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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 WILLIAM THOMPSON FOR JUDICIAL REVIEW

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Karen Quinlivan KC and Andrew Moriarty (instructed by Madden and Finucane, Solicitors) for the Applicant
Ian Skelt KC and Laura McMahon (instructed by the Coroners Service for Northern Ireland) for the Respondent
Donal Lunny KC and Andrew McGuinness (instructed by the Crown Solicitor's Office) for the notice party, the Ministry of Defence

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SCOFFIELD J

Introduction

[1] The applicant is the son of Kathleen Thompson (deceased), who was shot and killed in her back garden in Rathlin Drive, Derry on the night of 5-6 November 1971. By these proceedings he challenges the decision of the coroner who dealt with the inquest into his mother's death, Her Honour Judge Crawford (sitting as a coroner), not to reconsider the issue of the anonymity granted to Soldier D in the course of the inquest. Soldier D was found by the coroner to be responsible for the death of the applicant's mother in circumstances where the force used was not justified.

[2] The central issue in this case is procedural, namely a complaint that the coroner did not reconsider the issue of Soldier D's anonymity at the appropriate time. By the stage this issue came into focus, the coroner took the view that she was functus officio, that is to say that her functions in the inquest had been discharged and that she could not then remove the anonymity which had previously been granted. After these proceedings had been lodged, however, the coroner set out in a ruling how she would have addressed the issue had her functions not been discharged. Her determination in those circumstances would have been that it was appropriate to maintain the anonymity which had been granted.

[3] Ms Quinlivan KC and Mr Moriarty appeared for the applicant; and Mr Lunny KC and Mr McGuinness appeared for the Ministry of Defence (MoD) as a notice party. The coroner filed a number of position papers (discussed further below) but, thereafter, played no active role in the hearing before the court. For the assistance of the court, she was represented by counsel at the hearing – Mr Skelt KC and Ms McMahon – who were essentially neutral in their stance and indicated merely that the coroner relied upon the reasoned decision she had given. I am grateful to all counsel for their helpful written and oral submissions.

Factual background

[4] There has been a variety of litigation which has arisen from the inquest in this case. A summary of the factual background relating to the case, and the circumstances of the applicant's mother's death, has already been set out in previous decisions of the court (each of which has also gone on appeal): see *Re William Thompson's Application (No 2)* [2024] NIKB 9; and *Re William Thompson's Application (No 3)* [2024] NIKB 22.

[5] For present purposes, however, it is necessary to set out some of the detail of the concluding stages of the inquest. The evidence in the inquest (which had been directed by the Attorney General for Northern Ireland in August 2013) was heard between March 2018 and June 2021.

[6] During the inquest, the coroner and a previous coroner (Coroner McGurgan) examined a range of anonymity and screening applications made by former soldiers who were called to give evidence at the inquest on the basis that they had information which was either directly or potentially relevant to the applicant's mother's death. One such soldier was anonymised as Soldier D. His application for anonymity was the subject of a provisional ruling by Coroner McGurgan on 7 October 2017 and, shortly afterwards, a final ruling on 19 October 2017. (The label "final ruling" does not, of course, mean that the coroner cannot revisit this issue. It simply reflects the fact that Coroner McGurgan adopted an approach which is common in legacy inquests whereby a provisional ruling on an anonymity application is made, frequently without hearing submissions, and a 'final' ruling on the application is then made once the properly interested persons ("PIPs") have had an opportunity to make submissions on the provisional reasoning if they so wish.)

[7] According to the final ruling on Soldier D's anonymity and screening application, the risk assessment in relation to him was deemed as low ("an attack is unlikely") in both Great Britian and Northern Ireland. However, the assessment was also to the effect that, if Soldier D gave evidence without anonymity and screening, his threat level in Northern Ireland would increase up to moderate level ("an attack is possible, but not likely") depending on the subsequent intelligence received. In those circumstances, the coroner concluded that the potential rise in threat level "tends to demonstrate that the risk to life is real, immediate and not fanciful and trivial", so engaging the operational duty to protect life by way of reasonable measures under article 2 ECHR.

[8] The evidence in the inquest concluded on 23 June 2021. The respondent coroner handed down a summary of her findings in open court on 29 June 2022. She indicated that her "full decision" would be circulated within days; and that on that occasion she was simply summarising her key findings. It was decided among the parties that they would make written submissions as to the issue of possible referral of Soldier D to the Director of Public Prosecutions ("DPP") for consideration for prosecution and that, subsequently, the coroner would determine how to proceed in relation to that. The transcript also shows that on this occasion the coroner said, "Having concluded my summary findings, I would like to extend my thanks to the Coroner's Office and to all of the legal representatives and to express my sympathy to the Thompson family."

