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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY RAYMOND McCORD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW (No. 2)

AND IN THE MATTER OF THE DELAY IN HOLDING AN INVESTIGATION INTO THE DEATH OF RAYMOND McCORD (JNR)

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Martin O'Rourke KC with Andrew Moriarty (instructed by McIvor Farrell, Solicitors) for the Applicant
Philip Henry KC with Bobbie-Leigh Herdman (instructed by the Departmental Solicitor's Office) for the Proposed Respondents

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SIMPSON J

Introduction

[1] The applicant is the father of the late Raymond McCord junior. The proposed respondents (whom I will call the respondents) are Fowler J, the coroner appointed to conduct the inquest into the death of the applicant s son, and the Coroners Service of Northern Ireland. This is my second judgment arising out of the applicant s Order 53 Statement dated 23 February 2024. The first judgment ([2024] NIKB 29) was delivered on 19 April 2024 as a matter of urgency, in light of the then impending deadline for legacy inquests of 1 May 2024.

[2] Because there is an issue between the parties as to the pleadings in this matter, it is necessary to identify from the Order 53 Statement precisely what is challenged in this application for leave to apply for judicial review.

[3] Para [3] of the Order 53 Statement contains the following:

The impugned decision/omission

The applicant is challenging:

(a) the failure on the part of the Coroner and Coroners Service to provide disclosure and hold the inquest into the death of his son promptly and with reasonable expedition."

[4] Under para [4], the applicant states:

The relief sought

The applicant seeks the following primary relief:

(a) Declarations that

1. The coroner who has had carriage of this case and the Coroners Service have failed to conduct the inquest promptly and in compliance with Article 2 ECHR;

2. The Coroner and Coroners Service have failed to conduct the inquest promptly and in compliance with Rule 3 of the Coroners (Practice and Procedure) Rules (NI) 1963."

[5] The Grounds of Challenge are identified in para [5]:

[5.1] Against the former Coroner and the Coroners Service

(a) In breach of their obligations pursuant to Rule 3 of the coroners (Practice and Procedure) (NI) Rules 1963, as amended, the coroner and Coroners Service have failed to hold an inquest as soon as reasonably practicable after the coroner has been notified of the death." Whether the rule is read alone, or in an Article 2 ECHR compliant manner, as required by section 3 of the Human Rights Act 1998, the delay in holding the inquest is a breach of the coroner s obligations under the Rules and is incompatible with the Applicant s Article 2 ECHR rights and thus in breach of section 6 of the Human Rights Act 1998.

(b) …

[5.2] Damages

c) The European Court of Human Rights has awarded damages for violation of Article 2 ECHR for, inter alia, delay by Coroners in the holding of inquests. The operation of the mirror principle' requires that such remedies as are available for violation of Convention rights in Strasbourg should be available for violation of the equivalent Convention rights in the domestic courts."

[6] Para [9] of the Order 53 Statement seeks a declaration that section 9(3) of the Human Rights Act 1998 is incompatible with Article 2 ECHR under section 4 of the Human Rights Act 1998." It seems to be common case that the respondents are not the appropriate respondent in relation to this relief.

History — to April 2022

[7] Although the relevant history is set out in the judgment of the Court of Appeal in its judgment in *McCord, Re Application for Judicial Review* [2019] NICA 4, for the purposes of context I need to set out some of the history in this judgment.

[8] The applicant s son, Raymond McCord junior, was brutally murdered by loyalists in November 1997. An inquest into his death was initially scheduled for a preliminary hearing on 4 June 2001. In May 2002 the applicant complained to the Police Ombudsman for Northern Ireland (PONI") about the police investigation into the death. On 2 September 2002 the PONI advised the applicant s solicitors that there was a continuing investigation into complaints about whether a police informer had been involved in the murder but that he was unable to disclose any material under section 63 of the Police (Northern Ireland) Act 1998.

[9] The PONI s Operation Ballast report was provided on 22 January 2007. It ran to some 160 pages. At para 2 the report stated:

> Preliminary enquiries following receipt of Mr McCord s complaint showed that there were sufficient issues of concern to warrant a wide-ranging investigation not only into matters relating to the investigation of Mr McCord s son s murder, but also into police handling and management of identified informants from the early 1990s onwards."

