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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 BRIDIE BROWN FOR JUDICIAL REVIEW

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Des Fahy KC & Mark Bassett (instructed by KRW Law) for the Applicant
Tony McGleenan KC, Philip McAteer & Laura Curran (instructed by the Crown Solicitor's Office) for the Respondent
Frank O'Donoghue KC & Andrew McGuinness (instructed by the Independent Commission for Reconciliation and Information Recovery) for the Notice Party

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HUMPHREYS J

Introduction

[1] On 12 May 1997, Sean Brown, the chairman of Bellaghy Wolfe Tones GAA Club, was locking the gates to the training ground when he ambushed by loyalist paramilitaries. He was abducted, beaten, and shot six times in the head. His body was found next to his burning car the following morning in Randalstown.

[2] In the aftermath of his murder, Seamus Heaney wrote of his friend:

> "He represented something better than we have grown used to, something not quite covered by the word reconciliation, because that word has become a policy word - official and public. This was more like a purification, a release from what the Greeks called the 'miasma', the stain of spilled blood."

[3] How prescient it was of the Nobel laureate to identify the use of the word 'reconciliation' since it features in the title of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ('the Legacy Act') and in its creation, the Independent Commission for Reconciliation and Information Recovery ('ICRIR'). The impact of

the Legacy Act and the role of ICRIR have been recent features of the Brown family's 27 year quest to discover what happened to a much-loved husband and father.

[4] Sean Brown's widow Bridie is now aged 87. She married Sean in 1966 and together raised a family of six children. Sadly, one of them, Damian, passed away in 2021. Sean worked as an instructor at the Institute of Mechanical Engineering in Ballymena but devoted himself to his family and community in Bellaghy.

The investigation into the murder

[5] Bridie Brown deposes in her affidavit to the grave concerns she harboured in relation to the efficacy and diligence of the police investigation from its very beginning. She recalls the insulting and insensitive approach adopted by officers who came to her house. The investigation was closed in July 1998, and no one was ever charged.

[6] At the time, the family believed that Sean had been murdered by members of the Loyalist Volunteer Force. They now have reason to believe that he was killed by agents of the state.

[7] The Police Ombudsman for Northern Ireland ('PONI') published a statutory report on 19 January 2004 which followed on from a complaint made by the applicant in 2001. It concluded as follows:

(i) No proper forensic analysis was carried out of cigarette butts found close to Mr Brown's body;

(ii) There was no proper search for witnesses at the location;

(iii) No proper attempts were made to identify vehicles which had passed near to the scene of the abduction;

(iv) Special Branch did not share all available intelligence with the investigating team;

(v) The occurrence book from Bellaghy RUC station had gone missing;

(vi) As a result of these errors and omissions, an earnest effort to identify the murderers could not be evidenced from the investigation file.

[8] A further police investigation, under the auspices of an external consultant, followed the publication of the PONI report, but no new lines of inquiry were identified. An inquest into the death of Sean Brown was opened in 1997. Over 40 preliminary hearings were held during the course of which the coroner forcefully criticised state agencies for failing to comply with disclosure obligations. The family brought judicial review proceedings in relation to the failure to convene an inquest

and were awarded damages in November 2021. The inquest hearing finally commenced, after 26 years, before Kinney J in March 2023.

[9] The Brown family commenced civil proceedings against the Chief Constable of the PSNI and the MOD in 2015 and these settled on 12 May 2022. In open court the following statement was made on behalf of the Chief Constable:

> "Sean Brown, a devoted family man and a pillar of the Bellaghy community was murdered on 12 May 1997. As a result of negotiations, the Plaintiff has agreed a satisfactory full and final settlement of this action with the first Defendant. The PSNI wishes to apologise to Mrs Brown and her family for inadequacies in the RUC original investigation and continues to engage fully in the ongoing inquest proceedings."

The inquest

[10] Kinney J set out a draft scope of the inquest on 27 March 2023. As always, this was a document to be kept under review as the evidence was heard and submissions received. In relation to the question of how the deceased came by his death, the coroner was to consider:

(i) Who was responsible for the death;

(ii) What relevant agencies of the state knew, if anything, about the intention to attack Mr Brown, and, arising from what was known, whether the death of Mr Brown could have been prevented;

(iii) What relevant agencies of the state were able to ascertain about the death of Mr Brown after it occurred, and what happened to that information; and

(iv) The response of relevant agencies of the state to the death of Mr Brown and to the subsequent investigations into his death.

