, while admissible, could not form part of a prima facie case (*Hussien v Chong Fook Kam* [2007] AC 742)."

Lord Devlin also said at 949:

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: '**I suspect but I cannot prove.**' Suspicion arises at or near the starting point of an investigation, of which the obtaining of prima facie proof is the end."

[79] However, in the instant case the Interception of Communications Act 1985 which was in force at the time contained the following provisions and principles:

> (i) Intentional interception of the transmission of a communication by a public telecommunications system, otherwise than in accordance with the Act is an offence: see section 1;

(ii) The Secretary of State may issue a warrant authorising interception, in the interests of national security; for the purpose of preventing or detecting serious crime; or for the purpose of safeguarding the economic well-being of the United Kingdom: see section 2;

(iii) There was a statutory prohibition upon adducing any evidence in a court or asking a question in cross-examination which tends to suggest either that an offence under section 1 had occurred (i.e. unlawful interception had taken place) or that a warrant had been issued under section 2 authorising interception: see section 9(1).

[80] It is important to note that the provisions of section 9 of the Interception of Communications Act 1985 had been repealed and re-enacted in materially identical terms by section 17 of the Regulation of Investigatory Powers Act 2000 and has been carried over into section 56 of the Investigatory Powers Act 2016 which now regulates interception.

[81] It is accepted that a constable can rely on hearsay, provided it is reasonable: see *Clarke v Chief Constable of North Wales Police* [2000] All ER (D) 477. A constable may arrest a person as a result of an anonymous phone call provided that the person arrested corresponds to the description in the message: see *King v Gardner* [1979] 71 Cr App R 13. A constable may act on the word of an informer, even though such a source should be treated with considerable caution: see *James v Chief Constable of South Wales* [1991] 6 CL 80. A constable may rely on the briefing of another police officer: see *Alford v Chief Constable of Cambridgeshire* [2009] EWCA Civ 100 or on an entry in the police national computer: see *Hough v Chief Constable of Staffordshire Police* [2001] EWCA Civ 39. There is no duty on the arresting officer to check to see that the information given to him was correct: see *R(Tchenguiz) v Director of the FSO* [2012] EWHC 2254 (Admin). But the mere fact that the arresting officer has been instructed by a superior officer to make the arrest is not sufficient: see *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286. There is a much fuller discussion of this issue in Blackstone's Criminal Practice 2021 at D1.5.

[82] In *Logan (Roddy) v Chief Constable of PSNI* [2017] NIQB 70 Stephens J held that the arrest was lawful where the arresting officer was informed that there was intelligence which he assumed was sound. The source of the intelligence was not revealed to the arresting officer but part of the context was that the source of the information given to him was from a senior officer acting upon a briefing attended by a Detective Superintendent. At paragraph [31] Stephens J stated:

> "The power by a constable to arrest without warrant those reasonably suspected of being concerned in the commission, preparation or instigation of acts of terrorism is a valuable protection to the community. On the other hand there has to be protection against abuse of that power. The statutory protection is that reasonable cause for *suspicion* has to be established but that requirement is limited. It should not carry with it a whole series of investigative steps to confirm the suspicion. In this case the further information provided to Constable Connolly was '*intelligence*' without specifying the type of intelligence. Mr Lavery suggested that Constable Connolly ought to have made enquiries as to for instance the grade of intelligence. However, the legal test is that the constable reasonably suspects. The function of an inquiry is not to determine whether any of the facts on which the suspicion is based are true. If the information provided to the arresting officer satisfies the test of a reasonable cause for suspicion then there is no need for any enquiry prior to arresting the individual. Indeed, it is not hard to envisage that in certain circumstances it would be a dereliction of duty to make enquiries despite having a reasonable cause for suspicion before arresting an individual. Furthermore, in the area of terrorism and the potential involvement of a covert human intelligence source the scope for a constable to seek further information and to seek further detail is extremely limited and it is equally limited if the source was technical or a member of the public."

[83] It is also worth noting page 7 of the Home Office's Options for Pre-Charge Detention in Terrorism Cases (25 July 2007) indicates that police frequently refer to the need to arrest terrorist suspects based on tip-offs from intelligence rather than hard evidence:

> "Intercept is a highly effective intelligence gathering tool that has proved vital in preventing terrorist attacks. Because of the serious nature of the (terrorist) threat, it may be necessary to act on intelligence rather than waiting for further information, admissible as evidence to be gathered."

[84] The background information at page 4 of the Home Office – The Investigatory Powers Act – Interception – Impact Assessment (3 March 2017) states:

> "Interception in the UK is used as a source of intelligence, and is a vital tool in the fight against serious crime and terrorism. Intelligence derived from interception helps law enforcement to identify and disrupt threats from terrorism and serious crime, **and enable arrests**. It can provide real time intelligence on the plans and actions of terrorists and criminals, allowing law enforcement to identify opportunities to seize prohibited drugs, firearms or the proceeds of crime, and to disrupt or frustrate their plans. Interception of communications enables the gathering of evidence against terrorists and criminals, and means that they can be arrested and prosecuted." [Emphasis added]

[85] I consider that a police officer could lawfully make an arrest of a person "whom he reasonably suspects to be a terrorist when the reasonable suspicion was grounded on the fact that he had been told by a superior officer that there was cogent intelligence even if that intelligence was based on intercept material". So however, even if I am wrong in my conclusion about the ability of a police officer to act on sound intelligence, when that intelligence derives from intercept material, I am still of the view that there were other lawful means (set out above) available to disrupt those dissident republican terrorists identified by the intercept intelligence as playing lead roles in both groupings.

[86] As I have remarked already, it is important that I should set out in OPEN judgment many of the extensive legal powers which the authorities have been given to prevent terrorist offending. The exercise of the discretion as to whether or not to use these powers by the authorities at any particular time and in any particular circumstances is a much more difficult and nuanced question.

[87] There are various reasons which can be put forward as to why it is claimed that the hands of the authorities were tied when considering whether to try and disrupt the dissident republicans who were carrying out attacks on both sides of the border, although primarily north of it, in the months leading up to the Omagh bombing. Firstly, it is claimed that a political decision had been taken not to use all the legal powers available to the authorities to try and disrupt the dissident republicans. If the authorities had clamped down on those terrorists operating in the border region, this would necessarily have caught many local residents going about their lawful business, and would undoubtedly have caused significant tension locally. Further, and more importantly, those who remained wedded to violence were closely connected to those who had renounced the armed struggle and declared peace whether as friends, relatives, neighbours or former colleagues in PIRA. There was a real risk that those who favoured the peaceful approach would be dragged back into the armed struggle by heavy-handed security measures and local unrest. This would have had serious security implications not just for Northern Ireland but for mainland Britain which had also been the subject of

previous bomb attacks, such as the one at Canary Wharf. The SIO of the Omagh bombing, Detective Chief Superintendent Norman Baxter, told NIAC, that while nothing could have been done immediately before the Omagh bombing, there were missed opportunities to arrest the gang following earlier linked incidents. He told NIAC that "disruption may have prevented it", it being the Omagh bombing. He also said that "there was political pressure in relation to the de-escalating of security." He went on to say that the de-escalation was inspired by political thinking and "so on the one hand you have a policy to de-escalate so as not to annoy a certain community, or constituency within a community." If, this is correct, and it is something that an inquiry will want to investigate, it was a political decision taken in real time and it has to be judged against the background of what was happening at the time and not with any hindsight bias. If the claim is true, it is one that ultimately may be found to be reasonable in all the circumstances. But it is not a matter on which this court can or should reach a settled conclusion. At this stage the court is only dealing with plausible allegations, not reaching binding conclusions.

[88] Secondly, the authorities did not act to prevent the Omagh bombing because to do so would have resulted in the unmasking of a CHIS ("Covert Human Information Source") in the Real IRA. Again, at this stage the court is not looking to reach a final view on this claim, but is simply considering whether there is a plausible argument that the authorities' low key approach was driven by a determination not to put at risk a well-placed informer.

[89] Finally, it is also worthy of note that Baroness O'Loan, who was the Police Ombudsman, and who investigated many aspects of the Omagh bombing is on record as saying on BBC Radio Foyle on the 20th Anniversary of the Omagh bombing the following:

> "… It is now my firm believe [sic] that the bomb could have been prevented. And that is a terrible thing to say …"

On the Stephen Nolan Show she repeated what she had said, namely that the bomb could have been prevented by setting up checkpoints around the town "and that the effect of these could have been to drive the bombers to abandon their bomb." She also considered the phone call received on 4 August was profoundly important, "a very, very specific piece of information …" This was the anonymous telephone call made to the police warning of an attack on police which had been made on the day of the Omagh bombing.

[90] Baroness O'Loan thought that a public inquiry was necessary because the United Kingdom did not have "adequate, sufficient and comprehensible arrangements for the handling of intelligence and the sharing of intelligence in a way which will prevent future terrorist atrocities."

[91] The issue of the disruption of those dissident republicans who had embarked on a bombing campaign in Northern Ireland and the Republic of Ireland, is one that will require further consideration in the CLOSED judgment given the confidential nature of much of the material which has to be considered.

Hindsight

[92] It is impermissible to look at whether the Omagh bomb could have been prevented with the benefit of hindsight. It is also equally impermissible to make a judgement whether a real and immediate risk arose or whether the responses were reasonable with the benefit of hindsight. In *Bubbins v UK* [2005] ECHR 50196/99 at [147] it was noted:

> "… the Court must be cautious about revisiting the events with the wisdom of hindsight …"

[93] In *Bljakaj and others v Croatia* (2014) 38 BHRC 759 at [122] the European Court of Justice echoed this advice about avoiding the use of hindsight when looking at past events. As Barbara Tuchman, the renowned historian, said:

> "In the midst of war and crisis nothing is as clear or as certain as it appears in hindsight."

[94] Billy Wilder, the film director, put it more pithily perhaps when he said:

> "Hindsight is always twenty-twenty."

[95] The background against which the authorities had to make judgements in the summer of 1998 was one in which the dissident republicans were active on the ground. I have drawn attention to some of the previous terrorist attacks and to the fact that according to the un-contradicted evidence from the Chief Constable there had been hundreds of intelligence reports on possible and actual terrorist related activity in the preceding 6 months. This was a period of bomb attacks, hoax bombs and mortar attacks on the authorities. It is against a landscape stalked by well-armed terrorists who were co-operating and collaborating, and who were intent on causing maximum mayhem that the actions or inactions of the authorities have to be judged. It was Donald Rumsfeld who said:

> "Those who made the decisions with imperfect knowledge will be judged in hindsight by those with considerably more information at their disposal and time for reflection."

This must not be allowed to happen here.

[96] There is also the phenomenon of hindsight bias which is well recognised and occurs where the probabilities are revised after the fact or there is exaggeration of the extent to which past events could have been predicted beforehand. As the Nobel prize winner, Daniel Kahneman, said in "Thinking, Fast and Slow":

> **"The worse the consequence, the greater the hindsight bias."**

[97] It is therefore vital that when questions are asked about whether the Omagh bomb could have been prevented, the answers that are given are fact-based, objective and free from hindsight bias. It is important to emphasise that prior to August 1998 a bomb attack on any provincial town in Northern Ireland causing many civilian deaths could not reasonably have been anticipated from what had happened in the months preceding this attack. What reasonably could have been anticipated on the basis of previous events was:

(a) a bomb or mortar attack on a provincial town;

(b) a prior warning;

(c) the bomb or mortar being defused;

(d) alternatively the bomb or mortar failing to explode; or

(e) the bomb or mortar exploding but because of the prior warning, damage being confined to properties in the immediate locality.

[98] In the civil case of *Breslin and others v McKenna and others* [2009] NIQB 50 arising out of the Omagh bombing, the trial judge, Morgan J, had found that those involved in the bombing had not intended to kill or injure civilians, but had been entirely reckless as to whether they were killed or not. This finding was not overturned on appeal: see paragraph [17] of *Breslin and others v McKevitt and others* [2011] NICA 33.

[99] Of course, just such an obviously foreseeable risk of disaster arises in all such bomb attacks. There is always a chance that the bomb may explode prematurely or the warning which has been given may be inaccurate or misunderstood or has simply been given too late. The previous attacks over the past 6 months had led the authorities to believe that if they reacted promptly to the warnings given by the dissident republicans, then the consequence of any bomb exploding could be confined, at worst, to damage to buildings. But in the case of Omagh there was a disastrous concatenation of circumstances, namely:

(a) the egregious error in the first telephone warning call to UTV locating the bomb at the courthouse in Main Street, when there is no Main Street in Omagh and the bomb was ultimately left some distance from the courthouse;

(b) the third warning that the bomb was 200 yards away from the courthouse which was diverted to the Samaritans in Coleraine but was not transmitted or received by the police responding to the bomb warning; and

(c) the deliberate decision by the bombers not to identify the car into which the explosives had been packed thereby making it more difficult for the authorities to identify where the bomb was and to defuse it.

[100] Special Branch has suggested that the original warning was given before the bomb was put in place. Heavy traffic prevented the bombers leaving the bomb at the location they had originally intended, namely the Courthouse. The final warning advising that the bomb was not at the courthouse as originally claimed, never reached the police.

[101] As I have originally explained, in good faith the police had been directing people away from the Courthouse and towards the bomb. The disaster unfolded and, as I have stressed, responsibility for it rests exclusively with the terrorists who planned, planted and exploded the bomb. But there was nothing in the lead-up to what happened on 15 August 1998 and in any of the other previous incidents that would have alerted the authorities to suspect, never mind conclude, that dissident republicans were going to explode a huge bomb in the midst of shoppers in a busy provincial town in Northern Ireland without giving adequate warning to the authorities of their intention to do so, and allowing them sufficient time to clear the area of civilian personnel.

[102] I am also reminded by the Special Advocate that hindsight should not be used to vindicate decisions to ignore warnings which at the time easily passed the "arguable" test, just because it subsequently turned out that the authorities were vindicated by what actually happened. Thus, it is claimed that the 4 August 1998 anonymous telephone call should have been acted upon and security enhanced in Omagh, even though the court can now with all the information available be satisfied, with the benefit of hindsight, that the anonymous telephone call had nothing whatsoever to do with the Omagh bombing, but was a pure and tragic coincidence. It is claimed that each decision has to be judged in real time and that the warning call should have precipitated additional security measures, even though the authorities judged the call not be relevant and even though subsequently it did turn out not to have anything to do with the bomb. However, this is an issue which I will return to in the CLOSED judgment when I consider the Special Advocate's submissions in detail.

Investigation and Inquiries

[103] There have been various inquiries and investigations into the Omagh bombing. These include an inquest which was held by the Coroner, Mr John Leckey,

between 6 September 2000 and 5 October 2000. This was an old style enquiry to consider the causes of the deaths of the 29 civilians. It did not consider the bigger picture and, in particular, "by what means and in what circumstances" the deaths had occurred. The nature of an inquest carried out after the advice offered by the House of Lords in *R (on the application of Middleton) v HM Coroner for Western Somerset* [2004] 2 AC 182, is now designed to ensure that it is Article 2 compliant, which means that it can be very different from the old style inquest.

[104] This was followed by what is known as the "McVicker" review in November 2000. This was an internal RUC review carried out as part of the investigation process. The report itself was not published and its purpose was to consider all of the evidence and information which was available to the police at that time. It was hoped that this would lead to the identification of additional evidential opportunities. Subsequently, it was described in a report to the Northern Ireland Policing Board as "a quality assurance mechanism for the investigative process." It was considered in due course by the Police Ombudsman for Northern Ireland ("PONI") in the first investigation of the Omagh bomb. The McVicker Report was acted upon following recommendations contained in the first PONI Report. It did not consider measures which might have prevented the Omagh bomb.

[105] A Panorama programme of 9 October 2000 asked "Who bombed Omagh?" There was then a follow-up report in the Sunday People Newspaper of 29 July 2001 which alleged that Kevin Fulton, a former secret agent, had provided information to his handlers in RUC Special Branch about the bomb three days in advance of the explosion. It was alleged that Fulton had claimed that the RUC failed to stop the bomber in order to save the "skin of a police informer" inside RIRA who it is alleged had warned the RUC three days before the explosion that a large bomb was destined for Northern Ireland and which had been made in the Republic of Ireland. The suggestion had been that the bomb explosion could have been avoided if the RUC had acted upon the information provided. This led to a formal investigation by PONI which was commenced in August 2001. During the course of that investigation PONI became aware of the McVicker review and the fact that an anonymous telephone call had been made to the police on 4 August 1998 warning of an attack on police in Omagh on the day of the Omagh bombing and also of the intelligence which had been held by Special Branch. As a consequence PONI's investigation was expanded to include all of these issues. In addition PONI decided to examine –

(a) whether intelligence held by RUC was correctly revealed to and exploited by the Omagh Bomb Investigation Team; and

(b) whether the evidential opportunities contained within the murder review document had been investigated.

[106] On 12 December 2001 PONI published a report which included the following recommendations:

(a) Recommendation 1 – An Investigation Team led by a Senior Investigating Officer, independent of PSNI, should be asked to conduct the Omagh Bomb investigation.

(b) Recommendation 2 – **An officer in an Overall Command from an outside police force be appointed to carry out the investigation of the potentially linked terrorist incidents identified in the Omagh Bomb Review Report.** (Emphasis added)

(c) Recommendation 3 – That senior investigating officers in the Omagh Bomb Investigation, and all other investigations, must be given appropriate access to all relevant intelligence.

(d) Recommendation 5 – That a review takes place into the role and function of Special Branch with a view to ensuring that, in future, there are clear structures and procedures for the management and dissemination of intelligence between Special Branch and other parts of the Police Service of Northern Ireland and that Special Branch will be fully and professionally integrated into the Police Service of Northern Ireland.