[10] The PONI report linked police informants, one in particular referred to as Informant 1 , to 10 murders in the period 1991 to 2000. Informant 1 was also linked to multiple other serious crimes. PONI identified failures in the investigation into the

death of the applicant s son and identified serious concerns about police conduct relating to informants, including Informant 1, and the Mount Vernon UVF. The PONI investigation did not involve the disclosure of any material to the applicant.

[11] I need to set out the next stages in detail, and do so by quoting a number of paragraphs in the judgment of the Court of Appeal ([2019] NICA 4), which arose from the applicant s application for leave to appeal a decision of McCloskey J not to remove the stay on the hearing of the applicant s leave application to issue judicial review proceedings against the PSNI, the Department of Justice and the Coroners Service. Those proceedings sought a declaration that the delay in conducting an inquest into the death of his son violated his rights under Article 2 of the ECHR:

> [4] On 21 January 2011 the applicant s solicitors received correspondence from the Coroners Service which stated that the coroner was unable to list the matter as a PSNI investigation was ongoing. A preliminary hearing before the senior coroner on 30 April 2012 was adjourned until 5 September 2012 to ascertain what progress had been made in respect of that investigation. On 14 January 2013 the Crown Solicitor s Office indicated that an assisting offender had been entered into bail and that a preliminary enquiry had been set for May 2013. The letter stated that the assisting offender s criminal trial would have to conclude before any further investigative action could be undertaken by the PSNI and that it would be early 2014 before such investigations would be concluded.
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> [5] On 6 June 2013 the Crown Solicitor s Office wrote to the applicant s solicitor to indicate that the preliminary hearing scheduled for 23 May 2013 had been adjourned by the Public Prosecution Service (PPS") and would be relisted at some stage in the autumn. On 27 January 2016 this case was reviewed by the Presiding Coroner, Weir LJ, as part of a review of all of the then outstanding legacy inquests. It was noted that no coroner had been allocated to the inquest into the death of the applicant s son and that a criminal investigation into the death was still ongoing.
>
> [6] By letter dated 26 February 2016 the applicant s solicitors wrote to the PSNI requesting that disclosure of non-sensitive material be provided at that stage to the coroner in order to prepare for the inquest. In the absence of any response a pre-action protocol letter was sent to the PSNI on 18 May 2017 and on 6 June 2017 an application for leave to issue judicial review proceedings was made seeking an order requiring the Chief Constable to provide

disclosure to the coroner of the non-sensitive investigation materials touching upon the death of his son and a declaration that the failure to provide prompt disclosure of the information to the coroner had occasioned delay which violated his rights under Article 2 of the Convention.

[7] The application for leave commenced before Maguire J on 28 June 2017 but was adjourned. The pursuit of the criminal investigation was concerned with whether to rely on the evidence of an assisting offender, Gary Haggarty, to pursue a prosecution against certain former police officers for their conduct in the period leading up to the murder of the applicant s son. On 12 October 2017 the Director of Public Prosecutions (DPP") advised the applicant that Haggarty s evidence did not pass the test for prosecution in relation to the activities of former police officers. That decision has itself been the subject of challenge by the applicant and remains outstanding.

[8] On 24 October 2017 McCloskey J directed that pre-action protocol correspondence should be forwarded to any additional proposed respondents that the applicant wished to join and on 7 November 2017 the applicant amended his Order 53 statement to add claims for delay against the coroner and the Department of Justice. The application was reviewed by McCloskey J on 17 November 2017 when he gave directions for responses to the preaction protocol letters and the filing of papers. Further amendments to the Order 53 statement were made on 14 December 2017 but no further respondents were added.

[9] McCloskey J gave directions on 8 February 2018 requiring the parties to set out their proposals for progressing the case. On 13 March 2018 he made a case management direction ordering a stay of the proceedings with a review on 21 June 2018. The judge noted that at successive preliminary hearings on 30 April 2012 and 5 September 2012 the applicant adopted the position that the coroner s inquest should not proceed until the police activities had been completed. The inquest was then adjourned *sine die* without opposition from the applicant. The proceedings before Maguire J on 28 June 2017 were concerned with the disclosure of police documents but it was not until 30 October 2017, after the decision of the DPP,

that the applicant requested the coroner to revive the inquest proceedings.