[9] The full written ruling in the inquest was then provided by email nine days later, before 9.00 am on the morning of Friday 8 July 2022. On the same date, 8 July, after the coroner's full written ruling had been shared, the applicant's legal representatives requested that she reconsider and rescind Soldier D's anonymity and also that she refer Soldier D to the DPP pursuant to section 35(3) of the Justice (Northern Ireland) Act 2002 ("the 2002 Act") in light of her findings. I understand that the next of kin's representatives consulted with him on that date after the detailed findings had been given and the relevant correspondence was sent thereafter (by email, after 9.00 pm that evening). On 9 September 2022, the MoD provided a response to these requests. It opposed both the reopening of the issue of anonymity and the referral of Soldier D to the DPP. In relation to the former, it contended that the coroner had become functus officio on 29 June.

[10] On 28 September 2022, the applicant issued the application for leave in these proceedings (on a protective basis in case time for the purposes of RCJ Order 53, rule 4 ran from the date of 29 June). Shortly afterwards, on 5 October 2022, the coroner sent a letter to all of the inquest participants indicating that she intended to pass on her findings to the DPP pursuant to section 35(3) of the 2022 Act. In relation to the question of Soldier D's anonymity, the coroner invited submissions in relation to this and, in particular, whether she was functus officio in light of the ruling of the Court of Appeal in *Re McDonnell's Application* [2015] NICA 72.

[11] Independently, and without knowledge of the coroner's correspondence of the preceding day, a Case Management Directions Order was issued in these proceedings on 6 October 2022 indicating, inter alia, that "it would be of assistance to the Court if the Coroner could address the question of whether she considers herself to be functus officio and the substance of the anonymity issue which has been raised (or how it should be dealt with)."

[12] On 26 October 2022, the coroner ruled on the application which had been made to her. She concluded that she was functus officio and, thus, not in a position to reconsider the application to rescind the anonymity which had been granted to Soldier D because, at the time when she delivered her written findings and closed the inquest on 8 July 2022, none of the parties had by then raised the issue of anonymity. In light

of the court's invitation to assist on this issue, however, the coroner went on to explain that, had she not been functus officio, she would not have removed the anonymity which had been granted. She gave reasons for that indication, which are discussed further below.

[13] A contested leave hearing was held in February 2023, after which leave was granted on some grounds. Before the leave hearing the coroner filed a position paper indicating that she maintained a position of neutrality in the proceedings; and that she could not usefully add to the ruling which she had provided on 26 October 2022; but that she was ready to assist the court in any way required. She later filed a second position paper, after leave had been granted but in advance of the full hearing, in broadly similar terms, which clarified the submissions which she had had available to her at the time of her ruling on 26 October 2022.

Relevant statutory provisions

[14] The primary statute governing the exercise of coronial functions in this jurisdiction remains the Coroners Act (Northern Ireland) 1959 ("the 1959 Act"). Section 36 of the 1959 Act provides for the making of rules to regulate the practice or procedure at, or in connection with, inquests. It provides (insofar as material) that:

> "Rules under this section may:
>
> …
>
> (b) regulate the practice and procedure at or in connection with inquests and, in particular (without prejudice to the generality of the foregoing provisions), such rules may contain provisions—
>
> (i) as to the procedure at inquests held with a jury;
>
> (ii) as to the procedure at inquests held without a jury; …"

[15] The relevant rules are the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 (SR 1963/199), as amended ("the 1963 Rules"). Detailed provision in relation to the conduct of inquests is set out in rules 3 to 23. Rule 4 is important in the present context. It provides that, "Every inquest shall be opened, adjourned and closed in a formal manner." Rule 5 spells out the general rule that:

> "Every inquest shall be held in public: Provided that the coroner may direct that the public be excluded from an inquest or any part of an inquest if he considers that it would be in the interest of national security so to do."

[16] Rule 11 also underscores the requisite formality in relation to the listing of an adjourned inquest:

> "Where a coroner has fixed a date, hour and place for the holding of an adjourned inquest, he may, at any time before the date so fixed, alter the date, hour or place fixed and shall then give notice of the alteration to the members of the jury (if any), the witnesses, and any other person appearing in person or represented at the inquest."

[17] It is also necessary to set out section 35(3) of the 2002 Act, which is in the following terms:

> "Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must as soon as practicable send to the Director a written report of the circumstances."

Summary of the parties' submissions

[18] The applicant contends that the coroner had an obligation to keep under review the issue of the anonymity and screening afforded to Soldier D and, in particular, to reconsider it in light of the findings which she had reached. He further argues that the risk assessment on the basis of which anonymity was granted was out of date and, in any event, made under different circumstances, so that a further risk assessment should have been obtained before the issue could be properly reconsidered. The applicant further contends that the coroner was not functus officio at the time when his representatives requested her to reconsider the issue of anonymity because, at that point, she still had to decide whether Soldier D should be referred to the DPP under section 35(3).