[107] The Report was critical of:

(a) The handling of the Fulton information although PONI accepted that even if reasonable action had been taken in respect of that intelligence alone it is unlikely the Omagh bomb could have been prevented. She stated that Fulton had never claimed that a bomb was destined for Omagh. PONI concluded that:

> "Taking into account all the information provided by Kevin Fulton, which has become available during the course of the investigation, the objective conclusion of the Police Ombudsman is that even if reasonable action had been taken in respect of the intelligence above it is unlikely that the Omagh bombing could have been prevented." See paragraph 6.4 of the statement by the Police Ombudsman.

(b) She was critical of the handling of information provided during an anonymous phone of 4 August 1998 when the caller had informed police that AK47s and rocket launchers would be moved to a location outside Omagh on 15 August 1998 and used in an attack on the police. She said at paragraph 6.6:

> "The Police Ombudsman is firmly of the view that this significant information was not handled correctly. It is not possible to say what impact other action between 4

August 1998 and 15 August 1998 would have had, or what action other than that taken by Special Branch could have prevented the Omagh bomb."

(c) She was critical of the structure and internal operation of the PSNI. In particular, she complained that intelligence had been held by Special Branch which had not been shared with the investigating officers until 9 September 1998.

[108] This Report provoked a statement in response from the Chief Constable which joined issue with PONI on many issues and in particular made it clear that Fulton's information would not have prevented the Omagh Bomb and that the information provided by Fulton between June and August 1998 was not relevant to the Omagh Bomb. The Chief Constable denied that the information received on 4 August 1998 had not been handled correctly and if the police had responded, then the nature of the response would not have prevented the bombing. Finally, the Chief Constable complained that PONI had failed to acknowledge the resources devoted to the investigation and, more importantly, had failed to interview the Special Branch officers who originally received and analysed the information back in August 1998.

[109] As a consequence of the dispute between PONI and the police, the Northern Ireland Policing Board convened a series of meetings over three days in May 2002. As a result of those meetings it agreed a series of measures to address the recommendations made in PONI's report. These were:

(i) The appointment of Deputy Chief Constable Michael Tonge and Detective Chief Superintendent Phillip Jones, of the Merseyside Police, to act as an independent External Senior Officers of the Omagh bomb investigation. They began work on 28 January 2002 and focussed upon the recommendations of the McVicker Report, particularly those where it was thought that there were outstanding lines of inquiry. They presented a final report to the Northern Ireland Policing Board on 4 April 2003. It forms part of the CLOSED evidence in this case.

(ii) As a consequence of PONI's concern about the intelligence handling between RUC, CID and Special Branch in the opening investigation, a review of Special Branch took place by Mr Dan Crompton and was commissioned through Her Majesty's Inspectorate of Constabulary ("HMIC"). The terms of reference included the relationship between CID and Special Branch, intelligence flows, sharing intelligence with senior investigating officers, use of intelligence generated as management. Work commenced in February 2002 and the final report was published on 29 October 2002.

(iii) Finally, a report was commissioned via Her Majesty's Inspector of Constabularies ("HMI") to examine policy, practices and procedures in relation to murder enquiries in Northern Ireland. This was carried out by Mr David Blakely of HMI and was not specific to Omagh but did relate to murder investigations generally. He provided a comprehensive report in May 2003 with 10 recommendations on future practices. HMI oversaw the implementation of the recommendations contained in the report.

[110] In March 2002, PONI published a report regarding the activity of An Garda Siochana ("AGS") officers in 1998. This concerned allegations made by a Garda officer, Detective Sergeant John White, concerning a number of matters including the handling of intelligence in 1998 which he believed had not been properly acted upon. It included intelligence relating to a group of republican terrorists and concerned the activities of an AGS source, namely one Paddy Dixon, who was involved in the theft of cars which had been used by the group. He also made specific allegations concerning the availability of intelligence to the AGS about the car which was used in the Omagh bomb. As a consequence the Minister of Justice in Ireland established the Nally Group headed by the former Secretary of the Government, Dermot Nally, to investigate the allegations. This was reported to the Minister in June 2003. The report of the Nally Group found that the central allegations in respect of the availability of information about the car used in the Omagh bomb were untrue. It was found that the only information about the bomb car available to the AGS and which was passed to the RUC, was the fact that it had been stolen. It concluded that the allegations made by Detective Sergeant John White were "without foundation", they had been made not because of any feelings of guilt or responsibility for the Omagh bomb on his part but were motivated "solely by concerns arising from the difficulties in which he found himself with his superiors in the AGS and with the criminal law." However, there was no information linking the agent to the theft of the car nor linking the use of the car to either the terrorist group or to the Omagh bomb itself.

[111] Following Sean Hoey's acquittal of a series of terrorist bomb incidents, including the Omagh bomb, the Police Ombudsman commenced an investigation into the evidence of two of the police officers who had given evidence. The Ombudsman was satisfied there was no deception by the officers and raised a number of issues about organisation and structural failings related to case preparation, documents and disclosure which were the subject of a separate report to the Chief Constable. This further review was headed by Sir Dan Crompton and David Blakely (who had both been involved in the 2002 reviews). Their remit was to consider all of the evidence available to police in relation to the Omagh bomb, both used and unused during the Hoey trial and to consider whether any further action was justified by way of prosecution process. It also looked at the institutional changes which had been made within PSNI in light of the recommendations made during the previous reviews. This review was published in July 2008. It acknowledges that the police investigation was ongoing and that there were approximately 70 "actions" which were still to complete, some of which had

experienced delay with AGS. It was however acknowledged that the prospects of future prosecutions were unlikely in the absence of fresh evidence. It did make the following comment about the prospect of future prosecutions:

> "However, in the absence of good scientific evidence, a confession, or a reliable witness, we conclude, as did the Chief Constable, that it is unlikely that a new prosecution could be launched at present."

[112] In September 2008 the BBC broadcast a programme entitled "Omagh – What the police were never told." This was accompanied by an article in the Sunday Telegraph by BBC journalist, John Ware, claiming that GCHQ had made transcripts of mobile telephone conversations between the bombers on the day of the Omagh bomb and that this information had never been passed to the RUC detectives investigating the bomb. It was also suggested that these monitoring activities had been carried out "live" giving rise to the question of whether intelligence information had been available which might have been able to prevent the bomb exploding in Omagh.

[113] Within a matter of days of the BBC programme being broadcast, Sir Peter Gibson, the Intelligence Services Commissioner, was asked by the Prime Minister to carry out a review. His terms of reference were "to review any intercepted intelligence material available to the security and intelligence agencies in relation to the Omagh bombing and how this intelligence was shared." This was a non-statutory review, which accessed documents and personnel from GCHQ, MI5, RUC and PSNI. While Sir Peter Gibson provided a full report to the Prime Minister, a shorter version of his report was published which did not contain any sensitive security information. The full report contained all the relevant information, whether highly sensitive or not, and was classified. Again, this report will be considered in full along with the other CLOSED material. Sir Peter concluded that to the extent that any relevant intelligence was derived from interception, this was shared with RUC Special Branch South promptly and fully and in accordance with the procedures agreed with Special Branch South. He also concluded that any intelligence derived from interception as might have existed could not have prevented the bombing in Omagh. His conclusion was that there was no information on or before 15 August that could reasonably indicate by reference to the events of Banbridge that a further bombing attack was about to take place. Sir Peter also looked at the issue of how the intelligence from GCHQ was dealt with by Special Branch. This was because onward transmission beyond those authorised to receive it, required permission from GCHQ. Sir Peter described Special Branch's actions in sharing the information as "cautious" but that it was beyond the remit of his review to investigate why Special Branch had acted as it did.

[114] The Panorama programme and the Sunday Telegraph article by John Ware led to an investigation by NIAC. The investigation of NIAC touched upon four separate areas, namely:

(i) Whether there was intelligence which could have prevented the bomb;

(ii) Whether GCHQ had monitored the phones of the bombers on the day of the bomb;

(iii) If so, whether this had been carried out **live**; and

(iv) Why materials given to RUC Special Branch never reached the detectives in the Murder Investigation Team.

[115] NIAC was critical of the fact that they had not had access to the full Gibson Report. It did reach conclusions on the issue of whether intelligence was available which could have prevented the bombing. They were as follows:

> "… we are therefore left to take the word of those who had read the full report that no intelligence was available which might have prevented the bombing. We see no reason to doubt Sir Peter, the Secretary of State, Sir Hugh, or the Chairman of the Intelligence and Security Committee … we are able to say only that nothing we have seen leads us to challenge Sir Peter Gibson's conclusion that any available intelligence could have been used immediately prior to the Omagh bombing to prevent it."

[116] NIAC recorded that John Ware denied that his article asserted that the bombing and consequent loss of life and injury could have been prevented. NIAC did not feel that it could challenge Sir Peter's conclusion that "**any intelligence derived from interception as might have existed could not have prevented the bombing."** It further went on to say that the broader question of whether "it could have been prevented by taking action against the gang believed to have carried out bombings from mid 1997 onwards is one that remains to be addressed." It noted that the narrow terms of Sir Peter Gibson's inquiry had left that question unanswered.

[117] NIAC did concentrate on whether or not the intelligence shared by GCHQ with Special Branch had then been further shared with CID. NIAC noted that Sir Peter Gibson did not investigate how intelligence which was passed to Special Branch was used. It did note that Sir Peter had used the description that Special Branch had acted "cautiously" as I have already observed.

[118] NIAC stated at paragraph [48]:

> "[48] … Further inquiry on the Omagh bombing is required, not because enquiries lead to further

> inquiries, as the Secretary of State puts it, but because one substantial question outlined in this report remains unanswered: what public interest justification there can be, if any, for withholding of intelligence, information or evidence from the team of the detectives who investigated the Omagh bombing."

[119] The Government rejected the call by NIAC for a further inquiry and claimed that the issues had been examined by previous investigations. NIAC was not prescriptive about what further investigation should take place and it did not support the request for a public inquiry but said that whether a full scale public inquiry is required "is less clear." It said it would defer any final judgment and the need for a public inquiry until after it had received the Government's response to its report.

[120] PONI, following referral by the Chief Constable as a direct result of his consideration of the NIAC report, decided to open a further investigation. The terms of reference following the investigation are set out in PONI's publication announcing the investigations. They include:

> "(1) Assess the previous Police Ombudsman investigations relating to Omagh to determine whether information is available to address any of the issues raised by NIAC.
>
> (2) To research the previous OPONI ("Office of Police Ombudsman for Northern Ireland") investigations, investigative reviews and reports available to OPONI, relating to previous attacks referred to in the NIAC report which may link to Omagh (NIAC paragraph 17) and advise the Police Ombudsman on the need to widen the scope of the inquiry to examine the police response and investigation of those attacks.
>
> (3) Consider the content of the NIAC report and develop lines of enquiry to address the issues raised with particular emphasis on paragraphs 35-39, 45-48 and 49-56."

[121] The investigation by PONI commenced in 2010 and his report was published in October 2014. The report is titled "The RUC Handling of Certain Intelligence and its Relationship with Government Communications Headquarters in Relation to the Omagh Bomb on 15 August 1998." PONI had access to Sir Peter Gibson's full report, he met Sir Peter, analysed relevant intelligence material held by PSNI and conducted

enquiries with former police officers, including the original SIO of the Omagh bombing investigation.

[122] The report reached a number of conclusions. Firstly, it stated:

> "Neither the investigation subject of report by my predecessor in 2001, nor my current inquiry, identified intelligence held by the PSNI in relation to previous bomb attacks which, if acted upon, would have prevented the Omagh bomb."

Secondly, it went on to consider the use of the word cautious used by Sir Peter Gibson in his report and said:

> "Sir Peter Gibson told my investigation that his use of this language had been intended to reflect the significant legal restrictions placed upon the dissemination of the intelligence material involved, rather than to imply criticism."

[123] On that issue the Ombudsman concluded, inter alia:

> "(i) I am satisfied, having received independent expert legal advice, that the view held by the relevant police officers was a reasonable one in the circumstances. (3.17)
>
> (ii) In the context of seeking to comply with perceived restrictions imposed by the legislation and the agreement with GCHQ, Special Branch undoubtedly acted cautiously in not disclosing all the intelligence available to them to Police Officer 3. I have obtained independent expert legal opinion which leads me to conclude the actions of the officers were reasonable, given what they thought the restrictions and disclosure placed on the police were at that time. (3.20)
>
> (iii) My investigation examined police activity in relation to the development of intelligence between 20 August and 19 September 1998 when intelligence was provided to Police Officer 3 and did not identify any unexplained or unreasonable delays in the provision of that specific intelligence. This should not be confused with the wider issue of intelligence discussed in Baroness O'Loan's public statement." (3.29)

[124] There are two further reports which should also be mentioned. Firstly, the Bridger report prepared by Martin Bridger who was a former PONI investigator and who had assisted with the 2001 investigation into the Omagh bomb. His report had been commissioned by the OSSHG. He raised a number of key issues which remained unanswered and offered his opinion that the most effective way of addressing all of these and potentially other issues was "through the establishment of a full cross-border public inquiry."

[125] Finally, the British and Irish Rights Watch ("BIRW"), an independent non-governmental organisation had been monitoring the human rights dimension of the Northern Ireland conflict, and the peace process in Northern Ireland since 1990. It also came down in favour of a cross-border independent public inquiry and it supported OSSHG's calls on both United Kingdom and Irish Governments to facilitate "such an inquiry without further delay." This report was published in November 2012.

[126] It is important to consider carefully what these investigations and inquiries sought to achieve. Many were primarily concerned with the efforts made by the authorities to apprehend and punish the perpetrators of the Omagh outrage. The search for an answer to the question whether the Omagh bomb could have been prevented was only considered by some of the investigations. For example, it was looked at on a narrow front by the Police Ombudsman e.g. the information provided by the anonymous phone call on 4 August 1998. So it is important to appreciate that while there were many investigations and inquiries and reports published into the Omagh bombing, the focus of most of them was not to see whether the Omagh bombing could have been prevented, but to try and find out who the perpetrators were, and whether those perpetrators could be held to account.

[127] In September 2012 the Right Honourable Theresa Villiers MP had been appointed Secretary of State for Northern Ireland. She had met representatives of OSSHG on 25 February 2013. She had also met a number of other people including the Chief Constable and Lord Cormack who had chaired the NIAC. On 29 August 2013 she was provided with a detailed submission looking at the various options available to her in response to OSSHG's call for a full cross-border public inquiry into the events of the Omagh bombing. Having considered that submission and its contents she concluded that she was not going to establish a public inquiry for the following reasons. These were:

> "(a) She did not believe there was compelling new evidence in the OSSHG report to merit any form of review or inquiry above and beyond those that had already taken place or are on-going;
>
> (b) There had been many previous reviews and investigations into the bombing;

(c) She had consulted with a range of other stakeholders in the matter;

(d) While some of them supported an inquiry, many did not;

(e) The Secretary of State had received representations from other survivors who felt a further inquiry would cause some considerable trauma;

(f) Government policy was clearly against new, open-ended inquiries. This view was formed by wanting to avoid any hierarchy investigations into the past;

(g) There was a current review by the Police Ombudsman for Northern Ireland which the Secretary of State believed was the best way to address the issues relating to the police raised in the OSSHG report.

(h) A cross-border inquiry did not seem feasible without introducing primary legislation, given the different legal systems in two administrations.

(i) Policing had changed dramatically in Northern Ireland since 1998. Many of the recommendations in the first PONI report had been adopted and it was the Secretary of State's hope that the on-going police investigation would bring those responsible to justice."

[128] The Prime Minister, the Right Honourable David Cameron MP, wrote to the respondent on 9 September 2013 supporting her decision. On 12 September the respondent wrote to the applicant informing him that after giving the matter careful consideration she had decided not to instigate a public inquiry into the circumstances surrounding the Omagh bomb. She then set out in her letter the reasons for her decision and why she did not believe that it was in the public interest to establish such an inquiry. She offered to meet again with the applicant and OSSHG to explain her decision. A further meeting with the respondent took place on 18 September 2013. At the meeting she was handed a letter of the same date seeking a written response to questions posed by them at a meeting and advising her of their intention to challenge her decision. The applicant then issued the present application for judicial review for leave to apply for judicial review on 6 December 2013. Leave to apply for judicial review was granted by Treacy J on 21 January 2015 solely in relation to the Article 2 ground. There then followed an application made

by respondent pursuant to section 6 of the Justice Security Act 2013 ("JSA"). The application by the respondent sought a declaration under section 6(2)(a) of the JSA. The declaration sought is that the proceedings are one to which a CLOSED material application may be made to the court. The reasons for the application were set forth in an open statement of reasons, a document of some eight pages in length, signed by the respondent. There was also an affidavit filed by Lesley O'Rourke, the Head of Security, Policy and Casework in the Northern Ireland Office. The case came on for hearing before Maguire J. Having heard counsel for the respondent and the Special Advocate he made a declaration that the proceedings were ones to which CLOSED material applications may be made to the court under section 6 of the JSA.

[129] The inquiries and investigations I have outlined above were largely reactive to various issues as and when they arose. Further criticisms have been made of these inquiries and investigations. They include the following:

(a) There was insufficient involvement of the families;

(b) There was insufficient public scrutiny;

(c) There was no oral testimony and challenge to such testimony; or

(d) Although there was some overlap between the issues it was not complete and accordingly there was a failure to consider various allegations of preventability in their proper context.

[130] Further, it seems to me that the applicant was entitled, given how matters were allowed to develop, to have harboured a reasonable expectation that his complaints as to what he perceived to be the inadequacies of the investigations to date into whether the Omagh bombing could have been prevented would ultimately be addressed in the fullness of time. It was only in September 2013 that it should reasonably have been clear to the applicant that he was not going to achieve the Article 2 type compliant inquiry he sought and that his grievances as to why the bomb was not prevented were not going to be the subject of further deliberation. I will return to this issue when I consider the arguments on whether this application is out of time.

Public Inquiry

[131] The applicant has pressed for a public inquiry that straddles both jurisdictions, that is Northern Ireland and the Republic of Ireland. The court does not have the legal power to bring that about south of the border. Certainly, it is possible to see the advantages of any further investigation into the Omagh bombing operating in both jurisdictions given that many of those responsible for the Omagh bombing operated on both sides of the border, seeking to use the border as protection for their nefarious deeds.