[10] Having set out the positions of the various parties the judge then turned to a number of pending cases dealing with legacy. The first was the case of Jordan [2015] NICA 66 dealing with the circumstances in which as a matter of case management the Court of Appeal was entitled to postpone the award of damages for delay in the conduct of an inquest where the inquest proceedings had not been finalised. There were three cases, *McQuillan*, *Barnard* and *McGuigan and McKenna*, dealing with the circumstances in which the Article 2 obligation could be revived on the basis of the principles set out in *Brecknell v UK* (2008) 46 EHRR 42. The case of Finucane was a further case dealing with retrospectivity. The judge referred to the case of Bell being an Article 2 case on funding of the PONI although the judgment of the Court of Appeal indicates that Article 2 was not relied upon in that appeal. The final case referred to was Hughes which dealt with the issue of funding of the Coroners Service which was completed on 8 February 2018 and in respect of which judgment was in fact given on 8 March 2018. The learned trial judge had noted the judgment as being reserved.

[11] Having reviewed the outstanding cases the learned trial judge concluded that it would be pointless and disproportionate to adopt a course which would involve any further investment of finite public resources at this stage" (underlining that of judge). A stay was the obvious appropriate course. He required brief updated submissions in writing by June 2018 and adjourned the matter to 21 June 2018 when he continued the Order.

[12] The applicant applied for leave to appeal to this court and in the course of refusing leave the judge set out the consideration upon which he had relied on 21 June 2018:

> The court made a considered order on 13 March 2018 in which it referred to the broader panorama of other cases proceeding in superior courts which will result in decisions, by well-established principle, binding on this court. Because of that nexus and taking into account all of the ingredients of the overriding

> objective I just cannot see that anything of any merit or substance will be achieved by investing limited court resources in progressing this case further at this stage. I ruled in March that it would be pointless and disproportionate to adopt a course involving any further investment of the finite public resources by this court or the court administration or any of the proposed public authority respondents. Three months later nothing has changed to alter that assessment.'"

[12] On 18 January 2019 the Court of Appeal allowed the applicant s appeal. In the course of its judgment it said, para [23]:

> The death occurred more than 20 years ago. The obligation deriving from Article 2 of the Convention is that the authorities should act of their own motion and that the investigation should be prompt and proceed with reasonable expedition. The inquest in this case has not taken place. No coroner has been allocated to hear it and no materials have been provided to the Coroners Service by the police. It is impossible to estimate how many years it might take before the inquest might proceed, as was accepted by the parties at the hearing."

[13] In addition to the above judicial review proceedings, on 25 October 2021 further judicial review proceedings were issued against the Coroners Service only. The two sets of proceedings were consolidated. Both proceedings sought a declaration and claimed damages for breach of the applicant s article 2 rights caused by delay. It was those proceedings which were finally compromised in December 2022 (according to the applicant) or March 2023 (according to the respondents). The judicial review proceedings against the Coroners Service was dismissed by consent; those against PSNI were settled on terms endorsed on counsel s briefs.

[14] The Legacy Inquest Unit of the Coroners Service was established in February 2019 with the aim to have all remaining legacy inquests heard within a timeframe of five years. Covid-19 disrupted this ambition, but on 22 March 2022 the Presiding Coroner designated the inquest into the death of the applicant s son as a Year 3 (of the five-year timetable). In April 2022 Fowler J was designated Coroner for the inquest.

The applicant s original submissions

[15] The oral submissions which were made on behalf of the applicant bore little resemblance to the case which was made in the applicant s pre-action protocol letter, the grounding affidavit and the skeleton argument. I am clear that neither the pre-

action protocol letter nor the skeleton argument should be parsed and analysed like a pleading, and I do not do so. They are, however, a guide to the way in which the applicant and his advisers understood the challenge was to be formulated. All italicised emphases in the following paragraphs are mine.