[19] The position of the coroner is that she was functus officio, and therefore unable to reconsider the issue of the anonymity and screening granted to Soldier D, at the time this request was made. She reached this view on the basis that, at the point of delivery of her full written ruling and findings on 8 July 2022, no party had raised the issue of anonymity again. Rather, the request that she reconsider the issue of anonymity made by the next of kin of the deceased was made after delivery of her full written ruling on the inquest. As noted above, the coroner has also indicated that, even if she had been in a position to reconsider the issue of anonymity in relation to Soldier D, she would not have had changed the existing decision because the findings made by her at the inquest would only have increased the risk to Soldier D's life.

[20] The notice party's submissions broadly support the position of the coroner. The MoD contended that the coroner was functus officio on 29 June 2022 but, at the very latest, on the morning of 8 July 2024. It further submitted that the fact that the section 35(3) referral issue had not been resolved did not mean that the inquest remained open. As to the substance of the anonymity issue, the notice party submitted that the coroner's findings were insufficient to *require* her to reopen this issue of her own motion; and that, in any event, the maintenance of the anonymity which had been granted to Soldier D was inevitable (or there was no 'real risk' of it being overturned) in all of the circumstances. The court was therefore invited to decline to remit the matter to the respondent coroner even if there had been some procedural failing.

Should the coroner have reconsidered the issue of anonymity before closing the inquest?

[21] Leaving aside for a moment the question of whether and when the coroner became functus officio, it appears to me that the primary issue in this case is whether the coroner ought to have reconsidered the issue of Soldier D's anonymity before closing the inquest once she was aware of the nature of the adverse findings she was making against him.

[22] Rule 5 of the 1963 Rules makes clear that the general rule is that inquests should be held in public. An analogue provision – rule 17 of the Coroners Rules 1984 (SI 1984/552) (now repealed) – was considered by the Divisional Court in England and Wales in *R (Secretary of State for the Home Department) v Assistant Deputy Coroner for Inner West London* [2010] EWHC 3098 (Admin). That authority emphasises the limits of a coroner's discretion to depart from the principle of open justice and, at para [36] of its judgment, the court said that the relevant rule "recognises the fundamental principle of our legal proceedings, namely that they should be public unless there is good reason for them not to be." It went on to emphasise that, in this context, the "public" includes persons other than merely the PIPs participating in in the inquest. The starting point is therefore that a witness giving evidence in proceedings should be named and subject to public view.

[23] Nonetheless, it is well established that coroners may grant protective measures to witnesses on the basis of their Convention rights or the common law obligation to treat witnesses fairly. In legacy inquests in this jurisdiction this is now commonplace, largely as a result of the ongoing risk to serving or former members of the security forces posed by dissident republican terrorists. *Re Officer C and others* [2012] NICA 47 remains a key authority in relation to the approach to be taken and the principles to be applied.

[24] However, the authorities support the proposition that where anonymity is granted in proceedings such as an inquest, since this represents a derogation from the principle of open justice the position should be kept under review in the course of the proceedings. Generally, no further active consideration will be required unless there is a material change in circumstances which warrants a further balancing of the

interests in play; and/or one of the PIPs, or the witness himself or herself, requests the coroner to reconsider the matter on the basis of new information or (what they have identified as a potential) material change in circumstance.

[25] This issue is addressed in the Court of Appeal's decision in *McDonnell* (*supra*), at para [30] ("We have referred at para [22] above to the requirement for the coroner to keep under review the question of anonymity during the course of an inquest…" *per* Morgan LCJ); and in *Officer C and others* (*supra*), at para [15](c) ("… the coroner's rulings on anonymity and screening are subject to review and alteration in the course of the inquest and must be kept under review…", *per* Girvan LJ). In particular, para [30] of the *McDonnell* judgment indicates that, where there has been a material change in relation to the conditions which contributed to the grant of anonymity, the coroner has an obligation to reconsider the matter.

[26] There was nothing in the present case to suggest that the background risk in relation to Soldier D had altered, notwithstanding the vintage of the process by which it had been assessed. The key factor which might represent a change in circumstance was the coroner's finding that he had used unjustified force which resulted in the death of the applicant's mother. It is arguable that this should not, of itself, be considered to represent a change of circumstance requiring reconsideration of anonymity granted on the basis of article 2 ECHR. That is because, as a matter of common sense, such a finding in a case such as the present seems likely only to increase, rather than decrease, the likely risk to the witness (if it has any impact at all) by rendering them a more attractive target for perceived reprisal. Anonymity and screening granted pursuant to article 2 are protective measures designed to obviate or mitigate a risk to life. They are not granted as a reward; and are not to be removed by way of penalty or in disapprobation of a witness's behaviour. (I leave aside for the moment whether the position may be different where protective measures were granted only on the basis of common law fairness where findings as to the witness's own behaviour, credibility and subjective views may be more influential.)

