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

Delivered: 24/04/2024

IN THE CORONER'S COURT IN NORTHERN IRELAND

BEFORE HHJ McGURGAN, SITTING AS A CORONER

**IN THE MATTER OF AN INQUEST INTO THE DEATH OF
FERGAL McCUSKER**

**PROVISIONAL RULING ON THE VIABILITY OF THE INQUEST
PROCEEDING**

Introduction

[1] This is an OPEN ruling. I have determined that I can adequately express my decision in an OPEN ruling without the need for a CLOSED ruling.

[2] The inquest relates to the death of Fergal McCusker. Mr McCusker was killed on 18 January 1998. From the available evidence gathered so far it is likely that Mr McCusker was shot dead at the back of Fairhill youth club, or youth centre, at Tirkane Road, Maghera in and around 1:30am on 18 January 1998.

[3] Mr McCusker had recently returned from the United States. Later on 18 January 1998 the Loyalist Volunteer Force from south Derry claimed responsibility for the killing, in an anonymous call to a member of the press. This admission of responsibility was reiterated in another call to Ulster Television.

[4] A police investigation commenced into the murder, which included the arrest and interview of suspects, however no-one has ever been prosecuted or convicted for any involvement in Mr McCusker's death.

Procedural history of this inquest

[5] In my view it is important to set out the recent history of this inquest.

[6] At a hearing in June 2022 I listed this inquest for a six-week hearing commencing 16 January 2023. The review of the PSNI sensitive material by my legal team was completed by 24 October 2022. A Public Interest Immunity ("PII") hearing was scheduled by me for 13 December 2022. In the run-up to that PII hearing

PSNI counsel indicated it would not be in a position to deal with the PII application and hearing on 13 December 2022. I subsequently directed that PSNI counsel's opinion on the PII redactions was to be completed by 19 December 2022 and the PII hearing rescheduled for 16 January 2023.

[7] By letter of 1 December 2022 I was informed by the Crown Solicitors Office ("CSO") that due to demand on resources, the PSNI were not in a position to comply with my direction. At the Preliminary Hearing ("PH") on 19 December 2022 counsel for the PSNI was unable to provide a timescale for completion of the PII process. The final hearing was moved to commence 13 February 2023 on a modular basis. I emphasise that the case was moved in order to accommodate the PSNI's request for more time.

[8] At a review hearing on 16 January 2023 the PSNI were unable to provide a timescale for the disclosure of sensitive material. I was informed that the material was marked up and undergoing scheduling.

[9] Module 1 of the evidence commenced. At the conclusion of Module 1 on 16 February 2023 a CMR hearing was held in which I was informed by PSNI counsel that the material was marked up and ready for counsel's opinion. The following timetable was put forward by PSNI counsel:

- (a) Opinion to be with the Chief Constable by the end of June 2023.
- (b) Material to be put before the Secretary of State by July 2023
- (c) PII hearing early September 2023

[10] I was reassured by PSNI counsel that the PII process would not jeopardise Module 2 which I listed for end of November 2023. Indeed, the timescale proposed by PSNI would have given time for the PII process to be completed well before November 2023.

[11] A PII hearing was duly scheduled for 5 and 6 September 2023 which was later rescheduled to 4 & 6 September 2023. By way of a directed update on 8 June 2023, I was reassured that the dates as set out at the hearing in February 2023 were still achievable.

[12] The next review hearing took place on 16 June 2023. At that hearing I received assurances that significant work had been done and that the PII timetable was on track. The sensitive bundles provisionally redacted with PII and article 2 and article 8 redactions were to be disclosed to the Properly Interested Person(s) ("PIPs") by 17 August 2023. PSNI counsel was directed by me to flag any issues before this date and 18 August 2023 was pencilled in as a provisional date for a further preliminary hearing if required. CSNI wrote to CSO on 7 and 14

August seeking an update on progress with the sensitive bundles without a response.