[16] The pre-action protocol letter is dated 16 January 2024 and states:

> "… the substance of this challenge *concerns the period of delay in relation to the convening of the inquest hearing from 9 June 2022, when we understand the coroner was appointed, to present*."

[17] This submission echoes assertions in the applicant s affidavit. In para [7] he said:

> Since the settlement of those judicial review proceedings [in December 2022] a *further* substantial period elapsed during which no disclosure was received…"

[18] In para [6] of the applicant s skeleton argument the applicant refers to the previous judicial review challenges which, he says, were ultimately settled on 15 December 2022…" The skeleton argument goes on to say:

> Many of the issues in respect of which the applicant was vindicated in respect of, on that occasion, again arise in this challenge. Importantly, for present purposes, since those judicial review proceedings were settled, *a further substantial period has elapsed during which no disclosure has been received*… Given the period involved and the lack of meaningful product, we submit that there is, *once again*, an ongoing breach of Article 2 ECHR."

[19] That part of the skeleton argument relevant to this challenge (as opposed to that part of the challenge dealt with in my judgment of 19 April 2024) begins at para [29] under the rubric Article 2 and Promptness."

[20] Para [30] submitted:

> At the present time there has been a very considerable amount of *additional time* that has elapsed since the successful challenge to the delay that had been occasioned in the holding of an inquest into the death of the applicant s son and the settlement of that challenge in December 2022."

[21] In para [31] the applicant submitted the fact remains that there is *now again delay* in this case that … means that there is a *further* ongoing breach of Article 2 ECHR …"

[22] Having set out a very lengthy citation from the judgment of Stephens J in *Jordan* [2014] NIQB 11 the applicant concluded para [37] of the skeleton argument with the following submission:

> If a *further* period of delay accrues, and that is itself a breach of Article 2 ECHR, an applicant should not be prevented from again seeking just satisfaction in relation to *that additional period of delay* — to hold otherwise would allow for state actors to act with impunity when responsible for *further* delay."

[23] In light of the way in which the matter was pleaded, unsurprisingly the skeleton argument of the respondents concentrated on the period from 2022 (when the previous challenge was compromised) and February 2024 (when the coroner made the decision that the inquest could not be completed before the statutory deadline of 1 May 2024). I also note that the respondents reply to the pre-action protocol letter asserts (para [7]): Any claim alleging delay now lies only from that date [March 2023] onwards." The respondent s deponent, at para [5], asserts: I understand the applicant s latest judicial review deals with the period commencing with the end of his previous judicial review of the" [Coroners Service]. That affidavit then proceeded to set out in significant detail the steps taken by and on behalf of the coroner from the date of his appointment in April 2022.

The oral submissions

[24] At the hearing the core submissions of Mr O Rourke KC were that regardless of the provisions of the 2023 Act the coronial system has failed, in that it was never going to be capable of dealing with this inquest in its current form. He said that because of the amount of disclosure, and in light of the history of dealing with disclosure, even with five counsel working on the matter it would take somewhere in the region of 20 years to perfect disclosure.

[25] He submits that from the beginning, it should have been evident, from the fact of the connection with state agents, that a very large investigation would be involved. Secondly, even if that was not then evident, it should have been obvious in 2007 when the Operation Ballast report was published. Thirdly, when Fowler J was appointed in 2022, it was blatantly obvious" that the inquest needed a massive amount of resources and there ought to have been an early start of the disclosure process. He says that as far back as 2016, when the then Presiding Coroner, Weir J, allocated this inquest into year 3 of the timetable, the applicant asked for the process of disclosure to begin.

[26] By the time the inquest was allocated to Fowler J in 2022, he was faced with an impossible task. Resource issues affect viability, but the State has to organise its affairs so as to be Convention compliant.

The respondents submissions

[27] On behalf of the respondents Mr Henry KC asserts that the oral submissions of the applicant — essentially that the coronial system is not fit for purpose — do not tally with the pleaded case. He says that because of the passing of the 2023 Act, there will be no inquest, so the complaint made by the applicant is academic and that at the leave stage, where we are now, this is a knock-out blow. The applicant, he says, does not deal with this point anywhere in the skeleton argument.