[27] However, this issue has been addressed in previous authority. In particular, para [30] of the Court of Appeal judgment in the *McDonnell* states as follows:

> "The remaining issue to be determined in this appeal is whether the coroner erred in failing to review the question of anonymity once the verdict had been given. We have referred at para [22] above to the requirement for the coroner to keep under review the question of anonymity during the course of an inquest. Where there has been some material change in the circumstances affecting the question of anonymity the coroner has an obligation to reconsider. The question is whether or not there was such a trigger in this case."

[28] Para [34] then continues in the following terms:

> "Where there has been a finding of unlawful conduct on the part of an individual contributing to a death, we recognise that it may be necessary to conduct such a balancing exercise even where the article 2 threshold in relation to that individual has been met."

[29] The use of the phrase "may be necessary" suggests that such a finding can be sufficient to require further consideration of whether anonymity remains justified. (Realistically, at this point the question of any screening which had been granted to the witness will have become academic.) In itself, this will require a coroner to address their mind to whether such further consideration is in fact necessary in the circumstances of the case (and, if so, thereafter whether any further order requires to be made, or further step is required to be taken, in light of the circumstances as they then stand). On the facts of *McDonnell*, it was held that there was no change of circumstances which required a review of the grant of anonymity; however, that was in circumstances where the verdict contained a finding that there had been excessive force by a number of prison officers which caused or contributed to the death, but where no particular prison officer or officers were identifiable in this regard. That is to be contrasted with the present case where clear findings have been made in relation to Soldier D who has been identified as the individual who discharged the lethal shot.

[30] The Court of Appeal's approach in *McDonnell* is clearly based on that element of the article 2 jurisprudence which emphasises that there must be a "sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts" (see, for instance, para 140 of *Anguelova v Bulgaria* (2004) 38 EHRR 31). The Strasbourg Court has recognised that the degree of public scrutiny required may well vary from case to case.

[31] Generally speaking, the grant of anonymity and screening to a witness or witnesses in the course of an inquest, where there is a proper reason for granting it, will not undermine the transparency or effectiveness of an inquest to such a degree as to render it incompatible with article 2 ECHR. The evidence is still given in public; the witness is still subject to questioning, including by representatives of the next of kin; and it can all still be followed by those taking an interest in the proceedings. In the present case, Soldier D's occupation, role and actions were all a matter of public knowledge, even though his precise identity was not. In some cases, however, where there have been clearly adverse findings in relation to the actions resulting in a death, it may be argued that the balance has shifted to a degree that the public interest in naming an individual found responsible for a death, in order to ensure practical accountability, outweighs the reasons for granting anonymity in the first place. Where anonymity was granted on the basis of the article 2 operational duty, this would amount to an argument that it is no longer a *reasonable* measure to grant the individual protective measures to reduce or mitigate a risk to their life. For my part, I consider

that it would have to be an exceptional case for the balance to shift in that manner. Nonetheless, the Court of Appeal has clearly indicated that a finding that an individual caused a death by the use of unjustified force may require the issue to be revisited.

[32] On the evidence available to me, I have concluded that the coroner did not reconsider this issue before closing the inquest, either in substance or by addressing her mind to the question of whether the anonymity issue ought to be revisited. Indeed, the coroner has confirmed as much in her ruling (at para 31) where she indicates that she did not reconsider the issue of anonymity at the point when, or just before, the inquest was closed. In my judgment, she ought to have done so, having regard to what the Court of Appeal said in the *McDonnell* case, once the core findings in respect of Soldier D's use of force were clear. She thereby erred in law, either by failing to take a relevant consideration into account or failing to adequately comply with the duty arising under the principle of open justice to keep the grant of anonymity under review. She ought to have considered whether, in light of her findings, it was necessary to reconsider the grant of anonymity to Soldier D.

Was it too late when the request for reconsideration was made?

[33] The next question is whether the coroner was still empowered to do so at the time when the applicant's representatives requested this. There is no direct authority as to when a coroner becomes functus officio in relation to the conduct of an inquest. The Court of Appeal recognised this in para [23] of the *McDonnell* case. However, the commonsense approach, also rooted in the governing statutory provisions, is that this occurs when the inquest is formally closed by the coroner. At that point, the coroner's functions in relation to the conduct of the inquest – that is, the investigation into the death and the giving of a verdict or findings in relation to it – are concluded. There may be a residual category of actions or steps which remain open to the coroner thereafter; but these must necessarily be limited. Obvious examples are the powers to retain and disclose documents and paperwork relating to the inquest, dealt with in rules 35, 36 and 38 of the 1963 Rules.

[34] Leckey and Greer, in *Coroner's Law and Practice in Northern Ireland* (1998, SLS), at para 11-29, state as follow:

> "Once a coroner has completed his enquiries into a death, he ceases to have jurisdiction and is said to be *functus officio.* A coroner is thereafter incompetent to undertake any further enquiry, whether with or without the holding of a second inquest, in the absence of an order of the court.