[132] Section 1 of the Inquiries Act 2005 ("the 2005 Act") provides that:

> "(1) A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that—
>
> (a) particular events have caused, or are capable of causing, public concern, or
>
> (b) there is public concern that particular events may have occurred."

[133] The applicant submits with good reason that it is essential to ensure that public concern will be addressed by any inquiry and that this will be so sufficiently robust to ensure that there is public confidence in the outcome. The inquiry has to be impartial (see Section 9 of the 2005 Act) and there have to be safeguards where more than one member is appointed to the inquiry (see section 8). The inquiry chairman is given wide powers to act fairly and impartially. There is also the ability to hold CLOSED hearings and to appoint special advocates which may be particularly apposite here given that much of the evidence will be CLOSED: see *R (on the Application of Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin).

[134] It is also important to recognise that public inquiries in Northern Ireland rarely prove to be unalloyed successes. There is no doubt that they can raise expectations and yet deliver nothing but disappointment. The reaction to the Billy Wright Inquiry demonstrates that a painstaking and lengthy inquiry can be the subject of sustained criticism for not having answered all the questions or for failing to reveal the truth and then dismissed out of hand as a whitewash. Very often those holding strongly held views about such controversial matters, retain those views regardless of the findings of any public inquiry. Further, the combined costs of the Billy Wright Inquiry, the Hamill Inquiry, the Rosemary Nelson Inquiry and the Bloody Sunday Inquiry were almost one third of a billion pounds. This is a colossal sum of public money. Many would consider that the overall return for such a substantial outlay was disappointing and unacceptable.

[135] The view expressed by the government in the light of such experiences was that there should be no more open-ended public inquiries into the past in Northern Ireland because costs were high, they were difficult to control, they proved to be subject to repeated litigation challenges and there were difficulties in recalling the truth and answering the questions expected of them. That view might well be considered in the light of past experience not to be an unreasonable one.

[136] The applicant himself is quoted as saying "I am absolutely appalled at the costs of inquiries and the fact that QCs and law firms end up millions to the better from our pain." Although, in fairness, he did make it clear that if a public inquiry

was justified, then the costs and difficulty of undertaking such an inquiry should not be obstacles to one taking place.

[137] It is however surely reasonable for the government to carefully consider the potential benefits of a public inquiry and weigh them in the balance against the possible detriments, including the potential for there to be a prodigious bill for the cost of it all when deciding whether a public inquiry is required or whether some other Article 2 compliant investigation or investigations will suffice instead. A failure by the government to carry out such a reckoning would amount to a dereliction of duty on its part. Even this preliminary application, paid for out of public funds, will not have come cheap, given the industry which has undoubtedly been expended by all sides.

[138] *In the matter of an application by Eamon Cairns for leave to apply for Judicial Review* [2021] NIQB 20, McFarland J refused to order a public inquiry where two boys were murdered at their home in County Armagh on the evening of 28 October 1993 by two masked men using firearms. No one was ever held to account for these heinous murders. The suggestion was that the murders had been carried out as part of a deliberate campaign against family members of known republican terrorists or republican sympathisers. It was suggested that the murderers were a gang of loyalist terrorists in the mid-Ulster area and that some members of the gang were state agents. It was alleged that this was all part of a policy to persuade republican terrorists to abandon their terrorist campaign. McFarland J considered the authorities and concluded that the court was "not aware of any case in the United Kingdom of a court directing a Minister to convene an inquiry under the 2005 Act." When asked by the judge if the applicant was aware of any such authority, Ms Doherty QC for the applicant, was unable to assist the court.

[139] McFarland J, giving his decision, referred to *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69, paragraph [127], R (on the application of *Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin), paragraphs [74] and [75], *R (on the application of Scholes) v Secretary of State for the Home Department* [2006] EWCA Civ 1343, paragraph [72] and *Brecknell v United Kingdom* (2008) 46 EHRR 42, paragraphs [68] - [72]. He also considered that it was significant that in *In the Matter of an Application by Geraldine Finucane for Judicial Review* [2019] UKSC 7 the Supreme Court had not ordered a public inquiry. At paragraph [22], he said:

> "… it is also worth noting that despite the Supreme Court finding that there still had not been an Article 2 compliant investigation into the death, it was still for the state to decide, in the light of the various inquiries to date, how to meet the procedural requirement of Article 2, and, critically, what form of investigation, if indeed any was now feasible, was required in order to meet that requirement (see paragraph [153]). The Supreme Court

> offered no advice or direction as to the form of the enquiry."

[140] This ties in with the approach of the European Court. At paragraph [7] of *R (on the application of Middleton) v HM Coroner for Western Somerset* [2004] UKHL 10, Lord Bingham stated:

> "The European Court has never expressly ruled what the final product of an official investigation, to satisfy the procedural obligation imposed by article 2 of the Convention, should be. This is because the Court applies principles and does not lay down rules, because the Court pays close attention to the facts of the case before it and because it recognises that different member states seek to discharge their Convention obligations through differing institutions and procedures..."

[141] Not surprisingly McFarland J refused to grant leave to judicially review the decision of the Minister for refusing to hold a public inquiry.

Omagh – A Target?

[142] In his Review of Intercepted Intelligence in Relation to the Omagh Bomb, Sir Peter Gibson noted that:

> "11. In August 1998 security forces across Northern Ireland were alert to the risk of terrorist attacks, but not to the fact that any particular town was at immediate risk. It is to be noted that the attacks referred to in the previous paragraph were all in towns to the southwest of Belfast well distanced from Omagh. There was no obvious reason why Omagh should be attacked."

[143] I return to this issue in the judgment on the CLOSED materials but on the OPEN materials this judgment is unimpeachable. Northern Ireland was under siege from the dissident republicans. There are no obvious reasons why Omagh should have been chosen as the destination for this particular bomb on 15 August 1998. Nor, I find, was any warning given by the terrorists or their associates that Omagh was going to be a target. Of course, the same can be said with equal force in respect of other incidents such as Belleek, Banbridge, Moira and Lisburn which were also the subject of bomb attacks in the preceding six months. In truth, any town or city in Northern Ireland, was a potential target for the dissident republican gangs intent on making mayhem. In 1998 the authorities were expecting bomb and mortar attacks being mounted on towns and cities across Northern Ireland from dissident republicans. What they had difficulty in predicting was which one would be chosen and when that attack would take place.

D. GROUNDS OF PREVENTABILITY

[144] As Maguire J observed at paragraph [10] of his judgment in *Re Gallagher's Application for Judicial Review* [2016] NIQB 95, the allegations relating to the issue of the preventability of the explosion are wide-ranging. They are:

> "1. An anonymous phone call of 4 August 1998, in which it was indicated that an attack would be made on police on 15 August 1998, and the disappearance of the '**threat book'** at Omagh police station, which should have recorded all such threats as received in the anonymous phone call of 4 August 1998. ["Ground 1"]
>
> 2. Information passed to police between June and August 1998 by the former British security force agent known by the name of Kevin Fulton relating to dissident Republican activity. ["Ground 2"]
>
> 3. Information provided by David Rupert, an agent being jointly operated and managed by the FBI and MI5 at the time of the Omagh bomb, who had established and developed links with dissident Republicans; in particular, through e-mails he provided information on dissident Republican activity including identifying Omagh as a potential target. ["Ground 3"]
>
> 4. Information sent to the RUC by An Garda Siochana on Thursday 13 August 1998, relating to the particulars of the red Vauxhall Cavalier that was used in the Omagh bomb. ["Ground 4"]
>
> 5. A briefing to the Senior Operational Commander South Region on 14 August 1998 indicating that information had been received from An Garda Siochana in connection with potential borne improvised explosive device on 15 August, resulting in a military operation being deployed in the South Armagh/South Down area on the morning of 15 August 1998. ["Ground 5"]
>
> 6. Surveillance operations relating to events surrounding the Omagh bomb that were reported on in the BBC television programme, Panorama; in particular, telephone and vehicle monitoring carried out by the Government's Communication Headquarters. ["Ground 6"]

7. The tracking and pattern of telephone usage by dissident Republicans and the connections arising between different bomb attacks, including the same mobile telephone being used in the Omagh bomb and the Banbridge bomb on 1 August 1998. ["Ground 7"]

8. Information shared by An Garda Siochana with the RUC relating to intelligence obtained by Detective John White from the agent known by the name of Paddy Dixon, relating to dissident Republican activity; in 2002 Detective White made statements to the PSNI regarding information that had been obtained. ["Ground 8"]

9. Norman Baxter's evidence to the Northern Ireland Affairs Committee to the effect that investigators into previous attacks in Moira (20 February), Portadown (9 May) and Banbridge (1 August) and Lisburn (30 April) did not have access to intelligence which may have enabled them to disrupt the dissident gang by way of arrest or house searches prior to the Omagh bomb. ["Ground 9"]

10. Information relating to the possibility that there was a surveillance operation taking place on 15 August 1998, which may have involved methods of surveillance employed by the FBI. ["Ground 10"]"

[145] As I have observed, it has been urged on the court by the applicant that these matters should not each be viewed in isolation but that they should necessarily be looked at in the round.

E. RELEVANT LEGAL PRINCIPLES

The applicability of the Human Rights Act 1998 ("HRA")

[146] The relevant provisions of the HRA came into effect on 2 October 2000. The long title states that the HRA is designed "to give further effect to the rights and freedoms guaranteed under the European Convention on Human Rights" ("ECHR"). Section 1 specifies which rights ("the Convention Rights") are to be given further effect in domestic law through the provisions of the HRA. Section 2 requires UK courts and tribunals to take account of the judgments, decisions, declarations or opinions of the institutions established by the Convention when determining a question which has arisen in connection with the Convention right. There was a keenly contested dispute about the applicability of the HRA in respect

of the Omagh bombing which had occurred 18 months before the relevant provisions of the HRA came into force.

[147] In 1989 Patrick Finucane, a Belfast solicitor, who had represented terrorists from both communities who were charged with terrorist offences arising out of the Troubles was murdered by loyalist paramilitaries. There were three inquiries into Finucane's murder and these found collusion in the planning and commission by informers for the State and the police e.g. see the report of Sir Desmond de Silva QC.

[148] The Secretary of State argued that this murder fell outwith the investigative obligation under Article 2 because it predated the commencement of the relevant provisions in the HRA. Given that many murders from the 'Troubles' involve allegations of state collusion and predate October 2000, this was a matter of considerable importance. It has been the subject of two apparently conflicting authorities, namely:

(a) *Re McKerr's Application for Judicial Review* [2004] UKHL 12, a decision of the House of Lords; and

(b) *Re McCaughey's Application for Judicial Review* [2011] UKSC 20, a later decision of the Supreme Court.

[149] In 2004 the House of Lords had accepted that crimes committed pre-2000 fell outwith the HRA. But in 2009 the Grand Chamber in *Šilih v Slovenia* (2009) 49 EHRR 37 re-interpreted Article 2 as embodying an autonomous and freestanding duty detachable from the substantive duty not to take life. This duty 0extends backwards to before the ECHR was enacted in national laws. This required the Supreme Court in *Re McCaughey's Application* to revisit its decision in *Re McKerr's Application for Judicial Review*.

[150] *In the Matter of an Application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7 the Secretary of State had urged the Supreme Court to follow *Re McKerr's Application for Judicial Review* and find that Article 2 did not apply in the case of *Re Finucane's Application for Judicial Review*, and other legacy cases which predated 2000. The Supreme Court had to consider whether there were circumstances which "continued to animate the right"; and secondly, whether events occurring after the relevant date were sufficient "to inspire its revival" – per Lord Kerr at paragraph [86].

[151] Lord Kerr pointed out in his judgment, with which the other members of the Supreme Court agreed, that the Supreme Court had never been asked to depart from *Re McCaughey's Application for Judicial Review* where it had "unequivocally adopted the decision in *Šilih* as indicating the principled approach in domestic law to the question of genuine connection."

[152] At paragraph [96] of his judgment, Lord Kerr noted that in paragraph [159] of its judgment in *Šilih,* the Grand Chamber had said that:

> "… the procedural obligation to carry out an effective investigation under article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of article 2 it can give rise to a finding of a separate and independent 'interference' … In this sense it can be considered to be a detachable obligation arising out of article 2 capable of binding the state even when the death took place before the critical date."

[153] In paragraph [97] of his judgment, Lord Kerr went on to say the Grand Chamber was at pains to point out that:

> "there had to be "a **genuine connection between the death and the entry into force of the Convention"** in the member state. On that account, "**a significant proportion of the procedural steps required … will have been or ought to have been carried out after the critical date."**

[154] Further, the Grand Chamber in *Janowiec v Russia* (2014) 58 EHRR 30 at paragraph [146] had said:

> "… the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the "**genuine connection"** standard. Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed 10 years …"

[155] In the instant case the investigations carried out as to whether the Omagh bomb could have been prevented, such as the Ombudsman's investigation into the 4 August 1998 phone call, were carried out for the most part after the coming into effect of the HRA. Further, the period between the triggering event and the initial date was well within the 10 year period. So while in some cases it would be impossible to "breath[e] new life into a right whose currency had passed, when all the circumstances *constitutive of the interference* with the right had occurred before the relevant date [HRA's commencement date]", (see *Re Finucane's Application for Judicial Review* at paragraph [88]), that is "but part of the story." The present case does not fall into that category because many of the relevant circumstances have occurred after the relevant date.

[156] It is therefore not necessary for me to consider the further argument advanced that the applicant could also rely on the ECtHR's decision in *Brecknell v United*

Kingdom (2008) 46 EHRR 42 where it alleged that the RUC and British Army had colluded with loyalist paramilitaries in a murder. In that case it was decided that credible allegations concerning the identification of the perpetrators emerged after 2000 and this required a further Article 2 compliant investigation. I also do not have to decide whether the *Brecknell* test only applies to credible evidence identifying a perpetrator or perpetrators of a heinous crime or whether it can also apply to credible evidence relating to whether a death could have been prevented. If I had to determine the issue I would do so in favour of the applicant because I can see no great value in distinguishing between credible evidence which sheds light on who was responsible for a killing and credible evidence as to how that killing could have been prevented. In the instant case credible evidence emerged after the coming into effect of the HRA about other earlier bombings and the persons who were responsible both for them and the Omagh bomb.

Article 2

[157] Article 2 of the European Convention on Human Rights ("ECHR") provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

[158] The Human Rights Practice edited by Angela Patrick at 2.002 says:

> "Article 2 ranks as one of the most fundamental provisions in the Convention from which no derogation is permissible, save in time of war. It is the basic pre-condition of the enjoyment of other rights, and has repeatedly been described as the most fundamental of human rights … Its provisions must be strictly construed."

[159] Lord Bingham in *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653 at paragraph [18] said:

> "…Article 2(1) has been repeatedly described as "one of the most fundamental provisions in the Convention": *McCann v United Kingdom* (1995) 21 EHRR 97, para 147; *Salman v Turkey* (2000) 34 EHRR 425, para 97; *Jordan v United Kingdom* (2001) 37 EHRR 52, para 102. The European Court has made plain that its approach to the interpretation of article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied so as to make its safeguards practical and effective: *McCann*, para 146; *Salman*, para 97; *Jordan*, para 102."

[160] Article 2 has two aspects:

(i) Substantive and procedural. The latter is, "no doubt implied in order to make sure that the substantive right was effective in practice": per Lord Bingham in *R (on the application of Gentle) v Prime Minister* [2008] 1 AC 1356 at paragraph [5]. Lord Bingham went on to say at paragraph [6]:

> "…But it is clear (see the *Middleton* case [2004] 2 AC 182 para [3], *Jordan v United Kingdom* (2001) 37 EHRR 52, para [105]; *Edwards v United Kingdom* (2002) 35 EHRR 487, para [69]; *In re McKerr* [2004] 1 WLR 807, paras 18-22) that the procedural obligation under article 2 is parasitic upon the existence of the substantive right, and cannot exist independently. Thus to make good their procedural right to the inquiry they seek the claimants must show, as they accept, at least an arguable case that the substantive right arises on the facts of these cases. Unless they can do that, their claim must fail…"

(ii) Paragraph 4.2.4 of Lester, Pannick and Herberg: Human Rights Law and Practice states:

> "Article 2(1) imposes three different duties on the state:
>
> (i) The first is the negative duty to refrain from taking life, save in the exceptional circumstances envisaged by art 2.2 …

(ii) The second is a positive duty properly and openly to investigate deaths for which the state might be responsible. As Baroness Hale noted in *Savage*:

> **"There is not much point in prohibiting police and prison officers … from taking life if there is no independent investigation of how a person in their charge came by her death."**

(iii) The third duty requires the state not only to refrain from taking life but also to take positive steps to protect the lives of those in their jurisdiction in certain circumstances such as detained prisoners and patients in hospitals. Article 2(1) places on the state both a positive duty to safeguard the lives of those within its jurisdiction and a negative duty to refrain from the intentional and unlawful taking of life …"

[161] The obligation imposed on a state to investigate deaths was discussed by Lord Phillips of Worth Matravers in *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1 at paragraph [84] when he said:

> "84. The obligation to hold an article 2 investigation is triggered by circumstances that **give ground for suspicion** that the State may have breached a substantive obligation imposed by article 2…" [Emphasis added]

[162] As Leggatt J said in *R (Al-Saadoon and others) v Secretary of State for Defence* [2015] 3 WLR 503 at paragraph 282:

> "282. It is clear that the duty to investigate a death is not part of the substantive duty imposed on the state by article 2 to protect the right to life. It is an ancillary or adjectival duty, implied from article 2 read in conjunction with article 1, in order to make the state's substantive duty effective in practice. … It follows that the duty arises only where there is reason to believe that there has been, or may have been, a violation of the substantive right: see R (Middleton) v West Somerset Coroner [2004] 2 AC 182, para 3; R (Smith) v Oxfordshire Assistant Deputy Coroner [2011] 1 AC 1, paras 84, 97, 150 and 202. The trigger for an investigation is sometimes expressed as "**grounds for suspicion**" and sometimes as an "**arguable breach**" of one of the substantive obligations imposed by

> article 2. I do not understand there to be any subtle difference between these formulations. Rather, they are two ways of expressing the same test." [Emphasis added]

[163] I would sound two notes of warning. Firstly, Lord Brown said in *R (on the Application of Limbuela) v Secretary of State for the Home Department* [2006] 1 AC 396 at paragraph [92]:

> "… it seems to me generally unhelpful to attempt to analyse obligations arising under article 3 as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies. The real issue in all these cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim."