[28] He states that although both the coroner and the Coroners Service are the respondents in these proceedings, in reality the inquest was managed by the coroner, and he is the appropriate respondent. The [Coroners Service] operated under his direction."

[29] He submits that the Article 2 clock, for the purposes of this challenge, starts from the ending of the previous judicial review challenge (either December 2022 or March 2023), because the earlier period of delay has already been litigated in the earlier challenge and the matter was settled.

[30] Within the domestic setting an individual authority is only responsible for the delay caused by its own unlawful conduct; within the European context the State is responsible for all of the delay. Thus, Mr Henry took the court through the period from the date of appointment of Fowler J as coroner — he identified the resources deployed by the coroner, including having an unprecedented five-person team of counsel, he identified the actions of the coroner, including the number of directions and case management hearings — all seeking to demonstrate that the Coroner acted with expedition and appropriately over the whole period and to justify the period of delay. He suggested two questions, each of which should, he said, be answered in the affirmative: (i) did the coroner act promptly and with reasonable expedition?; and (ii) did the coroner react within the broad ambit of reasonable responses?

[31] In his reply, Mr O Rourke stated that he did not accept that the slate was cleared" when the previous judicial review challenges were compromised. He did not accept that the matter was academic, submitting that if a court finds that article 2 has been infringed this should be reflected in an order of the court. Further, since the Coroners Service has had continued responsibility for the holding of the inquest, they are the relevant limb of the state when considering delay.

Discussion

[32] There is nothing in the pleaded case which identifies the core submission of the applicant as outlined in the hearing by Mr O Rourke — namely that the coronial

system in Northern Ireland was never going to be in a position to hold an inquest promptly. This began life as a challenge to the further or additional delay in the holding of the inquest which occurred in the period from 2022 to 2024. It then metamorphosed, unforeshadowed, into a much more root and branch challenge to the whole coronial system and its efficacy. Such a challenge would need to be appropriately pleaded, and there was no application before me to amend the Order 53 Statement to comprehend such a wide-ranging challenge. In the circumstances, therefore, I consider that the pleaded challenge relates to the period from the appointment of the coroner to the date on which he indicated that the inquest could not be held prior to the statutory cut-off date in the 2023 Act.

[33] In those circumstances it behoves me to examine that period and the actions of the coroner within it. In doing so I bear in mind the identity of the respondents — ie the coroner and Coroners Service — and some of the principles distilled and articulated by Stephens J in *Jordan* (op cit).

[34] In his introductory paragraphs under the rubric Legal principles: The requirement of promptness and reasonable expedition in the investigation/inquest" Stephens J said:

> [122] An express requirement of promptness in conducting an inquest is to be found in rule 3 of the Coroners (Practice and Procedure) (NI) Rules 1963 which states:
>
> > On being notified of any death the coroner shall, without delay, make such inquiries and take all such steps as may be required to enable him to decide whether or not an inquest is necessary, and e*very inquest shall be held as soon as is practicable after the coroner has been notified of the death*. [emphasis added]
>
> [123] A requirement of promptness and reasonable expedition is also implicit in an Article 2 compliant inquest. In *Jordan v United Kingdom,* it was stated by the ECHR at paragraph 108 that a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. The court recognized that there can be exceptions:
>
> > because it must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation.'"

[35] Where material to this matter he said, para [125]:

> (d) If it is established on a prima facie basis that an inquest has not been conducted either promptly or with reasonable expedition then it is for the State authorities to satisfy the court that there were obstacles or difficulties which prevented progress. So, at this stage the onus is on the State authorities to justify the period that has elapsed. At this stage it is not appropriate or necessary for the State authorities to have to justify every detail of an investigation. Rather any significant period of delay by an investigating agency will require explanation and justification. The circumstances which can justify delay are open ended and specific to the facts of each individual case.
>
> (e) … The requirement of promptness and reasonable expedition under Article 2 rests on each of the State authorities that are in fact concerned with a particular death.
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> (i) Each State authority has a duty under Article 2 to assist in the investigation carried out by the coroner. The only statutory obligation to obtain and to give documents and information is on the PSNI under section 8 of the 1959 Act but other State authorities, if they are concerned with the death, have a similar continuing obligation to obtain and to provide information and documents to the coroner. That obligation is not dependent on a request or a direction from the coroner. In practice in order for one State authority to comply with that obligation they may need another State authority, such as the PSNI or the Security Services, to consider the documents, for instance, for the purposes of PII or Article 2 redactions. If that is so, then the other State authority will have its own free-standing obligation to consider those documents for that purpose in accordance with the requirement of promptness and reasonable expedition.