[35] The discussion in the *McDonnell* case, at paras [24]-[26], is also consistent with this approach. In particular, Morgan LCJ noted at para [25] that:

> "The 1963 Rules provide detailed procedures for the conduct of inquests between rules 2 and 23. Rule 4 provides that every inquest shall be opened, adjourned and closed in a formal manner. The importance of this lies in the fact that once the inquest is closed the coroner no longer has power to take any steps in relation to the conduct of the inquest. To do so would offend the rule that he has become functus officio. That includes any steps in relation to questions of anonymity and screening which he had to deal with in the course of the inquest."

[36] The indication in this passage that "any steps in relation to questions of anonymity and screening" fall within the category of matters relating to the conduct of the inquest which cannot be revisited after the inquest has been closed is clear and binding upon this court. It is perhaps unsurprising, since the grant of anonymity and screening to a witness is classically a matter of fairness to that witness in relation to their giving evidence in the course of the inquest. This aspect of the judgment – that, once the inquest is closed, the issue of anonymity cannot be revisited by the coroner – is also consistent with Treacy J's ruling at first instance in the *McDonnell* case (see [2014] NIQB 66, at paras [20]-[21]). In addition to the argument from statutory construction, Treacy J's conclusion was reached in part on the basis of the principle of legal certainty, namely that the coroner could not be required to deal with repeated, periodic requests to rescind anonymity granted in the course of a concluded inquest where, for instance, there was later some arguable change in circumstances (such as an amelioration of the security situation). A coroner's decision in relation to anonymity restricts publication of a witness's name as part of, or in connection with, the coronial proceedings and the coroner's power to make, vary or discharge any direction in that regard is tied to the proceedings.

[37] I also consider it to be clear that, in the present case, the coroner intended to, and did, close the inquest upon the delivery of her final written ruling on 8 July 2022. The Court of Appeal decision in *McDonnell* confirms that an inquest can be closed without the necessity for express words to that effect, where this can properly be inferred from all of the circumstances. The coroner could have indicated that there would be a further period after the delivery of her full written ruling during which the inquest remained open for any further issues to be addressed, after which she would formally close the inquest. As explained in para [26] of Morgan LCJ's judgment in *McDonnell,* if the coroner had proceeded in that way, she could have reconsidered the issue of the grant of anonymity before closing the inquest. However, that was not the approach which the coroner took. Rather, the oral delivery of her core findings just before the end of the High Court term, with an indication that this would be followed by delivery of her full written ruling – without a further hearing, once finalised and in what is traditionally the High Court Long Vacation – is consistent with this being the final outstanding step in the proceedings at which point the inquest would be considered to be closed. It is also consistent with the coroner's comments (noted at para [8] above) indicating her expectation that she would not see family, or

the various lawyers involved in the inquest again. Importantly, that this was the course in fact adopted by the coroner is confirmed by her in the ruling which she has provided.

[38] At the same time, I cannot accept the MoD's submission that the inquest was closed at the end of the hearing on 29 June. The coroner intended to deliver her full findings and the reasoning for them in her detailed written ruling which had not yet been provided. That appears to me to be an intrinsic part of her coronial function in the absence of which the inquest could not properly have been closed.

[39] I conclude, therefore, that the inquest was closed on the morning of 8 July 2022 and, thereafter, the coroner was not able to revisit the issue of the anonymity granted to Soldier D. As I have held above, she ought to have done so – of her own motion, if not prompted – before closing the inquest, once the kernel of her findings in relation to Soldier D's use of force was clear. By the same token, once the import of her findings was clear to the PIPs, the next of kin could and should have indicated to the coroner that the issue of Soldier D's anonymity would be the subject of a request that it be reconsidered. I would not be overly critical in this respect, since I understand the desire to consider the full written ruling before formulating any detailed submissions in relation to this; but there was nonetheless sufficient clarity on 29 June for the applicant to flag the issue as once again being live in advance of the coroner delivering her final ruling on 8 July.

[40] I should deal with the applicant's submission that the inquest must necessarily have remained open after 8 July 2022 because, at that point, the coroner had not yet decided whether or not a referral should be made to the DPP under section 35(3) of the 2002 Act. I reject that submission on the basis that a section 35(3) referral – unlike the grant of protective measures to a witness – falls within the limited category of matters with which a coroner may deal even after they have closed the inquest into the death to which the referral relates. That flows from the text of section 35(3) itself (set out at para [17] above) and the nature of the power in issue.