[164] This comment applies mutatis mutandis to Article 2.

[165] Secondly, there is some discussion in the authorities as to whether the threshold of arguability in respect of the preventive obligation is a low threshold or a high threshold, one that "is not easily reached" (see the dicta of Lord Carswell in *Re Officer L* [2007] UKHL 36). I do not find it helpful to discuss whether the test giving rise to the preventive obligation has a high or low threshold. There is one test for granting leave. The court has to concentrate when making its decision upon whether a plausible argument has been made out for a breach of Article 2. It should not be distracted by descriptions of whether the bar is set low or high in reaching its conclusion. The test is arguability.

[166] There have been cases where the State has been found to be in breach of its positive duty under Article 2 to take positive steps to prevent loss of life. For example, in *Kilic v Turkey* (2001) 33 EHRR 58 the deceased, a journalist who had worked for a Kurdish newspaper, had been the subject of threats which resulted in him asking the authorities to put in place protective measures for his safety. Nothing was done. It was found that no steps had been taken to prevent a "real and immediate risk" to the deceased's life. Accordingly there was a breach of Article 2. A similar finding was made in *Kontrova v Slovakia (Application no 7510/04)* [2007] ECHR 7510/04 where police had not responded adequately to complaints of violence and abuse by the applicant's husband. This resulted in a failure to prevent a husband from shooting their two children.

[167] In the present case it is the alleged failures of the State firstly to take reasonable steps to prevent the Omagh bombing and secondly to conduct an Article 2 compliant investigation into that failure which lies at the heart of this judicial review. It also has to be emphasised that the court is not making any findings at this stage, it is only deciding, first and foremost, whether there is an arguable case that a substantive duty under Article 2 had been breached.

The Osman Obligation

[168] The respondent makes the case that for the preventive obligation to be engaged ("the *Osman* Obligation") five essential elements had to be in place. I say the Osman obligation because they derive from the decision of the ECJ in *Osman v United Kingdom* (2000) 29 EHRR 245 where the respondent claims that the court concluded that there were five conditions which had to be satisfied before the preventive obligation could arise. They are:

> "(i) a threat to life from the criminal acts emanating from an identifiable source;
>
> (ii) an identified or identifiable victim;
>
> (iii) the risk to the life of the victim(s) from the identifiable source must be **real and immediate**;
>
> (iv) the state authorities must have knowledge or a sufficient means of knowledge of the threat, the source and the victim;
>
> (v) the threat must be one which the state could avoid by taking reasonable operational measures which were available to it."

[169] Although the respondent claimed that the threat had to be focussed on "an identified or identifiable individual or individuals", it was sufficient even if the individual(s) could not be identified that "**at the very least, it requires that the town of Omagh should have been known to the authorities**." No principled explanation was offered as to why Omagh would be sufficient, "at the very least", but that a larger town such as Lurgan or Portadown would presumably not be, or why it would not be sufficient for a city such as Belfast or Londonderry to be known to the authorities as the target for the attack. Certainly, the respondent was clear that the *Osman* obligation could not arise in respect of a threat to the citizens of Northern Ireland at large.

[170] In *Osman v United Kingdom* the ECJ had to consider the issue of whether the loss of a life was preventable. The facts of *Osman* are worth recounting because they provide a framework for the court's decision.

[171] A school teacher, P, had developed an unhealthy fixation with his 14 year old pupil Ahmet Osman. P harassed Ahmet and his family over a number of months and indeed committed acts of criminal damage. Although what was happening was reported to the police, they took no action in arresting or charging P. The consequences were that P shot and killed Ahmet's father also causing serious injury

to Ahmet. He was arrested. He asked the police "Why didn't you stop me before I did it, I gave you all the warning signs." Mrs Osman and her second son took an action against the police. The claim at first instance was dismissed because of the immunity granted to the police at common law by a decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53 and the fact that public policy required an immunity from suit. The Court of Appeal found against the mother and then refused her leave to appeal to the House of Lords. The application to the House of Lords for leave to appeal was also refused. Mrs Osman appealed to the ECJ asserting that by failing to take adequate and appropriate steps to protect the lives of the second applicant and his father, Ali Osman, from the real and known danger which P posed, the authorities had failed to comply with the positive obligation under Article 2 of the Convention. It is important to recognise that the ECJ was dealing with a threat to an individual and the court was looking at whether or not a breach of Article 2 had occurred in respect of that known individual.

[172] The court's assessment as to the alleged failure of the authorities to protect the rights to life of Ali and Ahmet Osman was as follows:

> "115. The Court notes that the first sentence of Article 2§1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *LCB v United Kingdom* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998–III, p. 1403, para. 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.
>
> 116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which *does not impose an impossible or disproportionate burden on the authorities*. Accordingly, not every claimed

risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see at para. 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see para. 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis,* the above-mentioned *McCann and others* judgment, p. 45, para. 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, **it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in light of all the circumstances of any particular case."**
[Emphasis added].

[173] I would also draw attention to the comment in *Keenan v United Kingdom* (2001) 33 EHRR 913 at paragraph 89:

> "… the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities…",

And therefore:

> "…[*n*]*ot every claimed risk to life .. can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising...*"
> [Emphasis added]

[174] In *Re Officer L* [2007] 1 WLR 2135, Lord Carswell summarised what was required of the authorities at paragraph 21:

> "21. Secondly, there is a reflection of the principle of proportionality, striking a fair balance between the general rights of the community and the personal rights of the individual, to be found in the degree of stringency imposed upon the state authorities in the level of precautions which they have to take to avoid being in breach of article 2. As the European Court of Human Rights stated in *Osman v United Kingdom 29 EHRR 245,* para 116, the applicant has to show that the authorities failed to do all that was reasonably to be expected of them to avoid the risk to life. **The standard accordingly is based on reasonableness, which brings in consideration of the circumstances of the case, the ease or difficulty of taking precautions and the resources available. In this way the state is not expected to undertake an unduly burdensome obligation**: it is not obliged to satisfy an absolute standard requiring the risk to be averted, regardless of all other considerations: cf McBride, "**Protecting Life: A Positive Obligation to Help" (1999) 24 EL Rev Human Rights Survey HR/43, HR/52."**
> (Emphasis added)

[175] In *Osman,* as I have emphasised, the threat was to one individual and it was against this background that the court was making its decision. The ECJ was not purporting to decide whether a breach of Article 2 could **only** arise in circumstances where the authorities "knew or ought to have known of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party."

[176] However, *Osman* did decide that:

> "…[i]t is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered **in light of all the circumstances of any particular case**. [paragraph 116]." [Emphasis added]

[177] I am satisfied that *Osman* does not purport to set out any series of conditions which all have to be satisfied before the *Osman* obligation arises. What it makes clear is that "the authorities have to do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they ought to have knowledge." The reasonableness of their actions or inactions will depend on all the circumstances of each particular case. They also cannot be expected to "undertake an unduly burdensome obligation."

[178] It is the risk to life, not to a particular life or lives which is important. In *Mastromatteo v Italy* [2002] ECHR 37703/97 the court decided that Article 2 enjoined a State to afford general protection to society against potential acts of one or of several persons serving a prison sentence for violent crime and the determination of that protection: see also *Maiorano & Others v Italy* No 28634/06 and *Gorovenky v Ukraine* [2012] ECHR 36146/05 and *Oneryildiz v Turkey* (2005) 41 EHRR 20.

[179] In *Sarjantson v Chief Constable of Humberside Police* [2013] EWCA Civ 1252 the Court of Appeal had to determine whether a claim could be made, inter alia, for a breach of Article 2 (and Article 3) when there was not a real and immediate risk to the life of an identified or identifiable individual. The Court of Appeal concluded that such a distinction was "arbitrary, unprincipled and wrong in law." Dyson MR said:

> "22. The source of the judge's conclusion in the present case that the *Osman* duty is owed where there is or ought to be known to be a real and imminent risk to the life of "*an identified individual or individuals*" is para 116 of the judgment in *Osman* itself. But this choice of words by the court in *Osman* was heavily influenced by the facts of that case … The court did not have to explore the boundaries of the scope of the duty and did not purport to do so in paras 115 and 116 of its judgment**. The subsequent jurisdiction to which I have referred shows that the ECtHR has not limited the scope of the art 2 duty to circumstances where there is or ought to be known a**

real and imminent risk to the lives of identified or identifiable individuals.

23. Leaving the case-law on one side, I can find no reason in principle for so limiting the scope of the duty. Neither the judge nor Ms Barton suggested any reason for doing so. Such a limitation would be inconsistent with the idea that the provisions of the Convention should be interpreted and applied in such a way as to make its safeguards practical and effective.

24. Take the facts of the present case. On the judge's approach, the duty arose (subject to the restrictions and safeguards mentioned by the court in *Osman*) when the police knew or ought to have known that there was a real and imminent risk to the life of the First Claimant; but no such duty arose when they knew or ought to have known that there was a real and immediate risk to the lives of unidentified individuals who were in the vicinity of the assailants. But they did know that there were individuals in the vicinity of the street where the youths were causing mayhem. They knew where to find them in order to protect them if it was reasonably necessary to do so.

25. In my view, the distinction drawn by the judge is arbitrary and unprincipled and is unsupported by the Strasbourg jurisprudence. The essential question in a case such as this is whether the police knew or ought to have known that **there was a real and immediate risk to the life of the victim of the violence and whether they did all that could reasonably be expected of them to prevent it from materialising.** Where the police are informed about an incident of violent disorder, the *Osman* duty may arise regardless of whether they knew or ought to know the names or identities of actual or potential victims of the criminal activity. It is sufficient that they know or ought to have known that there are such victims." [Emphasis added]

[180] I am satisfied that the distinction drawn by the respondent that "at the very least Omagh" should be identified as a target is both unprincipled and unsupported by authority. *Osman* was a case which was decided on its own particular facts. The submission by the respondents that there are five elements that need to be in place is contradicted by other authorities including *Mastromatteo* and *Sarjantson*. *Osman* never set out a series of conditions which had to be satisfied before the preventive obligation under Article 2 arises.

[181] The fallibility of the respondent's submissions can be easily demonstrated by just one example. The authorities received unimpeachable intelligence in early August 1998 that in the next 24 hours the group responsible for the Banbridge bomb are going to transport a 500lb bomb in a car to the British mainland where they intended to detonate it. However, its ultimate destination is unknown. In the respondent's analysis the authorities have no Article 2 obligation to take any action whatsoever because they did not know either the final destination of the bomb or the identity of the victims. That simply cannot be correct when the bomb can be easily intercepted by placing vehicle control points at Larne and Belfast ports (and possibly also at Holyhead and Fishguard in case it is transported through the Republic of Ireland).

[182] In 1998 Northern Ireland was under attack from dissident republicans. They were determined to use the bomb and mortar to coerce the inhabitants of Northern Ireland, to intimidate them, to foment strife and to destroy the GFA. The authorities knew this. They knew from what had happened during the previous few months that Northern Ireland was effectively under siege. Of course, the lack of specificity of the point of attack would make the response to the authorities much more difficult. The widespread nature of the threat in 1998 feeds into the judgement as to whether the authorities could be said to have done all that could "reasonably be expected of them" to avoid a "real and immediate risk to life" of which they knew or ought to have knowledge. The reasonable response of the authorities in such circumstances will always be determined by the precision and nature of the threat.

[183] The interaction among the terrorist groups and their members also made it difficult in respect of any particular incident to say with any certainty which group or groups carried it out, never mind who precisely were the members of those groups who were involved in any of the attacks. Again, this shapes what could reasonably be expected of the authorities in their efforts to protect the lives of the citizens of Northern Ireland.

[184] The respondent claimed that the threat to life had to come from an identifiable source. I am not entirely sure whether the respondent was alleging that there could be no identifiable source because of the shifting alliances of the various dissident republicans. It is quite clear from the evidence that there was a group of people opposed to the Good Friday/Belfast Agreement who were prepared to resort to violence of the most extreme sort in order to create conditions which they thought would ensure its failure. That group included disillusioned former members of PIRA, members of RIRA, members of CIRA, the INLA and others. The interaction between these terrorist groups and their supporters was such that it is impossible to say with complete confidence that even if each of the dissident republicans could be identified, exactly on behalf of which particular grouping they were acting at any particular time. Again, this feeds into the nature of the duty imposed upon the authorities which was only to do all that "could reasonably be expected of them." This court will be careful not to impose an "impossible or disproportionate burden"

on the authorities. These attacks in 1998 were the result of co-operation and collaboration between the various terrorist gangs and their members. There is a plausible case on the OPEN evidence that the authorities knew the identities of many of those committed to and involved in this violent insurrection against the Northern Ireland state and arguably could have done more to disrupt their activities. Accordingly, I am satisfied that it is arguable that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life by taking steps to disrupt these dedicated and ruthless terrorists. This issue will be addressed in greater detail both in consideration of the grounds of preventability that are relied upon and in the CLOSED judgment.

[185] It is also necessary that there should be "a real and immediate risk to life." In *Re Officer L* Lord Carswell giving the judgment of the court explained the meaning of this phrase at paragraph [20]:

> "[20] Two matters have become clear in the subsequent development of the case law. First, this positive obligation arises only when the risk is "**real and immediate.**" The wording of this test has been the subject of some critical discussion, but its meaning has been aptly summarised in Northern Ireland by Weatherup J in *Re W's Application* [2004] NIQB 67 at [17], where he said that:
>
> > '… a real risk is one that is objectively verified and an immediate risk is one that is present and continuing.'"

[186] I am satisfied on the evidence that has been adduced that there is plausible argument that there was an immediate and objective verifiable risk to life arising from the intentions of a number of dissident republican terrorists to the civilian population of Northern Ireland. It was a risk that at the time of the Omagh bombing was present and continuing. Northern Ireland was under siege. Its citizens were at risk from these random terrorist attacks. While it would not be possible to identify each and every dissident republican, whether actively engaged or providing logistical support, there was no problem at the time for the reasons given later in this judgment in identifying those who provided the driving force and who were the leading lights in these concerted and sustained attacks on the Northern Ireland state and its civilians.

[187] It is thus clear from a review of the authorities that there are no elements which have to be in place or conditions which have to be satisfied before there is an arguable breach of Article 2. The standard of reasonableness is the touchstone in determining whether there has been an arguable breach **where there is a real and immediate risk to life**. Reasonableness dictates whether there is a duty on the authorities to act or whether they can refuse to do so on the basis that they are being asked to "undertake an unduly burdensome obligation." Any assessment of what is

reasonable necessarily requires that all the relevant circumstances are taken into account.

[188] It also makes good sense to recognise that the authorities in general, and the police in particular, are better placed than the courts in most cases to make a judgment call on a matter such as this and determine what preventive measures, if any, should take place.

[189] The gravamen of the claim made by Detective Chief Superintendent Norman Baxter, the Omagh bomb SIO, to NIAC was that he considered that those who carried out the Omagh bombing could have been identified beforehand because of their involvement in other incidents and that "there was political pressure in relation to the de-escalating of security" which prevented the authorities from taking steps to disrupt those self-same terrorists. On that basis the assertion that there is a plausible argument that the Omagh bombing could have been avoided if a more pro-active and less pusillanimous approach had been adopted by the authorities is a matter that requires careful consideration.

Article 2 Compliant Investigation

[190] In *R (L) v Secretary of State for Justice* [2009] 1 AC 588 Lord Phillips said at paragraph [13]:

> "…The nature of that investigation will depend upon the particular facts. … In all but exceptional cases an independent investigation into the circumstances in which the suicide or near-suicide took place, which is prompt and effective and involves to an appropriate extent the relatives of the prisoner in the case of suicide, or the prisoner and his representatives in the case of a near-suicide, with the results made known to them, will be sufficient to comply with Article 2."

[191] There have been various pronouncements in cases as to what is required if an investigation is to be Article 2 compliant e.g. see Lord Bingham in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51. Lord Bingham put it thus:

> "In a succinct and accurate judgment Jackson J reviewed the domestic and Strasbourg case law, deriving from *Jordan v United Kingdom* (2001) 37 EHRR 52 the requirement that an investigation, to satisfy article 2, must have certain features (paragraph 41):
>
> (1) The investigation must be independent.
>
> (2) The investigation must be effective.

(3) The investigation must be reasonably prompt.

(4) There must be a sufficient element of public scrutiny.

(5) The next of kin must be involved to an appropriate extent.

From the recent case law Jackson J derived five propositions of which the fourth was:

> **"Where the victim has died and it is arguable that there has been a breach of article 2, the investigation should have the general features identified by the court in *Jordan v United Kingdom* at paras 106-109."**

The judge concluded on the facts that there had not been an effective official investigation into the death of the deceased and held that there should be an independent investigation, to be held in public, at which the family should be represented."