[11] On 22 November 2023 the Crown Solicitor's Office wrote to the applicant's solicitors in relation to the issue of disclosure and a proposed application for public interest immunity ('PII'). It is revealed that during disclosure work, the PSNI had "encountered issues arising from what can broadly be described as intelligence coverage." As a result, the PSNI had formed the view that an inquest was not the appropriate vehicle for the continuation of the investigation into the death of Mr Brown. It further stated:

> "In the event that the family seek a public inquiry into Mr Brown's death, PSNI confirms that it does not dispute that a public inquiry, which would have the facility for a

> closed hearing to address such issues, would be an appropriate method to continue the investigation into the death of Mr Brown."

[12] The then Minister of State for Northern Ireland, Steve Baker, signed four PII certificates between September 2023 and February 2024, and another was signed by the Minister for Defence People and Families. PII hearings were conducted over several days in January and February 2024. On one of the PII certificates, dated 19 December 2023, Mr Baker added the following words in manuscript:

> "The extent of redactions here strengthens the case for closed proceedings"

[13] On 27 February 2024 a global gist of the redacted sensitive materials was read by counsel to the coroner in an open hearing. The PSNI, MOD and the Northern Ireland Office were all represented by counsel. The gist stated as follows:

> "Sean Brown was murdered on the 12th May 1997. The murder has long been attributed to loyalist paramilitaries. The family of Sean Brown has alleged that agencies of the State are also culpable in respect of the murder. The Coroner is conducting an inquest into the death of Sean Brown. The documentation produced to the Coroner in the inquest by various agencies of the State consists of extensive, relevant, non-sensitive and sensitive material. The extensive, relevant non-sensitive and sensitive material has been reviewed by the Coroner in unredacted form. The material indicates that in excess of 25 individuals were linked through intelligence to the murder of Sean Brown. The intelligence material indicates that those individuals are said to have been involved at the material time with loyalist paramilitaries. Those individuals or potential suspects come from different geographical areas of Northern Ireland. Those individuals are not necessarily linked to one another.
>
> The intelligence material indicates that at the time of the death of Sean Brown, a number of individuals linked through intelligence to the murder were agents of the state. Intelligence is not evidence but issues relating to the agents of the state and their handling would inevitably fall to be investigated in the inquest if it were possible for the Coroner to do so. Agencies of the state for long standing reasons of national security in relation to source protection have asserted public interest immunity in respect of material that substantially bears on the issues that would otherwise be investigated by the Coroner."

[14] Mrs Brown deposes to her shock and distress at these revelations since what she had long suspected to be the case was by now a matter of public record.

[15] On 4 March 2024 Kinney J handed down an open ruling on the PII claims. He described the "lamentable" experience of the Brown family in waiting for an inquest to take place. He set out in some detail the failings on the part of state agencies in relation to their statutory duties to disclose material to the coroner. In summary he described their actions as:

> "deplorable and frankly inexcusable"

[16] He was satisfied that the material under consideration was relevant to the investigation into the death but that the disclosure of much of it would create a real risk of serious harm to the public interest in terms of damage to national security.

[17] Kinney J then asked himself the *Litvinenko* question as to whether he could satisfy his duty to carry out a full, fair and fearless investigation into Sean Brown's death in the absence of the material covered by PII. He concluded that he could not. On his analysis:

> "To do so would inevitably result in an inquest that would be incomplete, inadequate and misleading." (para [35])

[18] In that ruling, Kinney J evinced his intention to write to the Secretary of State for Northern Ireland ('SOSNI') requesting that a public inquiry be established into the death of Sean Brown, which would allow the sensitive material to be examined and tested in a closed hearing.

The request to SOSNI

[19] On considering this ruling, SOSNI instructed solicitors to write to the coroner, on 8 March 2024, in advance of any written request in respect of a public inquiry, to ask him to consider whether he would be minded to exercise his powers under section 9(6)(a) of the Legacy Act once they came into effect on 1 May 2024. This legislative provision enables a coroner who was a responsible for an inquest closed by virtue of the Legacy Act to ask ICRIR to "review" the death.

[20] A similar right to request a review is enjoyed by close family members of a deceased, the SOSNI and the Attorney General.