(ii) it is appropriate to attribute specific responsibility for component parts of delay to the various State authorities involved.

…

(h) If obstacles or difficulties preventing the progress of an inquest are established by a State authority and these have not been created by that particular authority then that authority will not be responsible unless its response to those difficulties is outside the wide ambit of appropriate responses or it is culpable in the way that it has reacted to the obstacles and difficulties.

…

(l) At the level of the ECHR the cases have been against the United Kingdom as the State responsible for all its various State bodies. In this case the notice parties are the Coroner and the PSNI. To obtain relief against either of them the applicant has to establish that either one or other or both of them created obstacles or difficulties or reacted to obstacles or difficulties created by others outside the wide ambit of appropriate responses or is culpable in the way that it has reacted to obstacles or difficulties."

[36] It is clear from the above that every case is fact-sensitive, and that any assessment of delay requires an analysis of the particular facts of the case.

[37] As noted above, Fowler J was appointed coroner in April 2022. The following chronology is taken from his ruling dated 2 February 2024, to which I have already referred to some extent in my earlier judgment. However, more detail is necessary in this judgment. I will try to deal with the chronology as succinctly as possible.

- The coroner held reviews on the following dates: 27 October 2022, 24 November 2022, 10 February 2023, 10 March 2023, 30 March 2023, 22 June 2023, 10 August 2023.

- The Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act") received royal assent on 19 September 2023.

- A further review was scheduled to be heard on 26 September 2023. (Others are referred to below)

- In June, October and December 2022 — disclosure request letters were sent to PSNI, PONI and other bodies (including MOD and the Investigatory Powers

Commissioner) requiring provision of disclosure within six months. As a result, the Coroners Service received "a substantial amount of material."

- PSNI provided 27 files of non-sensitive material in December 2022 and, subsequently, five files of sensitive material, the latter of which had to be inspected on PSNI premises.

- All files, sensitive or non-sensitive, had to be, and were, reviewed by the coroner and/or his legal team to determine potential relevance. During the Easter recess in 2023 the coroner's legal team met PSNI and PONI to discuss issues raised by the process.

- In May and June 2023, the Coroners Service provided PSNI with the lists of documents which had been identified as potentially relevant.

- At the review hearing on 22 June 2023 the coroner was informed by PSNI that the sensitive material (five files) was available for review. The coroner's legal team commenced its review of this material on 26 June 2023 and completed the exercise by 6 July 2023. On 5 July 2023 the legal team had a meeting with PSNI to discuss issues, including redaction.

- The coroner issued administrative directions relating to redactions during the long vacation of 2023 and held a case management hearing on 10 August 2023. At this hearing the coroner fixed the next hearing for 21 September 2023 to allow for a determination as to how potentially relevant material in the non-sensitive files should be redacted to allow for disclosure.

- From 12 September 2023 PONI made an initial 30 files of sensitive material available for review. On 14 September the coroner's legal team began its review of that material. Due to the dangers of jigsaw identification the coroner decided that it was not possible to disseminate PSNI non-sensitive material on a rolling basis until PSNI and PONI had each considered the other's material and made submissions on redaction. This led to the adjournment of the September 2023 review hearing.

- On 20 September PSNI and PONI were informed in correspondence of the coroner's concerns about the risk of jigsaw identification and were asked for proposals for a 'joined up' approach to redaction to address the concerns. PSNI and PONI were asked to reply by 25 September.

- PSNI replied that it would take 'some months' to undertake this exercise; PONI said it would take 6-8 weeks to review the PSNI material and then commence discussions with PSNI about redaction strategy.