[192] There has also been much discussion about what was required for an investigation to be Article 2 compliant. It was common case that there was no requirement that there had to be one all-embracing unitary hearing. It was sufficient that there was a number of investigations, which considered together, had covered all the issues necessary to comprise an Article 2 compliant investigation. In *R (L) v Secretary of State for Justice* [2009] 1 AC 588 at 624 Lord Rodger said:

> "77. The Secretary of State is concerned about the financial implications of having to hold an independent investigation in cases of attempted suicide. His concern is entirely proper, as the European court has recognised in the judgments cited in para 56 above. His anxieties may have been fuelled, however, by impression that, whenever article 2 requires an independent investigation be set up, that investigation has to have all the bells and whistles of the full-blown public inquiry described by the Court of Appeal in *R(D) v Secretary of State for the Home Department* [2006] 3 All ER 946 – sometimes called a 'type D inquiry.' Nothing could be further from the truth. I respectfully endorse what my noble and learned friend, Lord Browne of Eaton-under-Heywood, says on the matter at paras 107 and 108 of his speech.

78. The principal hallmark of an article 2-compliant inquiry is that it is "effective". The Grand Chamber explained what this means in *Ramsahai v The Netherlands*, a case where the police had shot someone suspected of stealing a scooter. The court said, at paras 324-325:

> '324. In order to be "effective" as this expression is to be understood in the context of article 2 of the Convention, an investigation into a death that engages the responsibility of a contracting party under that article must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard.
>
> 325. Secondly, for the investigation to be "effective" in this sense it may generally be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.
> …'
>
> <u>There neither is, nor can be, any single off-the-peg model that is suitable for use in all cases</u>."
> [Emphasis added]

[193] The authorities are clear about the paramount need for the investigation to be effective in determining whether there had been a breach of Article 2. They also make clear that different circumstances will trigger the need for different types of investigation with different characteristics. In *R (L) v Secretary of State for Justice* [2009] 1 AC 588, Lord Phillips said at paragraph 31:

> "…The Strasbourg court has emphasised the need for flexibility and the fact that it is for the individual state to

> decide how to give effect to the positive obligations imposed by article 2."

[194] The issue of what is required for an Article 2 compliant investigation was answered after the hearing had finished by the Supreme Court *In the Matter of an Application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7. The unanimous analysis of the court was as follows:

(a) The investigation should be independent;

(b) It should provide the means and the "will" and the opportunity to identify suspects and, if possible, call them to account.

(c) The need for an effective investigation into the death goes well beyond facilitating prosecution. It follows that any decisions by the state not to investigate further or to prosecute, could not be determinative, even though they are relevant: see paragraphs 125-127 and paragraph 137.

(d) The investigation has to have the tools to establish a vital fact such as identifying those involved and "uncovering the truth of what had actually happened." The investigation should be able to reach definitive conclusions.

(e) The obligation to re-open the investigation would arise whenever there was a *plausible or credible* allegation or evidence which had the potential to undermine the conclusion of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further: see paragraph 117.

(f) Finally, an Article 2 compliant inquiry should provide the opportunity to recognise the lessons to be learned to avoid similar occurrences in the future: see paragraph 138 and Bamforth and Hoyano on "ECHR and common law accountability for failure to investigate state collusion: the Northern Ireland "legacy cases" LQR 2020, 136 (Jan), 24 - 29.

Causation

[195] It is important to note that the test of whether or not there is a breach of Article 2 is not the "but for" test of tort law. An investigative obligation only arises where there is evidence of a failure to take reasonably available measures which have a real prospect of altering the outcome or mitigating the harm. This is sufficient to engage the responsibility of the State e.g. see *O'Keefe v Ireland* (Application No 35810/09).

[196] In *Bljakaj and others v Croatia* (2014) 38 BHRC 759, at paragraph 124, the ECHR said:

> "In the court's view, there are several other measures which the domestic authorities might reasonably have been expected to take to avoid the risk to the right to life from the violent acts of AN. While the court cannot conclude with certainty that matters would have turned out differently if the authorities had acted otherwise, it reiterates that the test under art 2 does not require it to be shown that 'but for' the failing or omission of the authorities the killing would not have occurred (see *Opuz v Turkey* (2009) 27 BHRC 159 at para 136 and, mutatis mutandis, *E v UK* [2002] ECHR 33218/98 at para 99), as it could be inferred from the decisions of the domestic courts... Rather, what is important, and sufficient to engage responsibility of the state under that article, is that reasonable measures the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm (see *Opuz v Turkey* (2009) 27 BHRC 159 and, mutatis mutandis, *E v UK* [2002] ECHR 33218/96)."
> [Emphasis added]

Rationality and Proportionality

[197] The issue of whether the decision of the respondent was "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it": see Lord Diplock in *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 at 410G. This is the classic "Wednesbury unreasonableness" test.

[198] In *R v Ministry of Defence ex p Smith* [1996] QB 517 the Court of Appeal adopted the following statement of principle from the argument of counsel (Mr David Pannick QC) at 554:

> "The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above."

[199] In *Kennedy v Charity Commission (Secretary of State for Justice and others intervening)* [2015] AC 455 Lord Mance noted that the common law no longer insists on the uniform application of the rigid test of irrationality once thought applicable under the Wednesbury principle and the nature of judicial review in every case depends on the context: see paragraph 51.

[200] At paragraph 54 he said:

> "54… As Professor Paul Craig has shown (see e.g. "The Nature of Reasonableness" (2013) 66 CLP 131), both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker's view depending on the context. The advantage of the terminology of proportionality is that it introduces an element of structure into the exercise, by directing attention to factors such as suitability or appropriateness, necessity and the balance or imbalance of benefits and disadvantages. There seems no reason why such factors should not be relevant in judicial review even outside the scope of Convention and EU law. Whatever the context, the court deploying them must be aware that they overlap potentially and that the intensity with which they are applied is heavily dependent on the context. In the context of fundamental rights, it is a truism that the scrutiny is likely to be more intense than where other interests are involved. But that proportionality itself is not always equated with intense scrutiny was clearly identified by Lord Bingham of Cornhill CJ in *R v Secretary of State for Health, Ex p Eastside Cheese Co* [1999] 3 CMLR 123, paras 41-49, … As Lord Bingham explained, at para 47, proportionality review may itself be limited in context to examining whether the exercise of a power involved some manifest error or a clear excess of the bounds of discretion …"

[201] Proportionality "stricto sensu" means more than that the court must weigh the interests of the state against those of the claimant. It means that *even if* a challenged measure is important, suitable, and necessary, it "still" violates proportionality if it produces impacts that outweigh benefits actually achieved by the measure: see Supperstone, Goudie Q.C. and Walker on Judicial Review (6th Edition) at [9.47].

[202] Lord Sumption has pointed out in paragraph 105 of *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 that while English law (and British law) has not adopted the principle of proportionality generally it has "stumbled towards

a concept which is in significant respects similar", which was "to expand the scope of rationality review so as to incorporate at common law significant elements of the principle of proportionality". This, he described in paragraph 106, as "a sliding scale, in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference."

[203] While irrationality and proportionality share some characteristics it would be wrong to suggest that rationality and proportionality are the same. In *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69 the Supreme Court turned down the invitation "to recognise proportionality as a further basis for challenging administrative action, a basis which, if adopted, would be likely to consign the *Wednesbury* principle to the dustbin of history" and that "proportionality should be adopted as the basis of challenge for all administrative decisions." Alternatively, proportionality should be adopted in a human rights context because, in effect, it already applies to fundamental rights such as the *right to life*. The Supreme Court declined the opportunity as offered. Lord Neuberger said that the move from rationality to proportionality would have "profound and far reaching consequences, because it would involve the court considering the merits of the decision at issue." Lord Neuberger, Lord Mance and Lord Hughes decided that it would not be appropriate for a five judge panel of the Supreme Court to accept or reject the applicant's argument that the traditional rationality basis for challenging executive decisions should be replaced by a more structured and principled challenge based on proportionality, which would appear to have potentially "profound" and far reaching consequences because it would involve the court considering the merits of the decision at issue: in particular, it would require courts to consider the balance which the decision maker had struck between competing interests (often of public interest against the private interest) and the weight to be accorded to each such interests."

[204] The court is not being asked as to what decision it would have reached. Rather it is having to decide "whether sensible decision-makers, properly directed in law and properly applying their minds to the matter, could have regarded the conclusion under review as a permissible one": see Supperstone, Goudie QC and Walker on Judicial Review (6th Edition) at [8.7].

[205] The proportionality principle applies to HRA cases as I have noted above. It requires the courts to take a closer look review than the one the courts would adopt in a Wednesbury review: see Professor Anthony on Judicial Review in Northern Ireland at 6.12.

[206] The proportionality review in respect of HRA cases is context driven as cases involving absolute rights demand a more intensive view than cases involving qualified rights. The courts still have to give effect to the decision-maker's "discretionary area of judgment in HRA cases." In paragraph 27 of *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, Lord Steyn said:

> "…proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions… the proportionality test *may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations.*" [Emphasis added]

[207] In R (*Lord Carlisle of Berriew and others) v Secretary of State for the Home Department* [2014] 3 WLR 1404 the Supreme Court held that where Convention rights were adversely affected by the executive decision the court was obliged to form its own view of the proportionality of the decision but it could not substitute its own decision for that of the primary decision-maker and that the degree of restraint to be exercised by the court and the extent to which the decision of the primary decision-maker would be respected depended on the context. Furthermore, where the court did not have evidence, experience and institutional legitimacy to form its own view with confidence, the interference could only be justified in exceptional circumstances.

[208] In *Pham v Secretary of State for the Home Department (Open Society Justice Initiative Intervening)* [2015] UKSC 19 Lord Sumption said at para [107]:

> "[107] … It is for the court to assess how broad the range of rational decisions is in the circumstances of any given case. That must necessarily depend on the significance of the right interfered with, the degree of interference involved, and notably the extent to which, even on a statutory appeal, the court is competent to reassess the balance which the decision-maker was called on to make given the subject-matter..."

[209] In the instant case the court is being asked whether the decision of the respondent was "wholly unreasonable" when it necessarily affects the human rights of those who require an answer to the question of whether the Omagh bombing could have been prevented. In those circumstances it is proper that the court should take a closer look review. However, the court should be mindful that the decisions that were taken by the authorities were taken in real time and by persons who had a particular expertise in security matters.

Time Barred

[210] The challenge in this case is to the decision of the respondent not to hold a public inquiry into the death of the applicant's son and others in Omagh town on 15 August 1998. This decision was made on 12 September 2013 by the respondent and proceedings were issued for judicial review on 6 December 2013. An application for leave to apply for judicial review "shall be made promptly and in any

event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made": see Order 53 Rule 4(1) of the Rules of the Court of Judicature (Northern Ireland) 1980.

[211] Section 6(1) of the Human Rights Act 1998 ("the Act") provides that:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

Section 7(1) provides:

> "(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."

Section 7(5) states:

> "(5) Proceedings under subsection (1)(a) must be brought before the end of—
>
> (a) the period of one year beginning with the date on which the act complained of took place; or
>
> (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,
>
> but that is subject to any rule imposing a stricter time limit in relation to the procedure in question."

[212] There can be no doubt that the proceedings were issued for judicial review promptly and within three months of the respondent's refusal to hold a public inquiry. The respondent complains that the grounds relied upon by the applicant are out of time, more than one year having passed from the date on which the act complained of took place. For example, the respondent says that ground 1 is well out of time relating as it does to an anonymous telephone call made on 4 August

1998 and which has been the subject of an extensive and independent investigation by the PONI many years ago. However, this complaint has to be seen against the background in which the Government, in general, and the respondent, in particular, were responding to the complaints of the OSSHG and were instituting various investigations into the complaints that they were making about the failure of the authorities to prevent the Omagh bombing e.g. the Gibson Review. I have no hesitation in concluding that it was only following the letter from the respondent specifically ruling out any public inquiry that the applicant would have been able to conclude that there was not going to be what could be considered an Article 2 compliant investigation into all the grounds upon which the applicant relied in alleging that the Omagh bombing could have been prevented. There is considerable force in this argument especially when the applicant was making the case that the grounds of preventability should not be viewed as each being hermetically sealed but as part of a much wider picture.

[213] In any event it is undoubtedly equitable to extend time under section 7(5) if it is needed for the following reasons:

(i) The principle of proportionality strongly favours extending time so that the grounds of preventability (which are plausible) can be fully considered in an Article 2 compliant investigation. It would not be proportionate for those plausible grounds of preventability to remain unexamined by an Article 2 compliant inquiry, when they relate to the deaths of so many people and the injuries to so many more.

(ii) The applicant has acted responsibly in seeking to exhaust all his other possible remedies which would enable the grounds of preventability to be fully investigated. The applicant has acted promptly once it became clear that there was not going to be an Article 2 compliant investigation into the grounds of preventability.

(iii) I have also looked at all the factors to be taken into account in deciding whether to extend time in a personal injuries action, and having done so, I am satisfied that in all the circumstances it would be equitable to extend time in the instant case: see *Cameron v Network Rail Infrastructure Limited* [2007] 1 WLR 163, at paragraph 43.

[214] Therefore, if this court does have to extend time under section 7(5)(b), it does so without hesitation.

F. DISCUSSION: GROUNDS OF PREVENTABILITY

Ground 1

[215] On 4 August 1998 an anonymous telephone call was received by a CID Detective Constable Ruddy at Omagh RUC station. The call warned that two

individuals, C and D, were arranging for four AK47 rifles and two rocket launchers to be moved from the Republic of Ireland into Northern Ireland on behalf of the Continuity IRA ("CIRA"). It was claimed that the weapons would be brought in by "E" (a nickname) between 8 and 9 August to a specified address, that is the family home of F. These would then be moved to an unknown address 2 or 3 miles from Omagh, where they would be used in an attack on the police.

[216] Detective Constable Ruddy on receipt of this information drove to the RUC station in Enniskillen to brief the Detective Chief Inspector and then the Special Branch officers who were on duty. He subsequently prepared a handwritten report. The Senior Divisional Commander ("SDC") was not informed about the telephone call until 15 August 1998. Neither was CID. It is claimed that the Force Order 99/91 required the SDC to be informed when a general threat was received so that appropriate action could be taken. It is also asserted that the warning should have been reported in the "Threat Book", but when PONI tried to locate this during her first investigation in 2001 the book could not be found. To date no satisfactory explanation has been given for the book's loss. The background of civil and criminal unrest against which this telephone call must be considered has been set out in some detail earlier in this judgment. During the summer of 1998 the authorities across the whole of the province were on the alert for terrorist attacks. There had been a number of incidents between January and the beginning of August including large vehicle borne bomb attacks on Moira, Portadown, Newry and Banbridge together with other worrying incidents which involved mortar or other explosive/incendiary devices. I have found that there was no reliable intelligence to suggest any particular town had been singled out for an attack. The terrorist threat was to the civilian population of Northern Ireland at large. Special Branch officers, in particular, were devoting major efforts to countering the threat posed by these dissident republicans. In July and August Special Branch handled many intelligence reports on possible terrorist related activities. In the five months before that, during and after the Omagh bomb there were many separate covert and specialist operations carried out against suspected active dissident republican terrorists.

[217] Following receipt of this information about a possible attack on the police, the Chief Constable claims, and this is not disputed, that the following actions and enquiries were initiated immediately:

(a) Officers contacted police colleagues in Omagh and Clogher to see if further information on those who had been named was available. There was no such information available.

(b) Contact was made with AGS with regard to E, who it is alleged was resident in the Republic of Ireland. Their immediate reaction, confirmed two days later, was that they had no knowledge of an individual with that nickname from the area mentioned by the caller.

(c) Family F and their address were checked for subversive traces. There were none.

(d) Arrangements were made for a Special Branch Officer to be present during the second call, which the caller had agreed to make the following evening, to ascertain further details and, if possible, arrange a meeting. No such call was made. The Chief Constable asserts that if the original call had been genuine or had been in connection with the Omagh bomb, then a subsequent call would surely have been made.

(e) Preliminary preparations, including a physical reconnaissance, were made for a possible surveillance operation against the address mentioned in the call, in case other checks proved positive. Significant practical difficulties in carrying out such an operation were identified and no surveillance was actually carried out. But despite the absence of the promised second phone call, this potential operation was not finally stood down until 10 August 1998.

(f) The decision to stand down was based on a number of factors. Those who had been named in the phone call had no known involvement with dissident republicans. Further checks, on both sides of the border, had failed to uncover any such links. The assessment by Special Branch was that those persons named were unlikely to be used by terrorists for an operation of this kind. Further the information on the type of attack did not match any other available Special Branch intelligence, or fit into the pattern of previous attacks (of 23 previous dissident attacks in 1998, only one had involved firearms).

(g) The only link to dissident republicans was that in the year preceding the Omagh bombing there had been a single sighting which placed D with Provisional IRA suspects in a pub frequented by republican sympathisers. The suggestion that E had strong Republican paramilitary involvement was investigated and was not found to have any substance.

(h) No information has come to light which would in any way connect C or D to the firm suspects for the Omagh bomb, or to republican dissidents in general. In the absence of any credible evidence against C and D, the PSNI did not consider there was any legal basis for arresting them for questioning about the Omagh bomb.

[218] While, of course, there was in some instances connections between smuggling and terrorism, Special Branch took the view that on the material available to it this was a smuggling operation which was being carried out and, in particular, was primarily concerned with dealing in illegal fuel. While, of course, I accept that many terrorists are smugglers and many smugglers are terrorists it does not follow that every smuggler is a terrorist and every smuggling operation is a terrorist one.

[219] Special Branch had reasonable grounds for concluding that the phone call was not a genuine call and that it was made for an ulterior motive. The suggestion made by the SIO is that the caller was a member of Special Branch/Customs hoping to create circumstances where surveillance would be redirected to the border in order to detect certain smugglers bringing laundered fuel over the border. The reasons for the suspicion that this call was made to reveal certain smugglers to the authorities include the following:

(i) The person to whom the call was originally directed.

(ii) The reference to the address, which gave it a police district but not the more usual postal district.

(iii) The description of the guns as AK47s, a term DRs do not use. Their term of choice is Kalashnikovs. AK47 is a name given by the authorities to this firearm.

(iv) As previously noted the failure to make the second call as promised.