[13] On 22 August 2023 correspondence was received from the CSO that the PSNI would not be able to make the PII application on 4 and 6 September and would require some further time. An OPEN and CLOSED hearing was scheduled for 5 September 2023. In OPEN proceedings PSNI senior counsel advised that an issue had arisen within the constraints of the PII. He was unable to say whether this would impact the hearing date (at that time scheduled to commence 30 November 2023).

[14] At a further reviewing hearing on 15 September 2023 the PIPs heard that there was a potential issue with the PSNI sensitive bundles which could impact on the ability to complete the inquest in November 2023. This was confirmed by the PSNI during a review hearing on 28 September 2023.

[15] At the review hearing on 28 September 2023 I directed that Module 2 would proceed in late November 2023 with non-contentious witnesses. To further accommodate the PII process I scheduled a final module for two weeks commencing 19 and 26 February 2024.

[16] I continued to actively case manage the progress of the PSNI PII process, holding frequent OPEN and CLOSED hearings throughout October, November and December 2023. During that period I agreed that the PSNI would provide me with a representative sample of potentially relevant sensitive materials over which PII was claimed.

[17] Having viewed the PSNI representative sample contained in bundles 1 and 2, I was and remain satisfied that they are potentially relevant to this inquest. The relevance of this material cannot be discussed in an OPEN ruling. It suffices to state that I considered the sensitive material I was shown to be of central relevance to the issues in the inquest.

[18] At a review hearing on 26 January 2024 the PII hearing was listed for 19 February 2024 with the remainder of the evidence in the inquest to be heard by week commencing 26 February 2024. Due to further delay in the provision of redacted PSNI sensitive bundles, the PII hearing finally took place on 23 February 2024.

[19] Over the course of the two modules in February 2023 and November 2023 I sat for a total of nine days hearing evidence from 18 witnesses including members of the deceased's family, civilian and police witnesses. I heard evidence from an investigation officer from the Office of the Police Ombudsman for Northern Ireland on maps, plans and sightlines of the Maghera area and incident locus and the pathology evidence from Professor Crane. Forty three statements have been read in under rule 17 and 27 bundles of non-sensitive material have been disclosed to the

PIPs. It was agreed by all PIPs that the remainder of the evidence to be heard cannot be done in the absence of my ruling over PII.

[20] In short compass I have upheld the majority of the PII application for the majority of the information contained in the ministerial certificate and accompanying schedule. I indicated that I proposed to circulate a gist relating to some of the information, but that decision is now subject to challenge by the Secretary of State for NI by way of Judicial Review proceedings.

[21] It follows from the above that the PIPs will not have disclosed to them any of the material over which PII is claimed. The only disclosure of that sensitive information may be in a list. I say “may” because my decision in relation to the list is under challenge.

Viability

[22] I have been asked by the Next of Kin (“NOK”) to make a determination on the viability of this inquest. I accede to their request. Moreover, even without their request I am of the view that I am required to make an assessment of whether this inquest is viable.

[23] I have received submissions from the parties to include the Secretary of State (“SOS”) for NI on this issue. I make clear that I have read and considered all of those submissions. I have also received oral submissions from the NOK at a hearing on 23 March 2024.

[24] It seems to me that there are 2 particular aspects to the viability decision:

- (a) Whether there is time to call the remaining relevant evidence and hear submissions prior to the present statutory ‘guillotine’ of 1 May 2024.
- (b) Whether my decision on PII means a proper inquest cannot be held, irrespective of the 1 May deadline.

[25] The NOK request that I consider both of these limbs.

[26] The SOS submits that I should only determine viability on the first ground and, in very short summary, if I find the inquest is not viable then I should not go on to consider the second issue. Their full submission is contained in their OPEN submissions referenced above.

[27] I am of the view that I should consider both limbs. Firstly, both limbs arise for consideration and individually have a potential impact on the viability decision. Secondly, both limbs could individually justify a finding that the decision is not viable. Thirdly, it parts company with reality to simply identify the first limb as the reason why the inquest may not be viable. This case has a long history of case

preparation and, as set out above, would have completed well in advance of now if the PII process not taken so long. It is the PII process which has directly caused the practical difficulty in finishing this case.