- PSNI was also asked about the absence of sensitive material which the coroner's counsel had expected to see — namely material dealing with the issue of collusion identified in the Operation Ballast report.

- On 3 October 2023 PSNI and PONI were asked by the Coroners Service for information about the viability of the then intended hearing date of 19 February 2024 and were asked to provide a joint position paper addressing the timescale they say they would need to deal with a significant number of elements of disclosure, review and redaction. Even though it was not usual to do so prior to all disclosure being made available to him, the coroner issued a provisional scope document on 9 October 2023.

- The coroner arranged for the instruction on his behalf of two additional junior counsel, bringing his legal team to five.

- On 18 October 2023 PSNI and PONI provided a joint position paper. PSNI said that there were some 98 boxes (approximately 490 folders) of non-sensitive material, approximately 40 boxes (around 200 folders) of sensitive material and around 20,000 pages of "SOCPA Debrief" material. This, according to PSNI, "will not reflect the entirety of materials that may fall for consideration for potential relevance…".

- PONI indicated that they had identified further materials not in their original disclosure which, it stated, "was very substantial."

- Both PSNI and PONI stated that they did not think it would be possible to complete disclosure to allow the inquest to commence on 19 February 2024.

- The coroner asked for written submissions on viability and convened a hearing on 10 November 2023. PSNI submitted that even if further resources were devoted to this inquest, it would not be possible to conclude the inquest by 1 May 2024; that it was not just a simple matter of resources being available, but the requirement for "subject matter experts" to be made available. At that hearing PONI told the coroner that the electronic material was estimated to amount to some 100,000 pages.

- Following requests from the coroner PSNI informed him on 16 January 2024 that it would be at least 3 months from announcing a vacancy for subject matter experts to having someone in post, even if suitable candidates could be found.

- A review hearing was held on 19 January 2024 to allow for all parties to make submissions.

- Following this, the coroner gave his ruling of 2 February 2024 concluding that the inquest had no prospect of finishing before 1 May 2024.

[38] As noted above, Stephens J said:

> To obtain relief against either of [the respondents] the applicant has to establish that either one or other or both of them created obstacles or difficulties or reacted to obstacles or difficulties created by others outside the wide ambit of appropriate responses or is culpable in the way that it has reacted to obstacles or difficulties."

[39] Following my examination of the facts of this case I am entirely satisfied that neither respondent has created any obstacles or difficulties; nor has either respondent reacted to obstacles or difficulties created by others in a way which was outside the wide ambit of appropriate responses available to them; nor is either respondent culpable in the way that each has reacted to obstacles or difficulties. I am satisfied that the coroner and, for that matter, the Coroners Service, have acted entirely appropriately in the circumstances and within the broad ambit of reasonable responses to the difficulties in this case.

[40] In passing, I note also that the effect of the coroner s ruling is that the responsibility of the State to provide an investigation into the applicant s son s death which is article 2 and 3 ECHR compliant will shift to the Independent Commissioner for Reconciliation and Information Recovery set up by the 2023 Act. I also note para [370] of the judgment of Colton J arising from the challenge to aspects of that Act ([2024] NIKB 11) in which he says that he is satisfied that the provisions of the Act leave sufficient scope for the ICRIR to conduct an effective investigation as required under articles 2 and 3 ECHR."

Is the challenge academic?

[41] As noted above, Mr Henry submitted that the matter was entirely academic — something he described as a knock-out blow" at the leave stage. He relied on the well-known passage in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, 457A where Lord Slynn said:

> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[42] Mr Henry says that in this case there is no matter of statutory interpretation to be considered and that there is no identifiable public interest in the matter proceeding.

[43] In the circumstances of this case as outlined above, I would not have been inclined to refuse leave solely on the basis that the case at this stage is academic.

Disposition

[44] In light of all that I have identified in some detail above, I consider that the challenge to the coroner in relation to his actions between the date of his appointment and February 2024 is unarguable — in the sense identified in *Ni Chuinneagain s Application for Judicial Review* [2022] NICA 56, at para [42].

[45] Accordingly, I refuse leave to apply for judicial review.

[46] I will hear counsel on the issue of costs.