[220] A fair view of all the evidence as it was available in early August 1998 leads inexorably to the conclusion that the phone call of 4 August 1998 giving the 15 August as the date of a proposed attack on the police had nothing whatsoever to do with the bombing which took place in Omagh. It was a tragic coincidence. Whatever provoked that phone call on 4 August 1998 it was most certainly not to warn of any imminent bomb attack on Omagh which would place all of its inhabitants and visitors at risk.

[221] It is also worth noting that the operational policing response to the threat of what would have been perceived to be a gun or rocket attack as indicated in the telephone call of 4 August 1998 would have been to increase security around police stations and limit the number of police officers on the ground, thus denying the terrorists easy targets. Vehicle control points would not have been set up. Accordingly, if the call on 4 August 1998 had been believed, it should have reduced police presence in and around Omagh on the fateful day and made conditions for the bombers easier.

[222] I do not see any evidence to challenge ACC Stephen Martin's averment that:

> "It was determined that there was no real and immediate threat arising from this information. Police nonetheless took reasonable operational measures in response to receipt of the anonymous information."

[223] It is undoubtedly true that there is evidence which does not portray SB in a favourable light after the bombing. PONI had every reason to believe that SB was being less than frank in failing to bring the 4 August phone call to her attention.

However, I have to consider all of the evidence relating to the 4 August phone call and to make a decision on that evidence.

[224] The identified risk, taking the threat at face value, was exclusively to the police, not to the public at large. More importantly, I am satisfied that it was fairly and objectively assessed by the authorities at the time and dismissed as an attempt to goad them into action to apprehend smugglers laundering illegal fuel.

[225] PONI's criticism of the police and its failure to draw the phone call of 4 August to her attention appears to be justified. But when the nature of the phone call is analysed, it is not possible to conclude that it raises a plausible argument that it required preventive action by the authorities either when considering it on its own, or along with other evidence. Indeed, there is no plausible argument that if the authorities had responded to the threat as made, that there would have been a real prospect that the Omagh bombing could have been prevented.

[226] As I have noted it is also of significance that the applicant has not been able to suggest what preventive measures should have been taken in response to such intelligence, other than to suggest that vehicle control points could have been set up around Omagh. Thus, precisely the opposite of what would have happened if the authorities had acted on 4 August phone call. The evidence before this court is to the effect that if the authorities had treated the 4th of August phone call as being genuine, the police response would have made it easier for the bombers, not more difficult.

[227] There are other issues raised by the respondent which confound the applicant's claims in respect of the 4 of August phone call. These include the opinion of the Omagh bomb SIO, Detective Chief Superintendent Norman Baxter. He thought that SB was working alongside HM Customs and Excise to try and prevent ongoing smuggling operations, the proceeds of which were used to fund terrorist activities. He had formed the view which accorded with SB's assessment that the nature of the call was consistent with someone who had connections to the SB in the area. He concluded:

> "It is my considered view that the August 4th phone call emanated from within Special Branch/Customs to create the circumstances where surveillance or other security force activities could be redirected to the border in order to detect [A] and [B] bringing laundered fuel across the border during August 1998."

[228] The authorities are in a much better position than the court to make an assessment of the information available. The court lacks knowledge, expertise and experience and should be wary of departing from an assessment of the authorities, unless there is plausible evidence which would allow it to do so. Such evidence is absent in this instant case. The authorities could not reasonably have expected on

the information they had that dissident republican terrorists were going to explode a bomb in Omagh on 15 August. Such an attack was not objectively verifiable. The authorities were entitled to expect, at the very worst, a weapons attack on police on 15 August 1998 with the objectively verifiable risk being to police personnel. What actually occurred was of a wholly different order.

[229] The telephone call did not constitute a "real and immediate threat" to the applicant or to any identifiable group to which he belonged. It was a threat specific to the police. The respondent makes the point that the scope of the obligation to act is limited to those circumstances in which there was a risk to those individuals who are the subject of the threat. The phone call identified no one at risk, save for the police. The operational measures which the authorities had to take in the context of that risk had to be "judged reasonably" and be such that they "might have been expected to avoid that risk" (see paragraph 116 of *Osman v United Kingdom* [Emphasis added]).

[230] There is other powerful evidence that the 4 August 1998 phone call had nothing to do with the Omagh bombing. That evidence includes that of DI Superintendent McVicker, the then SIO of the enquiry into the Omagh bombing, who prepared a report in which he considered the 4 August phone call. It was his firm view at the time "that the information did not refer to the Omagh bombing."

[231] There is also no force in the objection of the Special Advocate that even though the phone call had nothing to do with the Omagh bomb, if the call was looked at objectively in real time, it should have been acted upon and if it had been acted upon, then this arguably could have prevented the Omagh bombing taking place. The answer is that it was assessed objectively in real time and considered quite correctly (as it turned out) not to give rise to a plausible risk to the citizens of Northern Ireland and further, that if measures had been taken, then those measures would have made it easier, not more difficult for the terrorists.

[232] The phone call of 4 August 1998 gave rise to no specific or general risk to Omagh. It was assessed contemporaneously with expert knowledge and not considered to be a well-founded threat to the people of Omagh. I should also add that those with expert knowledge did not, after investigation, consider it to be a real threat to police officers either.

[233] The police response to the threat contained in the phone call comprised the following:

(i) DC Ruddy was put on duty in Omagh RUC Station on 5 August 1998 in the hope that the original caller would call back, as promised. He was accompanied by a SB officer and calls were diverted from the Omagh CID Office to the Omagh SB office. As noted, no follow up call was received.

(ii) Unsuccessful attempts were made to trace the call.

(iii) Instructions were given to attempt a surveillance operation at the address to which the weapons were going to be moved. However, investigation resulted in the conclusion that such a course of action was not viable – no option found.

(iv) Further details of what was done are set out in full in the PONI report which will be considered in the CLOSED judgment.

[234] In the circumstances the response of the police was both reasonable and proportionate.

[235] There have been a number of investigations into the 4 August phone call apart from the ones already mentioned:

(a) Detective Superintendent McArthur, the then SIO of the Omagh bomb inquiry, prepared a report prior to the PONI investigation analysing the 4 August call and setting out his reasoning for his "firm view at this time the information did not refer to the Omagh bombing."

(b) The PONI investigation report of December 2001 examined, inter alia, the 4 August phone call. PONI is wholly independent of the police and there is no evidence to suggest that PONI lacks either the powers or the willingness to carry out an effective investigation. However, any objective consideration of the PONI report (whether in OPEN or CLOSED) must reach the conclusion that there was no breach of the Article 2 positive obligation to prevent the killings. While alternative operational measures were considered, none were identified which could have altered the ultimate outcome.

(c) SB and PONI investigated the claim by Detective Chief Superintendent Baxter that it was an attempt by someone with inside knowledge to redirect authorities to stop laundered fuel being smuggled across the border. However, they did not consider there was sufficient evidence to substantiate the Detective Superintendent's conclusion and to bring a prosecution.

[236] On the basis of the evidence adduced before me, I am not satisfied that ground 1 if acted upon on its own, or if taken in conjunction with any of the other grounds, raises a plausible argument that there was a real prospect that the Omagh bomb could have been prevented.

Ground 2

[237] On 29 July 2001 the Sunday People published a story which identified Kevin Fulton as an RUC agent who had provided information to his handlers about the Omagh bomb, three days before it exploded. The claim in the article was that Kevin Fulton had "tipped off his handler about the device three days before the

blast." The explanation given for the RUC's failure to act was that the bomb-maker was also an RUC agent. The report states:

> "The RUC's top mole inside the RIRA says he warned – three days before the blast – that a large bomb bound for Northern Ireland has been made in the Republic.
>
> Again Fulton … claims he told his handlers where the mix for the massive car bomb was being made … Special Branch allegedly failed to act on the information because the man mixing the device is the security force's top mole inside the dissident terrorist group."

[238] Mr Southey highlighted what he said was the proven reliability and credibility of Kevin Fulton. He referred to the 2001 Police Ombudsman Report in which the Police Ombudsman was satisfied at the relevant time Kevin Fulton was considered by the police to be a reliable source. In the Smithwick Inquiry he was described by a Detective Sergeant in the Drug Squad as being "a very credible informant." Judge Cory, a Canadian judge, whose report prompted the setting up of the Smithwick Inquiry, did note that a number of varying views had been expressed about Kevin Fulton's credibility. He also noted he had deliberately lied and fed misinformation to his handlers. However, he concluded that he found Fulton to be "a very impressive and credible witness and I have formed the view that his evidence was truthful." (See 15.11.10).

[239] PONI in the 2001 Report noted at 6.3 that she reached a number of conclusions which included:

(a) Fulton did pass information relating to alleged dissident terrorist activities to a CID handler on five occasions between June and August 1998;

(b) The contact sheets in respect of each of these meetings were delivered to Special Branch;

(c) The contact sheets in respect of the two most important meetings on 23 July 1998 and 12 August 1998 cannot be found in Special Branch records;

(d) For the period up to August 1998 there is no formal written RUC record of Fulton being unreliable. In all his contacts with the RUC at this time he was graded by them as a reliable source;

(e) Notwithstanding his period of acknowledged unreliability in the latter part of 1994, Fulton had been granted *participating informant status* in July 1997 by the ACC Crime and in 1999 by another agency. Fulton received large rewards from the RUC during his involvement with them.

(f) The information contained in these contact sheets should have been seriously considered and assessed by Special Branch in the context of all other available and relevant information.

(g) Other intelligence available at the time would have added credence to Fulton's claim that A was a leading active dissident republican terrorist.

(h) Further action as a consequence of the receipt of the information should have been considered.

(i) Fulton had never claimed that the bomb was destined for Omagh.

(j) Fulton did not say that he took the RUC to the location in which the Omagh bomb was made as reported in the newspaper article.

(k) A should have been, and should now be, treated as a *firm* suspect by the Omagh Bomb Investigation Team and any potential role he may have had should have been investigated.

(l) The Omagh Bomb Review Team was unaware of Fulton's information throughout the period of the Review.

(m) The Omagh Bomb Investigation Team only received the Fulton intelligence after allegations appeared in the Sunday People newspaper on 29 July 2001.

PONI went on to conclude at 6.4:

> "However, taking into account all the information provided by Kevin Fulton, which has become available during the course of this investigation, the objective conclusion of the Police Ombudsman is that, even if reasonable action had been taken in respect of that intelligence alone it is unlikely that the Omagh bomb could have been prevented."

[240] Details of the information Kevin Fulton provided to the authorities immediately before the Omagh bombing are set out in the Bridger Report. They are:

(a) On 22 July 1998 he provided information that A was arranging for packages (believed to be firearms) and that A was responsible for organising a recent bomb attack at Newry. Further, that when Kevin Fulton had met him at about this time he smelt of fertiliser, all consistent with his involvement in the manufacture of bombs.

(b) On 4 August 1998 he had warned that the "RIRA were planning a show of strength";

(c) On 11 August 1998 he said that he had supplied A with a list of weapons he was looking for and that A had told Kevin Fulton that RIRA were about "to move something North over the next few days." The Omagh bomb exploded 4 days later. It is significant that Kevin Fulton was particularly keen to confirm with his handler after the Omagh bombing that this information had been passed on.

[241] The intelligence provided by Kevin Fulton cannot be dismissed summarily. The respondent has tried to traduce his reputation and has attempted to portray any evidence from Fulton as being irredeemably unreliable. But in the papers it is clear that favourable assessments have been made of his reliability and trustworthiness in the past and reliance had been placed upon his intelligence. At this stage this court should be slow to make any definitive judgment one way or the other. Certainly, there can be no doubt that some of the claims attributed to him by the Sunday People newspaper were incorrect. He did not:

(a) warn that there was a bomb destined for Omagh;

(b) nor did he ever take RUC Officers to the location where the Omagh bomb was made (although he claimed 5 months later to have shown the authorities a location which had been used for bomb making).

[242] Was intelligence obtained about other known active dissident republican terrorists? how were they treated in the run-up to the bombing on 15 August 1998. Should a different strategy of surveillance, arrest and questioning should have been employed to disrupt their activities. However, these matters need to be considered not only in this judgment, but also more particularly in the CLOSED one.

[243] As I have noted there have been many assessments of Kevin Fulton's reliability. It is true that some have been unfavourable, but most are on the whole testament to his usefulness as a CHIS. I am satisfied that it is arguable that the intelligence supplied by Kevin Fulton either on its own, or more importantly in conjunction with other intelligence about the activities of those who planned and planted the Omagh bomb (and other bombs) had a real prospect of preventing this tragedy. There was a strong prima facie case for proactive steps being taken against those involved in acts of violence on both sides of the border. However, there may be good reasons why the authorities adopted a cautious approach:

(a) The risk that a CHIS in RIRA would be uncovered if such action was taken;

(b) The threat that action against those involved in acts of violence both in Northern Ireland and the Republic of Ireland would result in the widening and deepening of the conflict resulting in bomb attacks in mainland Britain and ultimately the end of the peace process.

[244] Of course such decisions had to be made in real time and have to be judged in real time, and must not be judged with the hindsight of the Omagh bomb and its tragic consequences. However, ground 2 does have a part to play in determining whether or not the Omagh bombing could have been prevented. It is also important to emphasise that I am not reaching any conclusion on the facts, just assessing whether those facts give rise to an arguable breach of Article 2. It is also important that this ground is considered together with grounds 6, 7 and 9.

Ground 3

[245] The applicant claims that information supplied to the authorities by David Rupert, an informant and American citizen, in relation to the Omagh bomb was such that, if acted upon, there is a plausible argument that there was a real prospect of preventing the Omagh bombing.

[246] In particular the applicant claims that David Rupert named people as being linked to the Banbridge bombing on 1 August 1998 including someone by the name of "Curneen" who he had identified as far back as 11 April 1998. Telephone records would have linked a mobile phone registered to "Anthony Cunnane" to the Omagh bombing. If a review of the records had been carried out on a timely basis then they would have demonstrated Cunnane's phone being used to call a number ending in "585." That phone was linked to the Omagh bombing. Accordingly, it is suggested that the intelligence, if provided to those investigating the Banbridge bombing, may have permitted identification of those who were to be involved in the Omagh bombing before it took place.

[247] Further, David Rupert did identify Omagh as a possible target for a bomb. The context was that on 11 April 1998 in an e-mail he advised that dissident republicans from Donegal had possession of a bomb for use in Northern Ireland. David Rupert suggested that two viable targets for the bomb were Derry and Omagh. That information having been given to the RUC it is argued that it is claimed the response to the coded message of 15 April 1998 would have been different according to the Gold Commander and the SIO.

[248] The respondent's answer is that there was no information supplied by David Rupert that could arguably give rise to a real and immediate risk to the people of Omagh in August 1998. The e-mail of 11 April 1998 does not reach the requisite standard even on an arguable basis. Indeed, all the information available points to the opposite conclusion. David Rupert has given a witness statement in which he confirmed he did not have any knowledge of the Omagh bombing over and above the information which he provided in his original witness statement to the AGS.

[249] It is important to consider the evidence:

(a) David Rupert's existence as an agent for the authorities was revealed when he appeared to a Special Criminal Court in Dublin as witness for the prosecution at the trial of Michael McKevitt, the driving force behind RIRA. The e-mails of David Rupert to his handler were revealed in the course of the trial.

(b) During the civil trial brought by the applicant and others against those responsible for the Omagh bombing, documents were produced by the FBI relating to intelligence from David Rupert. The key document is the e-mail of 11 April 1998 referred to above, which identified Omagh and Derry as possible targets.

(c) There is nothing in the e-mail to suggest that Omagh and Derry were anything other than guesses on the part of David Rupert as he himself explained. It is important to note that Derry was selected by him as being "just a hunch."

(d) In any event the information was acted upon by the AGS at the time. They carried out a successful disruption operation on those involved. The respondent asserts that "it is not arguable that four months later the e-mail could provide a foundation for a continuing real and immediate risk to the lives of the people of Omagh from which a further operational response remained outstanding."

[250] On 6 March 2006 the role of David Rupert was explained to the families and copies of his e-mail distributed. It was made clear to all concerned that the intelligence was not related to Omagh and the terrorist unit concerned had been the subject of a successful disruption operation. This was not the RIRA unit which carried out the Omagh bombing.

[251] I am not satisfied that the e-mail of April 1998 or any other information provided by David Rupert reaches the necessary threshold on its own. The e-mail was speculation on the part of Rupert about the possible actions of a dissident group far removed from those who carried out the attack four months later. I do not see how this e-mail, either on its own or considered with other evidence gives rise to the right to have an Article 2 investigation.

[252] Further, the claim that because the surnames "Curneen" and "Cunnane" are similar sounding provides a weak basis to argue that if the authorities had acted against Curneen that gave rise to a real prospect of preventing the Omagh bombing. In truth the evidence against Curneen being so involved in the Omagh bombing is very weak. It is most unlikely he was involved at all. He appears to have been part of an entirely different group of terrorists to the South Armagh/North Louth gang who were responsible for the Omagh atrocity. It is Anthony Cunnane who was a member of this group. Looking at the totality of David Rupert's evidence, whether viewed separately or along with other intelligence, I am not satisfied that it gives rise

to a plausible argument that if acted upon it would have had a real prospect of preventing the Omagh bombing.

[253] However, I consider that David Rupert's evidence has to be further considered in the CLOSED judgment.

Ground 4

[254] It is alleged that the RUC were given information by the AGS on 13 August 1998 relating to the red Vauxhall Cavalier that was used in the Omagh bombing. In his skeleton argument the applicant says that "there is information that suggested AGS may have provided information on the day before the bombing that a bomb was to be moved to the border." It is claimed that there are two sources for this, firstly Detective Garda John White and secondly "a very reliable individual" whose identity John Ware, the Telegraph journalist did not feel able to disclose.

[255] It is clear from the sworn evidence of ACC Martin that the only information passed to the RUC by the AGS on 13 August 1998 was that a red Vauxhall car had been stolen. This was normal information sharing in accordance with agreed protocols. This car was one of 125 vehicles reported as stolen and passing between the AGS and the RUC from 9.00 pm on 12 August 1998 to 15 August 1998. It is highly relevant that there was no suggestion that this car was to be used for any terrorist purpose never mind a terrorist attack.