[21] On 13 March 2024 the coroner wrote to the SOSNI stating as follows:

(i) In light of the materials disclosed to the inquest, serious questions arise as to whether those who conducted previous investigations were misled and, if so, why and by whom;

(ii) The disclosure process in the inquest was handled in a completely unsatisfactory manner. Highly relevant and important material was only disclosed after much resistance to the extent that he formed the view that it would never have been disclosed but for the diligence and persistence of his legal team;

(iii) The question therefore arose as to whether it was intended that he would conduct an inquest without knowledge of this material;

(iv) All of these matters would be of very great concern to the public, as should the treatment of the Brown family be of real concern to all citizens;

(v) In his opinion, the appropriate way to deal with issues of this consequence would be through a public inquiry;

(vi) In light of all the circumstances known to him concerning the death of Sean Brown he did not regard ICRIR as the appropriate mechanism to investigate; and

(vii) He noted that the Chief Constable of the PSNI had confirmed his support for a public inquiry, despite the fact that this would inevitably involve the examination of the conduct of his organisation.

[22] As a result, Kinney J asked the SOSNI to establish a public inquiry and to confirm, within four weeks, that he had done so.

[23] In parallel, the applicant's solicitors made it clear that the family were fundamentally opposed to the Legacy Act in general and to ICRIR in particular. They made it clear that a public inquiry was, in their view, the only avenue open to them to find out the truth about what happened to Sean Brown.

[24] No answer was forthcoming from SOSNI within the timeframe and judicial review proceedings were commenced on 22 May 2024.

The first decision

[25] On 16 May 2024 the respondent's solicitors informed the applicant that officials were preparing advice for Ministers which would be submitted within a week and that a decision was expected to be made within a further week thereafter. By 22 May advice had been drafted but the Prime Minister then announced that a general election would be held on 4 July. It was determined that a decision on a public inquiry in the Brown case ought not to be taken during the purdah period.

[26] Following the election, and the appointment of the new SOSNI, a letter was written to the Brown family offering a meeting. This took place on 28 August 2024 at a hotel outside Belfast.

[27] Officials prepared advice to SOSNI on 7 September and, following some further inquiries, a decision was made by him that a public inquiry into Sean Brown's death would not be established. This was communicated to the applicant and her family by letter dated 13 September. On the same date a similar letter was sent to the coroner.

[28] The letters recited a number of factors taken into account by SOSNI including the views of the family, the coroner's rulings, the article 2 obligation, public concern, promptness and cost. In particular, SOSNI concluded:

> "I consider [ICRIR] to be capable of discharging the Government's human rights obligations."

The second decision

[29] On 20 September 2024 the Court of Appeal handed down its judgment in *Re Dillon's Application* [2024] NICA 59. In light of this, officials provided a further ministerial submission to SOSNI to permit him to consider whether a different decision should be reached. The recommendation to the Minister was that he agree and affirm the previous decision and encourage the Brown family to meet with ICRIR.

[30] The advice, which was dated 11 November 2024, stated that it was "highly likely" that a public inquiry under the Inquiries Act 2005 ("the 2005 Act") would be able to deliver an article 2 compliant investigation. It was recognised that focused terms of reference would enable a chair to build upon the work already carried out by the inquest. It was estimated that an inquiry could take two to three years to complete, and emphasis placed on the resources in terms of premises and staff which would be required. Officials also reminded SOSNI of the clearly expressed views of the Brown family.

[31] The advice was to the effect that, on the law as it currently stands, ICRIR does not offer an article 2 compliant process. However, this could change if either the Supreme Court reverses those findings, or the position is altered by legislation. Despite this obvious infirmity, SOSNI was advised that an ICRIR investigation could start and finish sooner than a public inquiry, with less cost. Further, it was stressed that:

> "Ministry of Defence and MI5 officials have raised concerns about resourcing their responses to an additional separate process if another Troubles-related inquiry were to be established … Home Office officials raised consideration of a large number of other cases, as well as the costs and impact on the public finances."

[32] On 12 November SOSNI indicated that he agreed with the recommendation contained in the submission on the basis that there was "a clear commitment to ensure the ICRIR is made ECHR compliant."

[33] On the eve of the hearing of this case, SOSNI announced that a Remedial Order would be laid before Parliament under section 10 of the Human Rights Act 1998 ("HRA") to remedy the deficiencies in the Legacy Act found at first instance in *Dillon* in relation to immunity and civil actions. He also stated that primary legislation would be introduced "when parliamentary time allows" to restore inquests and reform ICRIR by addressing the disclosure and representation issues identified by the Court of Appeal. In parallel, the Government would seek leave to appeal to the Supreme Court in respect of these matters.