[28] I deal firstly with whether it is practically possible to complete the inquest in the time remaining until 1 May 2024.

[29] The short answer is that it is not possible. There are only a handful of working days. That is not enough time. Whilst I note the Secretary of State's position that it may be possible to complete the inquest, I do not see that as acknowledging the reality of obtaining a free a courtroom, securing the attendance of the various legal representatives, organising all the relevant witnesses attend court, calling their evidence and hearing submissions.

[30] I should observe that we did have all of these arrangements in place for the scheduled final hearing in February 2024. Had the case been in a position to proceed on that date the inquest would have been finished well before the 1 May 2024. It could not proceed because the disclosure exercise for sensitive material was not complete.

[31] I thereby find that the inquest is not viable because it is now not practically feasible to hear the case to completion (other than delivery of verdict) between now and 1 May 2024.

[32] I am firmly of the opinion that I should also answer the second limb on which the inquest may not be viable – whether the disclosure of sensitive material is sufficient to allow a proper and sufficient inquest. This is now often referred to as the *Litvenenko* question.

[33] Rule 15 of The Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 set out as follows:

“The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely:

- (a) Who the deceased was;
- (b) How, when and where the deceased came by his death;
- (c) The particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning the death.”

[34] The deceased's death was in 1998. I acknowledge that after *Duffy and Ors* [2024] NIKB 12 there may be arguments as to whether the procedural requirements of article 2 of the European Convention on Human Rights apply in this case. We have, thus far, proceeded on the assumption that this is an 'article 2 case.' Given this inquest is likely to be the "bulk of the investigative effort" into the death I am of the view that article 2 does apply.

[35] However, if I am wrong about that then I consider I have materially similar duties of investigation – see para 100 *et seq* in *Duffy and Ors*.

[36] It is acknowledged that the law does not allow for a CLOSED material procedure in inquests, which in essence means sensitive material over which I have upheld PII cannot be taken into account by me when I come to consider the statutory questions outlined above.

[37] At the present moment in time my decision on the disclosure of a gist is under review by the High Court. In my view that does not prevent me from considering this aspect of viability.

[38] At the present moment in time my decision on the disclosure of a gist is under review by the High Court. In my view that does not prevent me from considering this aspect of viability.

[39] I have assumed for the purposes of this ruling that the gist is to be disclosed. I do that because if it is disclosed, that is likely to represent the maximum disclosure of sensitive information to the NOK and the other PIPs. It follows that I am assessing this limb of the viability decision on the 'best case scenario' of disclosure. In the event the High Court challenge succeeds, the PIPS will receive even less disclosure.

[40] As set out above, I am of the view that the information that is withheld on PII grounds is of central importance to the issues in this inquest. Without it being considered by the inquest I am not conducting what I consider to be a sufficient investigation into the death.

[41] Therefore, in the circumstances I have come to the conclusion albeit with enormous regret that I cannot continue with this Inquest. To do so would simply be unfair in particular to the NOK of Mr McCusker as it would inevitably mean that I am not conducting a sufficient investigation into the death and/or could not deliver a full and proper verdict.

[42] This ruling is provisional. I invite any submissions as to any consequential orders or directions that arise from the above provisional decision. I will in due course make this decision final.

Public Inquiry

[43] I do not consider that that my decision on the viability of this inquest should be the end of all investigations into this death. Given the sensitive nature and content of the materials over which I have upheld PII and given the fact that I cannot via the vehicle of an inquest have a CLOSED material procedure, I believe this is a case requiring a public inquiry.

[44] In the circumstances I now intend to write as a matter of urgency to the Secretary of State for Northern Ireland requesting that a public inquiry be established into the death of Fergal McCusker. Such an inquiry in my view would allow evidence to be heard in CLOSED session if required and will allow for a full examination of the evidence.