[256] The original message cannot be recovered but there is evidence to support the claims made by the RUC as to the nature of the message:

(i) The entry made in the PSNI database records the information received in the following way …

> "RUC were notified by AGS that a maroon Vauxhall Cavalier Registration No 91DL 2544 had been stolen."

That alert became active at 1.00 pm on 13 August 1998. It records a reference to the original document which, as I have said, cannot now be retrieved.

(ii) The evidence from the AGS on this issue was given to the Nally Investigation which had been established by the Irish Minister for Justice following the 2001 PONI Report. This confirmed that the information provided related only to the particulars of the car and did not include information that it may be used for terrorist purposes. No intelligence relating to the stolen Cavalier being destined for use by dissident republicans was ever received by the AGS prior to the bombing.

(iii) A Detective Superintendent for the PSNI told the Nally Investigation that this information while useful in dealing with ordinary crime –

> "Is not of much use for counter-terrorism given the high resource levels that have to be dedicated to covert policing and intelligence. They cannot dedicate this sort of resources to a hunch."

What is needed is some sort of indication from intelligence that one of the vehicles is likely to be used for terrorist purposes. This seems uncontroversial and was certainly not challenged by the applicant as being unreasonable and untruthful.

(iv) In any event Detective Garda White (whose claims led to the setting up of the Nally Investigation) never made the case that the AGS had provided to the RUC in advance of the Omagh bombing particulars of the car used by terrorists. The Nally Report expressly records that the AGS "had no intelligence about the red Vauxhall Cavalier in advance of the Omagh bombing which they failed to pass on to the RUC."

The Nally Investigation recorded that it was not aware *of any basis for such a suggestion*.

[257] On the applicant's case as presented in the OPEN hearings there are no grounds for concluding that the information provided by the AGS to the RUC related to any car which was to be used in a bombing, never mind one which was to take place in Omagh. The AGS did provide details of a stolen car, but this was one of many that had been stolen and certainly was not earmarked as a car which was to carry a bomb. The evidence is weak and does not support a plausible argument either on its own, or with other information, that it would have had a reasonable prospect of preventing the Omagh bombing.

Ground 5

[258] This ground relates to an alleged military operation carried out on 15 August 1998. It is claimed that information had been received from the AGS in connection with a potential car bomb on 15 August resulting in this military operation being deployed on the south Armagh/south Down area on the morning of 15 August 1998.

[259] The claim appears to be based on evidence from Detective Chief Superintendent Norman Baxter, the SIO to NIAC and upon allegations made in the BBC Panorama programme that the RUC had information on 14 August 1998 relating to a possible bomb attack on 15 August 1998. It is claimed as a direct consequence a military operation was carried out in South Down/South Armagh area on the morning of 15 August 1998.

[260] This claim was investigated in some detail by Sir Peter Gibson who reached the following conclusions which are set out in the published summary of his report. Then Sir Peter said:

> "The evidence that I have received is consistent and clear to the effect that there was nothing to suggest either that a bomb attack was going to take place on 15 August or that the town of Omagh was to be the target of any bomb attack. **There is no evidence whatever before me to make good the assertions in the Sunday Telegraph and the Panorama programme that, on 14 August, the Garda had warned the police of a likely attack."**
> [Paragraph 28].

ACC Martin in his second affidavit refers to the findings and search procedures set out in an email dated 6 July 2017 exhibited to his affidavit. This email states:

> "We have conducted a search of a number of archives, namely the Army operational archive, the files and other material held in GB such as Commanders' diaries, as well as our legacy intelligence material.
>
> Whilst reviewing all this material, we have found no evidence that the military surged or were tasked to surge and manpower into the SAMA or south Down areas on the evening of the 14th or at any time on the 15th. The operational material contained military log sheets which would record any military activity; they make no mention of any increase in activity or indeed any mention of patrolling patterns which would be considered to be **out of the norm** e.g. increased stop and search, or increased patrols on the ground. There is no evidence of any deliberate operation, technical or otherwise, and the intelligence does not support any passage of information from the police to the military to suggest anything imminent; it does refer to the earlier bombing campaign.
>
> In short we have conducted a fairly extensive search and run analytics to identify any evidence that the military may have been warned off or stood up to react, but drawn a blank. Sorry."

[261] The claim that there was a military operation on 15 August 1998 is unsupported by any reliable evidence. Sir Peter Gibson concluded in his Open Report that there was "no evidence whatsoever" before him in support of the assertion that the AGS had warned the RUC of a likely attack. I am satisfied that

there is no substance to this allegation. Furthermore, no arguable case is made out that this information gave rise to a breach of Article 2. The evidence of the SIO to NIAC was given on 11 November 2009 and NIAC published its report on 10 February 2010. The Gibson report was published in summary form on 16 January 2009. This allegation has been fully investigated and has been found to be baseless.

Grounds 6 and 7

[262] These Grounds are best considered together and also along with ground 9. Although further consideration of the CLOSED materials will be necessary.

[263] Lisa Purnell produced a report after the Omagh bomb dealing with cell-site analysis of the various activities of the dissident republican terrorists which I have set out above. As I have remarked no satisfactory explanation has been provided as to why this exercise was only apparently carried out after the Omagh bombing and why it only relates to some of the pre-Omagh bombing terrorist incidents. There may be a convincing reason why the exercise could not have been attempted until after 15 August 1998 and why it has been confined to five different incidents. But at present it is only possible to speculate. As I have said there were other incidents in respect of terrorist actions carried out by dissident republicans prior to the Omagh bomb in which no such analysis had apparently been carried out. For example, there were explosions at Enniskillen on 21 January 1998, Moira on 20 February 1998 and Belleek on 9 May 1998 to give but three examples. No satisfactory explanation has been offered by the respondent as to why such an investigation could not have been carried out much earlier and why it was necessary to wait for the Omagh bomb before undertaking such an exercise.

[264] There is also no information as to whether such an exercise was carried out in the Republic of Ireland after, for example, the recovery of 1½ tons of homemade explosive ("HME") in Howth in January 1998, the explosion at Hackballscross, Co Louth on 3 March 1998 or the car bomb found in Dundalk, Co Louth, on 21 March 1998.

[265] Obviously, the court has no control over what happens in the Republic of Ireland, and neither do the authorities. But I am unsighted as to what inquiries, if any, have been made and what responses have been received. There is also no evidence on the face of the OPEN materials as to whether any request has been made to the authorities in the Republic of Ireland to find out whether they also attempted to carry out a cell-site analysis, whether they were able to do so, whether any request has been made for the results of such an exercise and whether this request has been refused or granted. Indeed, I do not know what evidence, if any, has been obtained from the authorities in the Republic of Ireland in respect of the various explosions and attempted explosions which have occurred in that jurisdiction.

[266] What the court does know is that after the Omagh bombing cell-site analysis was carried out and the evidence used to obtain a judgment in the civil courts

against some of those involved in the Omagh bombing. I have set out in the judgment the names of some of those who were involved. This cell-site analysis provides clear prima facie evidence to the authorities as to whom was involved in some of the terrorist attacks in the six months leading up to Omagh. The authorities were entitled given the evidence, which should have been available, to use it to disrupt those dissident republicans who had been involved in the previous incidents.

[267] In respect of those living in Northern Ireland there were powers of arrest, powers to enter and search their premises given that this cell-site information provided, at the very least, reasonable grounds that they had committed a scheduled offence, powers to stop and powers to detain.

[268] Roadblocks could have been set up close to where these dissident terrorists lived in Northern Ireland. For example, roadblocks could have been set up around Drumintee, where Peter and Liam Campbell lived and they could have been arrested given that there were reasonable grounds for suspecting that these two men were actively engaged in recent terrorist activities. There were powers to search their premises, there were powers to stop and question them for the purpose of ascertaining their identity and movements and what they knew concerning recent explosions.

[269] There is no doubt that the authorities in Northern Ireland could have made life very uncomfortable for those dissident republicans who could have been identified on the OPEN evidence which was potentially available as being involved in terrorist activities in the six months leading up to Omagh. Of course, such actions might have had repercussions and it is entirely proper that those in authority considered what those repercussions were likely to be. But the court at present is looking only at what is arguable. On the present evidence it would have been possible to target those who appeared to be involved in previous bomb attacks, both north and south of the border. It would obviously be much better if there was a joint approach on behalf of the RUC and the AGS. It is arguable that such a pro-active policy would have had a real prospect of preventing the Omagh bomb because it would have made life so much more difficult for the dissident republicans living in Northern Ireland who were intent on carrying out a terrorist campaign. It would also have disrupted those from Northern Ireland who were living in the Republic of Ireland or those whose normal place of residence was the Republic of Ireland from entering Northern Ireland because of the risk to them of arrest.

[270] It is not clear whether the AGS in the Republic of Ireland could also have targeted those involved in the earlier incidents, if they were given the necessary information. Certainly, they had their own way of keeping track on the dissident republican terrorists south of the border. However, the court does not know:

(a) What steps were taken to share intelligence with AGS;

(b) If intelligence was not shared with AGS, why not;

(c) If information was shared, whether this was a two-way process;

(d) If it was shared, whether any information was held back and why that information was held back;

(e) If intelligence was shared, what intelligence was given and received and with what results?

[271] AGS had 24 hour coverage of Michael McKevitt apparently and he has been described, not inappropriately, on the basis of the evidence adduced as the Moriarty, the criminal mastermind, behind the dissident activity. I would have expected that the authorities would know of the terrorists operating on their side of the border and share that information with the authorities on the other side of the border. But did that happen? If not, what is the reason for this failure?

[272] Detective Chief Superintendent Baxter's evidence to NIAC makes sense from his point of view. He is having to deal with the aftermath of the Omagh bomb when he finds out that there had been previous bomb attacks involving some of the same people who have been responsible for earlier terrorist incidents, Liam and Peter Campbell, Oliver Treanor, Colm Murphy, Seamus McKenna etc. He obviously found it difficult to understand why active steps were not taken to hunt down and bring those perpetrators to justice. No wonder he was perturbed that key intelligence was apparently not shared with CID, thus making investigation of these terrorists' activities that much more difficult.

[273] But there are a number of factors which also had to be taken into account:

(i) A cell-site analysis may not have been carried out in respect of these earlier attacks. There may be a good reason why no such exercise was performed. While I appreciate that it is difficult, expensive and time consuming these do not appear in the overall context to be good reasons. But prima facie, it seems an obvious step to have taken and then to have shared that information with those carrying out the investigation, including AGS who had their own enquiries to make given the bombings which were taking place south of the border. A reciprocal exchange of information on those considered responsible would have made good sense.

(ii) There had been no loss of life caused by any of these explosions before August 1998. They had been managed successfully. The exercise by the authorities of their full array of powers on those against whom there was evidence of involvement in earlier bomb attacks could have provoked an ugly reaction, not just from those involved, but from sympathisers in the border areas. There was a risk that the nascent peace process could be aborted and

the possibility of a return to open hostilities with PIRA being unable to avoid being dragged back into the armed struggle.

[274] Fortunately, these are not matters for this court on the hearing of this application, but it is important that I highlight them. They are not easy decisions for the authorities and the government to make. There was much to lose by escalating security prior to Omagh, although it may not appear that way by looking back on what happened in the shadow of the Omagh bomb. The evidence is that those who played leading roles in terrorist incidents which preceded Omagh, could easily have been identified and targeted. These include the Campbells, Colm Murphy, Oliver Traynor, Sean Hoey, Joe Fee, Gerald McMullan, Seamus McKenna, Mooch Blair, Declan McComish and, of course, Michael McKevitt. However, I am satisfied that arguable grounds are disclosed in respect of grounds 6 and 7 and 9 and it is important that an Article 2 compliant investigation be held to look into them. Furthermore, if possible, it makes sense that a similar inquiry is held in the Republic of Ireland looking at the self-same issues and, in particular, what intelligence was shared between both states. If the full panoply of legal powers available to the authorities had been used to disrupt these terrorists' activities, especially if coordinated on both sides of the border, then arguably there must have been a real prospect of preventing the Omagh bombing.

Ground 8

[275] The applicant claims that information shared by AGS with the RUC related to intelligence obtained by Detective Sergeant John White of AGS from the agent known by the name of "Paddy Dixon" relating to dissident Republican activity. In 2002 Detective White made a statement to PSNI regarding the information that had been obtained. The complaint made by the applicant is very general as no attempt was made to identify the content of the intelligence which it is contended gave rise to the real and immediate risk to the life of the inhabitants of Omagh.

[276] Apparently Detective Sergeant John White of AGS claims that prior to the Omagh bombing he was a handler for an informant, Paddy Dixon who was involved in stealing cars for known criminals including dissident republicans. Detective Sergeant White submitted a written report to Detective Chief Superintendent Jennings on 18 August 1998, three days after the Omagh bomb. The contents of this report are summarised by the Nally report as follows:

> "(a) On or about 24/25 August 1998 (sic), Subversive X telephoned White's informant and said he would need the informant's team to get a special order in two weeks or so.
>
> (b) Subversive X did not telephone the informant again until Monday 10 August when he stated he would get one of the car thieves the following night, Tuesday

11 August to get a special order for him with **one of his own boys**.

(c) Subversive X did not telephone for the car thief on Tuesday or Wednesday and X made telephone contact with the informant on the morning of Thursday 13 August at approximately 10.00 am stating he would need a car thief that night and would ring later.

(d) Subversive X rang between 9.30 pm and 10.00 pm. One of the car thieves and one of Subversive X's associates went out together in a car that night – Thursday – and returned at about 3/4 am having failed to get a car. The car thief told the informant that he and Subversive X's associate would meet again the following night.

(e) The informant got a phone call on Friday 14 August at approximately 2.00 pm from Subversive X's associate saying everything was off until Monday 17 August 1998. Detective Sergeant White met the informant at noon on Tuesday 18 August, by which stage the informant had not heard from Subversive X or his associate."

[277] Detective Sergeant White was interviewed subsequently by two members of PSNI Omagh Investigation Team on 21 August 2002. He did not allege at any time that:

(i) The informant had stolen or supplied the actual bomb car, that is the red Vauxhall Cavalier used in the Omagh bomb.

(ii) AGS knew the car was to be used for terrorist purposes or the target for any attack.

(iii) AGS had allowed the actual Omagh bomb car to travel into Northern Ireland without attempting to apprehend it.

(iv) He, the informant or Jennings knew the make, model or colour of the car Subversive X had obtained from elsewhere.

(v) He, the informant or Jennings knew from where the car had been obtained, or by whom it had been obtained.

(vi) He, the informant or Jennings knew that the target of the bomb was Omagh, or the date of any intended attack.

(vii) AGS passed any information to the RUC of anything to do with the informant's activities in July/August 1998.

Accordingly, ACC Martin states:

> "It would appear therefore that the height of D/Sgt White's allegations is that Subversive X/the Real IRA were seeking a vehicle for use in a bombing in Northern Ireland in late July 1998, they were seeking a vehicle in mid-August 1998, they obtained a vehicle of unknown make/model and that AGS knew of this and did not pass information on to the RUC."

[278] This matter was subsequently investigated by the Nally group which concluded that the following key facts "should be kept clearly in mind", namely:

(a) While an attempt to do so was made, no vehicle was stolen for the RIRA by the team of D/Sgt White's informant in the days preceding the Omagh bombing.

(b) The red Vauxhall Cavalier which was used in the Omagh bombing was stolen in Carrickmacross, County Monaghan sometime between 11.05 pm on 12 August 1998 and 3.30 pm on 13 August 1998.

(c) While the particulars of the red Vauxhall Cavalier stolen at Carrickmacross was sent at 1.00 pm on Thursday 13 August 1998 to the RUC, no intelligence relating to the stolen Cavalier having been destined for the RIRA was ever received by AGS prior to the bombing.

(d) The theft of the red Vauxhall Cavalier at Carrickmacross took place on the night **before** the night in which Detective Sergeant White said the informant went out with an associate of Subversive X to try and steal a vehicle. This raised the suspicion over whether the vehicle which the informant was supposed to steal with Subversive X was in fact intended for use in the Omagh bomb at all.

[279] The Nally group concluded the allegations made by Detective Sergeant White were inconsistent and without foundation for the following reasons:

(i) They considered the allegation that DCS Jennings would have been prepared to let a vehicle, if one had been found, go through to Northern Ireland for use in the bombing to be incredible. Not only would this have been a gross dereliction of DCS Jennings' duty, he would have been most unlikely to bring a witness along to his conversation with Detective Sergeant White.

(ii) The written record kept by Detective Sergeant White was made on 18 August 1998. The Nally group recorded that the report dealt "at some length with several matters having no relevance to that atrocity while omitting any reference to what on his version of events were the really relevant parts, namely that a car was being sought for bombing in Northern Ireland and that a car had by 14 August been obtained elsewhere." [paragraph 4.5]

(iii) In the written report Detective Sergeant White submitted he left out the two key elements which would have given some point to his insistence to put things on the record, namely that Subversive X wanted the car for a spectacular bombing in Northern Ireland and that Subversive X told the informant on 14 August that RIRA had obtained a vehicle elsewhere. The Nally group noted that the omission of these elements meant, if they were indeed true, that Detective Sergeant White's written report seriously distorted what had happened. The Nally group concluded that Detective Sergeant White's allegation was "unconvincing" and rejected it at paragraph 2.43.

(iv) The group considered his claim of coming forward with allegations was motivated by his sense of guilt and responsibility for the Omagh bombing as being "wholly inadequate and unconvincing" when he acknowledged that he did not make any decisions personally to let any vehicle through and no vehicle was in fact allowed to go through. They considered that there was **no good reason** for the Detective Sergeant to have suffered from or to have been motivated by a sense of guilt or responsibility for the Omagh bomb. [paragraph 4.2]

(v) Detective Sergeant White did not come forward with any allegations until he was arrested for offences on 21 March 2000 (for which he was subsequently acquitted). [See paragraphs 4.2.5-4.2.6]

[280] Although the Nally group attempted to question the informant through his legal advisor, the informant was not prepared to answer any questions.