[41] Section 35(3) imposes the relevant duty on a coroner where "the circumstances of any death which <u>has been, or is being, investigated</u> by a coroner" appear to the coroner to disclose that an offence may have been committed. This provision clearly contemplates a referral being made by a coroner in relation to a death where their investigation has been concluded (i.e. where the inquest has been closed). In this respect, the provision may be distinguished from the similar provision in England and Wales (rule 25(4) of the Coroners (Inquests) Rules 2013 (SI 2013/1616)) which imposes the obligation merely "during the course of the inquest." There is nothing to inhibit a coroner in Northern Ireland making such a referral after the inquest has been closed. Moreover, a referral to the DPP is not, in itself, part of the coroner's investigation into the death, nor a core part of the inquest. It is a separate obligation – such as the obligations imposed upon other authorities by the remaining provisions of section 35 of the 2022 Act – designed to assist the DPP in the discharge of his functions, which may arise out of a coronial investigation or upon its completion. There is no reason

why the provision of such a report by the coroner should be considered to fall within that category of powers which are no longer exercisable once the inquest has been closed. I reject the applicant's submission that it is to be characterised as a "judicial" function, although that description would not in itself be determinative of the issue which falls for consideration in this case.

[42] The notice party submitted that one reason why the section 35(3) power may require to be considered and exercised after an inquest is because it may not be straightforward for a coroner to ascertain whether it appeared to them that an offence may have been committed, given the potentially broad range of offences which might be in issue, and in particular because the provision also refers to offences against "the law of any other country or territory" which may need to be researched.

[43] In any event, I conclude that the fact that the issue of the section 35(3) referral had not been concluded on 8 July 2022 in the present case is no reliable indicator, if indeed it is any indicator at all, that the inquest was not closed on the morning of that date.

[44] The notice party has relied upon the case of *R v White* [1860] 3 E & E 137, 121 ER 394, in which Cockburn CJ stated:

> "In holding an inquest, the coroner performs a judicial duty, and he is functus officio as soon as the verdict has been returned. He can hold no second inquest in the same case unless the first has been quashed by the Court…"

[45] It is of course correct, and consistent with more modern authority, that, having given the verdict, a coroner cannot hold a second inquest (or take steps which would amount to the holding of a second inquest or the continuation of the coronial inquiry relevant to the giving of the verdict). However, in light of the current statutory framework, and in particular rule 4 of the 1963 Rules, I consider that a coroner does have a significant discretion in relation to the management of the inquest up to the point where he or she formally closes it. I agree with the position adopted by the respondent coroner in this case that:

> "It is clear that the fact of a verdict does not itself close the inquest. It is open to a coroner to take a verdict and specifically adjourn the closure of the inquest for consideration of anonymity. If done in that way, the inquest remains open, and the coroner is not functus officio."

[46] As noted above, this is not the course which the coroner took in the present case. She intended to – and in my view did – close the inquest with the delivery of her detailed written rulings on 8 July 2022. When she was later asked to reconsider

the issue of anonymity, she correctly considered that she was functus officio in relation to that matter and had no power to re-open it.

Guidance for future cases

[47] The circumstances of the present case have brought into focus a number of practical issues and provide an opportunity to reflect on best practice for the future conduct of inquests in general and legacy inquests in particular. The following observations may warrant consideration by coroners:

(a) Rule 4 of the 1963 Rules indicate that inquests should be opened, adjourned and closed in a formal manner. This requirement should be borne clearly in mind. The opening of an inquest is frequently dealt with formally, in open court. Where an inquest is adjourned, this should also be done formally. Ideally, this should also be done in open court so that any member of the public wishing to follow or attend the inquest is advised of the next sitting. It may, however, be done in writing where appropriate (copied to all relevant PIPs), in which case the coroner may also wish to consider whether any further steps are required in order to inform the public.

(b) Experience indicates that inquests are often not now closed with the degree of formality required by the 1963 Rules. Frequently this may be because it is clear by inference that the coroner is closing the inquest. Where a coroner rises after giving their verdict or findings, thanking the legal representatives and expressing sympathy with the family of deceased, it will often be clear that the inquest is being closed at that point. Nonetheless, it is best practice to state clearly that the inquest is being closed – whether orally in court or in writing, if appropriate – so that there is no doubt as to precisely when that formal step has been taken.

(c) Further, it is also best practice to give PIPs some advance warning of the coroner's intention to close the inquest and to enquire whether there is any objection to the inquest being closed and/or whether there are any issues which the PIPs consider ought to be addressed before the inquest is closed.

(d) PIPs should conscientiously seek to assist the coroner as best they can in relation to this issue, including by identifying as soon as possible after findings are promulgated (whether the findings are expressed as summary, provisional or final) any ancillary issues which they consider might arise and/or which ought to be dealt with before the inquest is closed. Some indication of this should be given to the coroner (or the coroner's office or instructed legal team) as soon as practicable.

(e) As appears from paras [27]-[29] above, where a coroner has granted anonymity to an individual whom they later find to have caused a death which is the subject of the inquest in circumstances where the coroner critical of the

behaviour causing the death (such as finding that the force used was unjustified), the coroner should consider, before closing the inquest, whether this necessitates a reopening of the issue of the grant of anonymity. It will usually be appropriate to seek submissions from the PIPs on this issue (or perhaps, in a composite manner, both on the issue of whether anonymity ought to be reopened and the submissions which would be made in the event that the coroner was prepared to reconsider the matter in substance).