[281] Therefore even taking the applicant's evidence at its highest, no information was made available to the RUC by the AGS about the activities of Detective Sergeant White's informant and his activities prior to the bombing which could arguably have constituted a real and immediate risk to the life of the people of Omagh or Northern Ireland.

Ground 9

[282] This ground has to be considered in conjunction with grounds 6 and 7. On 11 September 2009 the former SIO of the Omagh bombing investigation from 2002 until his retirement in November 2008, Detective Chief Superintendent Norman Baxter gave evidence to NIAC. In response to being asked why he suspected Sir Peter was not correct in his view that there was nothing that could

have helped the Omagh bomb inquiry team, Detective Chief Superintendent Norman Baxter said he considered that if telephone numbers had been available they should have been shared with investigators at an early stage as that could have helped the Omagh inquiry team. He considered Sir Peter had indicated a different view, that there was nothing (in any information that might have been available) that could have helped the Omagh bomb inquiry team.

[283] The SIO refused to speculate on what might have happened if some of those had been arrested, but he did accept that the disruption may have prevented the Omagh bombing. He said:

> "I think it is inconceivable on mainland UK if you had a series of bombs happening every week or two weeks that there would not have been arrests and there would not have been Government intervention to ensure that this team was disrupted."

[284] He went on to say:

> "I am satisfied that all the intelligence in relation to Omagh was disseminated. I am also satisfied from that intelligence the Omagh bomb on that day could not have been prevented – what I am saying is that there were a number of opportunities in the past when this group could have been disrupted."

Detective Chief Superintendent Baxter's opinion is deserving of respect and he has no obvious axe to grind.

[285] The then ACC Harris, when giving evidence to NIAC on behalf of PSNI, hinted at two reasons why Special Branch may have acted cautiously in the handling of intelligence:

> "One was the sensitivity of the relationship with GCHQ and then the sensitivity of the particular phone number."

[286] As a consequence of NIAC's conclusion the issue of intelligence sharing practices resulted in the Chief Constable referring to PONI a number of issues, including both the RUC's relationship with GCHQ and the way in which intelligence was handled in relation to the Omagh bomb. PONI issued an open report on the investigation in October 2014. This report was issued after PONI had reviewed various materials held in relation to previous inquiries which had been carried out, had seen the closed Gibson report, met Sir Peter Gibson and had complete access to all relevant intelligence held by PSNI. PONI considered the question of whether action could have been taken in relation to the earlier bomb attacks. It noted an

intelligence gathering operation was in place in the south Armagh border area and concluded:

> "3.6 This intelligence operation assisted in generating information in relation to members of the group, albeit significant in number, believed to have been responsible for the Omagh bomb, including some of the police subsequently identified as suspects.
>
> 3.7 Neither the investigation subject of my report or my predecessor in 2001, nor my current inquiry, identified the intelligence held by PSNI in relation to previous bomb attacks which, if acted on, would have prevented the Omagh bomb."

[287] In his summary report Sir Peter Gibson had commented as follows:

> "Once intercept material reached RUC HQ and the Special Branch South, any further publication and release of the material, even to another part, or other members of Special Branch, was subject to strict restrictions imposed by GCHQ designed to achieve a balance between providing support to customers like Special Branch and protecting GCHQ's capabilities, sources and methods. GCHQ also sought to ensure compliance with its legal obligations, in particular that required of the Director of GCHQ by Section 4(2)(a) of the Intelligence Services Act 1994, viz to ensure that no information was disclosed by GCHQ except so far as necessary for the proper discharge of its functions or for the purpose of any criminal proceedings. If those persons within RUC HQ and Special Branch South who received intelligence from GCHQ wanted to disseminate it within the RUC or even Special Branch a set procedure had to be followed. GCHQ's permission had to be sought for the use of intelligence in a **sanitised** form, that is, without revealing its source, to carry out some authorised action."

[288] PONI was impressed, following his conversation with former Special Branch Officers, of the importance in complying with the agreement established with GCHQ, central to which was the prevailing legislation. There was a genuine and real fear that:

> "Deliberate disclosure outside the permitted legislative framework may have been an offence contrary to the Official Secrets Act 1989. The degree of importance police

> attached to the maintenance of their relationship with the intelligence services for the purpose of on-going national security operations is less clear but is likely to have been a consideration in the decision-making."

[289] PONI reached three separate conclusions. Firstly, at paragraph 3.20 he stated:

> "I have obtained independent expert legal opinion which leads me to conclude that the actions of the officers were reasonable given what they thought the restrictions on disclosure placed on police were at that time."

Secondly, his conclusion at 4.1 namely:

> "My investigation has not identified evidence that intelligence was available to the police which, if acted upon, could have prevented the Omagh bombing."

Thirdly, he concluded:

> "It is also my assessment that Special Branch acted in accordance with a reasonable understanding of the agreement and legislation in place in August/September 1998 and any breach of IOCA could have rendered evidence obtained inadmissible in any subsequent criminal proceedings resulting in the proceedings being stayed and risk jeopardising the credibility of the Omagh investigation."

[290] It is also clear that Special Branch officers acted cautiously and **reasonably** on the basis of what they considered to be their legal obligations. In any event there is a positive finding by PONI that there was no intelligence "available to the police, which if acted upon could prevented the Omagh bombing." However, I am satisfied from the evidence of the SIO, Detective Chief Superintendent Norman Baxter, that there is an arguable case of breach of Article 2 either taken on its own or in conjunction with the grounds 6 and 7 which I have discussed earlier in this judgment. There was arguably a failure of policy. Instead of encouraging the authorities to use all the legal powers given to them to deal with terrorism there was a de-escalation of security "which was impaired by political thinking." On the basis of the OPEN evidence there is a plausible argument whether taken on its own, or preferably with grounds 6 and 7, that there was a failure to access all the intelligence potentially available in respect of earlier dissident attacks and that this would have enabled the authorities to so disrupt those at the heart of dissident terrorism and that consequently there was a real prospect of avoiding the Omagh bombing.

Ground 10

[291] It is claimed by the applicant that there was a surveillance operation taking place on 15 August 1998 which may have involved methods of surveillance employed by FBI. This suggestion appears in the Bridger report and is premised on the basis that the AGS had placed a tracking device in the vehicle and had used satellites to monitor its progress. The Bridger report states:

> "If a tracking device was on a bomb vehicle on 15 August 1998, it would show beyond doubt that the people who planted the bomb in Omagh would be monitored on that day."

It goes on to say that:

> "The Group believes that it could conceivably have been the case that the vehicle was first **tracked** in the ROI and as it crossed the border that tracking capability was afforded by a conventional surveillance team from the RUC and, of course, with the assistance of GCHQ."

[292] There is not a shred of plausible evidence to support these claims. Sir Ronnie Flanagan has sworn an affidavit in respect of this allegation. He makes it absolutely clear that:

(a) There was no surveillance carried out by the FBI and this had been confirmed by Mr Louis Freeh, then Director of the FBI.

(b) The suggestion that the bomb car was covered by satellite was wrong.

[293] These allegations are speculative. I agree with the respondent's submission that it appears to be based on two separate misconceptions:

> "(a) As to the role of Paddy Dixon and DCS Jennings;
>
> (b) As to the content of the conversation between Sir Ronnie Flanagan and Laurence Rush at the meeting of March 2001."

There is no substance to ground 10.

Rationality Challenge

[294] The applicant also relied upon the respondent's arguable breach of common law reasonableness ("rationality") in making her decision to refuse to grant to the applicant a public inquiry as to whether the Omagh bomb could have been

prevented. This was a fall-back position for the applicant to be pursued if the HRA did not apply to the present proceedings. Presumably that is why the judge who granted leave to the other 10 grounds of preventability did not consider it necessary to give leave on this particular ground. For the reasons I have set out above, I consider that the HRA does apply to the present application and therefore, the claim advanced under the rationality banner is somewhat redundant. I therefore intend to deal with it in a summary fashion.

[295] The applicant claims that the court should decide if it is rational to decline to hold an inquiry under the 2005 Act. The applicant relies on the following matters:

(i) In *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2016] AC 1355 there was recognition that it can be rational to decline to conduct a public inquiry: see paragraph [138].

(ii) Whether or not the HRA applies, the submissions made on behalf of the applicant demonstrate that Article 2 requires a compliant inquiry.

(iii) The submissions made on behalf of the applicant also demonstrate that the ECtHR would conclude that it has jurisdiction to consider the alleged breach of Article 2 and would disregard any finding that HRA does not apply.

(iv) In *Kennedy v Charity Commission* [2014] UKSC 20, Lord Mance in giving judgment considered that the rigid test for irrationality which was once thought applicable under the Wednesbury principle should be replaced by a context driven approach. He said that "the nature of judicial review in every case depends upon the context" (see paragraph [51]). Where fundamental rights are at stake "it is a truism that the scrutiny is likely to be more intense than where other interests are involved" (see paragraph [54]).

(v) In *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591, Lord Carnwath noted that in *Kennedy v Charity Commission* the majority of the court endorsed a flexible approach to principles of judicial review, such that the intensity of the scrutiny and the weight to be given to the primary decision-maker's view depended upon the gravity or importance of the matters at issue (per paragraphs 60 and 107).

(vi) Finally, the fact that the issue is whether the decision not to hold a public inquiry is rational means that the conclusion at paragraph 32 of *Re McKerr's Application for Judicial Review* [2004] UKHL 12 that there is no freestanding obligation equivalent to Article 2 can be distinguished.

[296] The respondent submitted that there was no merit in this additional ground of challenge, both as a matter of legal principle and also on the facts.

[297] Firstly, the relationship between the common law and the State's obligation to investigate a death or deaths under Article 2 had been considered by the House of Lords in *Re McKerr's Application for Judicial Review* and by the Supreme Court in *Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69. The House of Lords had rejected the submission emphatically that the common law included an obligation to investigate suspicious deaths which was equivalent to that which operated under Article 2 in *Re McKerr's Application for Judicial Review*. In the United Kingdom, the investigation into suspicious deaths was a matter for which Parliament had traditionally legislated by means of coroner's inquests and now, the HRA. It was therefore inconsistent with the legislative scheme of investigation for the court to develop parallel common law rules. Lord Nicholls had expressed the matter in the following way:

> "[32] … The effect of counsel's submission, if accepted, would be that the court would create an overriding common law obligation on the state, corresponding to art 2 of the Convention, in an area of the law for which Parliament has long legislated. The courts have always been slow to develop the common law by entering, or re-entering, a field regulated by legislation. Rightly so, because otherwise there would inevitably be the prospect of the common law shaping powers and duties and provisions inconsistent with those prescribed by Parliament."

[298] Lord Hoffman was more emphatic in his rejection of the argument. He said:

> "[73]… The very notion of such a principle, capable of overriding detailed statutory and common law rules is alien to the traditions of the common law. The common law develops from case to case in harmony with statute. Its principles are generalisations from detailed rules, not abstract propositions from which those rules are deduced. Still less does it provide a solvent for any difficulties which may exist in the rules enacted by Parliament …"

[299] The Supreme Court in *R (Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another* reached the same conclusion and Lord Neuberger rejected any contention that "customary international law, through the medium of the common law, requires the UK Government to hold an inquiry into the killings" (see paragraphs 118 - 122).

[300] The applicant does not submit that there is a freestanding common law obligation to hold a public inquiry. However, that is the substance of his argument, namely that because an investigative duty would arise under Article 2 if it applied, the facts of the case are such that it is irrational not to hold a public inquiry. The

respondent points out correctly that precisely such an argument was rejected in both *Re McKerr's Application for Judicial Review* and *R* (*Keyu and others) v Secretary of State for Foreign and Commonwealth Affairs and another* although it was shaped in different language. However, one thing is clear. Both the House of Lords and the Supreme Court have found that the common law will not impose an obligation to investigate a suspicious death in the absence of an express legislative obligation. In those circumstances it cannot be irrational as a matter of common law, to refuse to establish a public inquiry into a death, simply on account of the absence of a statutory duty.

[301] If I am wrong, and the decision could be challenged on the grounds of common law reasonableness, then I am satisfied that the decision of the respondent not to hold a public inquiry, was rational. I can summarise the position briefly as follows:

(a) The applicant's claim for a public inquiry relied on the Bridger Report produced for the OSSHG. This was carefully analysed and the allegations contained in the report were duly considered by the respondent.

(b) The respondent consulted widely including the MOD, the Cabinet Office, the Security Office, GCHQ and the Chief Constable seeking their responses to the Report and asking whether it raised any more allegations or issues which had not been considered or of which they were not aware.

(c) The respondent met with the Chief Constable and the Irish government to discuss the case and how it could best be resolved.

(d) The respondent invited comments from the DPP about a future inquiry.

(e) The respondent met the applicant and members of OSSHG. She also met members of Families Moving On.

[302] The respondent was also provided with a very detailed submission setting out the background to a request for an inquiry, the considered views of all the public authorities, the history of previous investigations into the Omagh bomb and legal advice. Her reasons for not doing so are set out in the OPEN affidavit of Mark Larmour, a Director within the Northern Ireland Office. These included:

(i) There was no compelling new evidence over and above that which had already been considered during the previous inquiry.

(ii) There had already been a substantial number of prior reviews and investigations into both the bomb itself and the investigation of whether it could have been prevented.

(iii) There had been substantial consultation with stakeholders. Some supported an inquiry, but some did not. In particular, some of the families and survivors

do not support an inquiry and thought that it would give rise to further trauma.

(iv) Government policy was against the establishment of potentially long running expensive inquiries into the past in Northern Ireland.

(v) The most recent PONI investigation remained outstanding and was likely to address many of the issues concerned raised by the applicant relating to the police.

(vi) A cross-border inquiry was unlikely to be feasible without primary legislation.

(v) There had been considerable changes in policing in Northern Ireland since 1998. In particular, the first PONI report had reviewed the RUC investigation of the bombing and had made many recommendations which had been and were being implemented already.

[303] There can surely be no doubt that the consideration given to the issue whether to hold a public inquiry was both detailed and comprehensive. However, I am obliged, given the allegation of breach of human rights, to give the matter the intensive scrutiny it deserves. If I am wrong and there is a freestanding right at common law to investigate suspicious deaths, (which I find there is not) I do not accept that there is an arguable case that the decision offends common law reasonableness. I am satisfied the decision of the respondent not to hold a public inquiry was one that was reasonable when all the circumstances are considered. I can summarise the position briefly.

[304] There is no arguable case that the decision to refuse to hold a public inquiry is flawed. There is no doubt that the respondent and the Prime Minister were aware of the views of both OSSHG and FMO on the advantages and disadvantages of holding a public inquiry. The suggestion that the respondent regarded the Gibson review as akin to a public inquiry is simply wrong. What the respondent was saying was that she doubted whether a public inquiry, which would have taken in CLOSED evidence, would tell the relatives anything more. There is nothing "irrational" in holding such an opinion and it certainly does not mean that she regarded the Gibson Review as the equivalent of a public inquiry.

[305] The respondent had read the Bridger Report and seen the Chief Constable's response to the main allegations. Many of those were to be addressed by the investigation being carried out by PONI. This accurately described the situation at the time. The respondent obviously gave the issue of whether there should be a public inquiry close thought and careful consideration. I am not satisfied on the evidence that it is arguable that her decision can be impugned as being irrational.

[306] The respondent was entitled to conclude on the basis of the investigations held to date that there had been no failure to uncover the truth or to hide it from the

public. There were certain matters that could not be revealed to the general public and they will be considered in the CLOSED judgment. Secondly, it was not irrational for the respondent to conclude from all the evidence that there had been sufficient family involvement to satisfy Article 2 given the nature of the matters under consideration. Thirdly, there was no arguable evidence offered that the Republic of Ireland would co-operate with the public inquiry on the other side of the border. Finally, at the time of the decision the most recent PONI investigation was underway and the question of whether there could have been earlier arrests was under consideration.

[307] The Inquiries Act 2005 provides a framework for the setting up and conduct of public inquiries. It confers a power solely on Ministers (section 1) and Parliament's choice reflects the multi-factorial nature of the decision to establish an inquiry, central to which is an assessment of the public interest at the relevant time.

[308] I agree with the submission of the respondent that Ministers are in the best position to make such an assessment given their "constitutional role as accountable public representatives charged with acting in the public interest." They are also best placed logistically given the resources at their disposal to obtain all necessary information to make the decision fairly and to then implement it.

[309] In the circumstances I refuse leave to the applicant to challenge the Secretary of State's decision not to hold a public inquiry on the basis that it offends common law reasonableness.

G. CONCLUSION

[310] I am satisfied that grounds 2, 6, 7 and 9 when considered separately or together give rise to plausible arguments that there was a real prospect of preventing the Omagh bombing. These grounds involve, inter alia, the consideration of terrorist activity on both sides of the border by prominent dissident terrorist republicans leading up to the Omagh bomb. It will necessarily involve the scrutiny of both OPEN and CLOSED material obtained on both sides of the border. It is not within my power to order any type of investigation to take place in the Republic of Ireland but there is a real advantage in an Article 2 compliant investigation proceeding in the Republic of Ireland simultaneously with one in Northern Ireland. Any investigation will have to look specifically at the issue of whether a more proactive campaign of disruption, especially if co-ordinated north and south of the border, had a real prospect of preventing the Omagh bombing, and whether, without the benefit of hindsight, the potential advantages of taking a much more aggressive approach towards the suspected terrorists outweighed the potential disadvantages inherent in such an approach.

[311] I am not going to order a public inquiry to look at the arguable grounds of preventability. I do not intend to be prescriptive. However, it is for the

government(s) to hold an investigation that is Article 2 compliant and which can receive both OPEN and CLOSED materials on grounds 2, 6, 7 and 9.