What relief, if any, should be granted?

[48] I have held at para [32] above that the coroner fell into error, in light of her substantive findings, by failing to reconsider whether she should reopen the grant of anonymity to Soldier D during the course of the inquest. What relief, if any, should the court grant to reflect this finding? I have concluded that it is unnecessary, and would be inappropriate, to grant any relief going beyond what is stated in this judgment for two reasons.

[49] First, despite the fact that the coroner was functus officio when she was asked to reconsider this issue, through the process which followed, I have a clear view of the case each of the parties was making in relation to the issue of anonymity and of the coroner's response. Although it is theoretically open to the court to quash the closure of the inquest and remit the issue of anonymity back to the coroner for further consideration, in my judgment this course would serve no purpose. The coroner has already indicated how she would have approached the matter, and I find no legal error in the approach she has outlined. In those circumstances, requiring the coroner to go through the motions of reconsidering the issue again would be unwarranted.

[50] The coroner's indication of how she would have approached this issue in substance is in my view unimpeachable. It is set out in para 39 of her ruling of 26 October 2022 in the following terms:

> "In deference to the submissions made by the PIPs on these issues I should briefly address what decision I would have made on anonymity had I found there was jurisdiction and/or had I reviewed the issue at the time of delivery of my findings. I shall express the matter in brief terms: I would not have changed the existing decision on anonymity. My core reasons are:
>
> a) The previous decision identified there were sufficient grounds to grant continuing anonymity to Soldier D.
>
> b) The basis of the application for a review and recission of anonymity are the findings I have made in this case.

c) Soldier D has been found by me to have killed Mrs Thompson and to have done so without lawful justification. In my judgment those findings are unlikely to have reduced the threat to Soldier D. Certainly, there is no basis to assume a reduction in the threat level.

d) I do not consider that identifying Soldier D is necessary to comply with the article 2 procedural requirements of this inquest. I am conscious that whilst anonymity orders were made on the basis of assessed threat, those orders tend to encourage participation in the inquest by witnesses.

e) This inquest was an extremely detailed analysis of the death of Mrs Thompson. In my judgment and judged as a whole the process was compatible with the procedural requirements of article 2. That process includes the referral to the PPS, which has taken place.

f) The findings in this case have been referred to the PPS. It follows that Soldier D may be subject to criminal prosecution for homicide. In that event it is likely applications will be made for his anonymity. If I removed Soldier D's anonymity now it would frustrate any possible application in criminal proceedings.

g) For the avoidance of doubt, I acknowledge that most suspects in criminal proceedings are named. However, with the general background to this case it is overwhelmingly like that Soldier D would seek anonymity in any criminal proceedings. Any decision on anonymity in criminal proceedings should properly be for the criminal courts.

h) I am entitled to take a precautionary approach to the issue of anonymity."

[51] Although the applicant contended that the coroner did not have detailed representations from them on the issue, at the time she gave her provisional indication she had had sight of the papers filed by the applicant in these proceedings and a range of submissions in relation to the issue of anonymity. These included the applicant's solicitors' letter of 8 July 2022 and the applicant's further submissions of 15 September

2022 (in response to the MoD's contribution of 9 September); as well as further detailed submissions from the applicant of 11 October 2022 "on the need to rescind the grant of anonymity" and a further response from the MoD of 14 October 2022. In truth, the points relied upon by the applicant as supporting the removing of anonymity are both limited and uncomplicated. The PIPs had had a fair opportunity to make representations on the issue and the coroner was well aware of the points being made on each side.

[52] The applicant also complained that the coroner did not have an up-to-date threat assessment in relation to Soldier D at the conclusion of the inquest. However, there is nothing whatever to suggest that the threat assessment in relation to him would have changed in any manner likely to be of assistance to the applicant's application. The coroner had also seen a range of additional threat assessments from 2021, in relation to other military witnesses, which were in materially similar terms to that which had initially been obtained in relation to Soldier D.

[53] It is also instructive to consider how other coroners have dealt with similar applications to remove anonymity at the conclusion of an inquest in light of critical findings. Horner J, sitting as a coroner, dealt with a similar issue in the inquest touching upon the death of Pearse Jordan: see *Re an inquest into the death of Patrick Pearse Jordan: Postscript on Anonymity Orders Relating to Officers M and Q* [2016] NICoroner 2. Although his critical findings in relation to the two police officers concerned did not relate to the unjustified use of force (but, rather, potential interference with the course of justice and/or perjury), Horner J took the view that his findings did not decrease the risk to their lives which had formed the basis of the grant of anonymity. He did not consider that he was required to reconsider the grant of anonymity in substance but also concluded that, had he done so, "any public interest there may be in revelation of those officers' names in light of the findings and, in particular their wrongdoing, would still have to yield to the article 2 rights of the officers". This is consistent with the Court of Appeal's observation in *McDonnell*, at para [33], that there are "very limited circumstances" in which a witness in respect of whom there was a finding that he would be subject to a real and immediate risk to life would lose the protection of anonymity.

[54] Perhaps more directly relevant is the more recent decision of Colton J, again sitting as a coroner, who also dealt with a similar issue in the inquest touching upon the death of Daniel Carson: see [2019] NICoroner 7 (with the provisional and final anonymity rulings included as appendices). Having found that the use of force causing death was unjustified in that case, Colton J revisited the issue of anonymity (which had provisionally been granted to the witness known as 'S1') upon the application of the next of kin of the deceased. He found that the potential threat against S1 had increased as a result of the findings he had made. He dealt with the argument that accountability under article 2 ECHR required the identification of the person responsible for the death but found that, even with the findings he had made against S1, it was still a proportionate response to the article 2 risk to maintain his anonymity.

[55] An interesting factor in this case is that the coroner decided to refer Soldier D to the DPP for consideration for prosecution. In the coroner's view, that represented a factor tending against removing his anonymity. That is largely because, if he was prosecuted, the coroner's removal of anonymity (resulting in his being named in the public findings) would render nugatory any application on Soldier D's part which might be made to the trial judge for anonymity in the course of those proceedings. In addition, if he were to be prosecuted, his prosecution would likely require him to return to Northern Ireland where the threat to him is higher than in Great Britain where he resides, with the threat potentially being raised again by the findings which had been made against him in the inquest. I cannot agree with the applicant's argument that the coroner was not entitled to consider these matters, particularly having regard to the fact that a primary purpose of an article 2 investigation is as a potential precursor to the prosecution of a perpetrator where the death was unlawful. The consequences for that further process of naming the individual were matters which, in my view, the coroner was perfectly entitled to take into account in weighing the overall interests at play.

[56] Different considerations may arise where no report to the DPP is being made, in which case, as Ms Quinlivan put it, the inquest ruling itself may be "the only justice" the family of the deceased obtains. (It is, of course, unlikely that, in a case where a finding of unjustified force causing death has been made, the threshold for a section 35(3) referral will not also be met.) Factors of this nature may also, however, make it desirable for the DPP to consider whether, if a prosecution is not to follow, in promulgating his decision on that issue it is appropriate to name the person judged responsible for the death at that point. Where a prosecution is to be pursued, I see force in the suggestion that this is best left to be resolved by the trial judge, particularly where (as indicated above) the trial process itself may require the soldier to return to Northern Ireland where the risk is higher. Another authority relied upon by the applicant – *R v Marine A* [2013] EWCA Crim 2367, where a Royal Marine who had been anonymised had his anonymity revoked after a conviction for murder – clearly suggests that, where a criminal conviction of that nature follows, that will be a factor strongly in favour of removing anonymity (although it is to be noted that there was not ultimately considered to be an article 2 risk to life in that case). A further option may be for the coroner to keep the inquest open to reconsider the issue of anonymity once it is known whether or not the DPP intends to proceed with a prosecution; but that appears to me to be undesirable given the lack of finality to the inquest proceedings which it might entail.

[57] In summary, however, I am satisfied to the high degree required that, if the anonymity issue was remitted to the coroner, she would make the same decision as suggested in her ruling of 26 October 2022; and, moreover, that this would be a perfectly lawful ruling, in line with the approach taken by other coroners in the *Jordan* and *Carson* cases.

[58] Second, as a subsidiary issue, this is a case where in my view it would have been appropriate for the court to decline to grant intrusive relief in the exercise of its discretion. That is because the applicant or his representatives could, and should, have indicated to the coroner promptly, after promulgation of her summary findings, that they intended to ask her to reconsider the issue of anonymity. They were in a position to do so in relation to the question of referral to the DPP. Whether at the hearing of 29 June 2022 or in writing in the few days thereafter, they could equally have indicated that they considered that this was a case where the issue of anonymity should be reopened. Within a short time, they were in a position to send detailed submissions to the coroner identifying the relevant case-law and arguments. Albeit the coroner ought to have addressed the issue of her own motion, the course she adopted also permitted an appropriate opportunity for the applicant's representatives to flag this issue up before it was too late. In light of the sequence of events described above, I consider that it would be unreasonable to quash the closure of the inquest and remit the matter back to the coroner upon the applicant's application when that could have been avoided if the issue had been brought to the coroner's attention promptly by the party who wished it to be addressed.

[59] I have additionally considered whether a declaration is necessary or appropriate to reflect the illegality identified in para [32] above but consider that this is clearly one of those cases where the content of this judgment speaks for itself, and a formal declaration would serve no additional purpose.

Conclusion

[60] For the reasons given above, the application for judicial review is allowed but in circumstances where the court declines to grant any relief.

[61] I will hear the parties on the issue of costs but, provisionally, consider that the making of no order for costs between the parties would meet the justice of the case; with the only order in relation to costs being that the applicant's costs are taxed as those of a legally assisted person.