[34] In these judicial review proceedings, the applicant challenges the legality of the decision of SOSNI not to establish a public inquiry. The applicant seeks a declaration that this decision is unlawful as being contrary to section 1 of the Inquiries Act 2005 ('the 2005 Act') and an order of mandamus compelling SOSNI to establish a public inquiry.

The legal framework

(i) Article 2 ECHR

[35] At the core of the applicant's case is the state's obligation to conduct an effective investigation into the death of Sean Brown under article 2 of the ECHR.

[36] A coroner's inquest is one such means by which the article 2 procedural obligation may be satisfied. It is not, however, the only one. The caselaw in this field makes it clear that, for instance, a criminal investigation or prosecution, a PONI report or civil proceedings may all contribute to the satisfaction of the obligation. Self-evidently, a public inquiry may also fulfil this role. As the Supreme Court observed in *Re Dalton's Application* [2023] UKSC 36:

> "The choice of investigative method is firmly within the State's margin of appreciation." (para [312])

[37] The key elements of an article 2 compliant investigation were summarised by the Court of Appeal in *Dillon* at para [185]:

(i) the investigation must be initiated by the state itself;

(ii) the investigation must be prompt and carried out with reasonable expedition;

(iii) the investigation must be effective;

(iv) the investigation must be carried out by a person who is independent of those implicated in the events being investigated;

(v) there must be a sufficient element of public scrutiny of the investigation or its results; and

(vi) the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interest.

[38] For article 2 to apply to an investigation involving an allegation of wrongdoing against state agents, it is necessary to establish a 'genuine connection' between the death and the coming into force of the HRA on 2 October 2000.

[39] In *Re McQuillan's Application* [2021] UKSC 55 the Supreme Court held that for the genuine connection test to be satisfied:

(i) The lapse of time between the critical date of 2 October 2000 and the triggering event must be reasonably short and should not normally exceed ten years; and

(ii) Much of the investigation into the death must have taken place or ought to have taken place after the critical date.

[40] There is no dispute that article 2 is engaged on the facts of this case.

[41] In *R (Amin) v Home Secretary* [2004] 1 AC 653 Lord Bingham concluded that there is no "single model of investigation" to be adopted in all cases and Lord Hope stated that the choice of the investigation to be carried out is a decision by the state and may vary depending on the circumstances.

(ii) The Legacy Act

[42] Section 44 of the 2023 Act introduced a new section 16A into the Coroners Act (NI) 1959 which required coroners to close Troubles related inquests with effect from 1 May 2024. A number of inquests were halted by operation of this statutory provision. As the applicant points out, the inquest under scrutiny in this case was brought to an end for different reasons.

[43] The architecture of the ICRIR is found in Part 2 of the 2023 Act. Sections 30-34 govern the use and disclosure of information. Paragraph 4 to Schedule 6 provides that a disclosure of sensitive information by the ICRIR is permitted if the SOSNI notifies the Commissioner for Investigations that such disclosure is permitted.

[44] Keegan LCJ at para [194] of *Dillon*:

> "ICRIR has stated its commitment to Convention compliance. However, the real question is whether that

> essential compliance is or can be achieved within the current statutory structure. It is not simply enough that the ICRIR contains the word independent in its title. This must be substantively established. Nor are proper and worthy intentions sufficient if the ICRIR lacks legal power to deliver article 2 compliant investigations."

[45] In cases where ICRIR was effectively a replacement vehicle for the inquest process, the Court of Appeal found that ICRIR was significantly deficient in two major respects. Firstly, as regards the engagement and representation of the next of kin ands secondly in relation to disclosure. On the first ground, there is no provision for legal aid to fund representation for families. The idea of lawyers being seconded to ICRIR was roundly rejected. On the issue of disclosure, the court said:

> "Given the breadth of the provisions set out in Schedule 6, we share the applicants' concern that the 2023 Act clearly places the final say on disclosure in the hands of the SOSNI. That is something which is outside the control of the Chief Commissioner of the ICRIR. The SOSNI can prohibit the ICRIR from sharing sensitive information – which, as we have said, is defined in terms which could and would go much wider than material over which PII is asserted – with the next of kin and others in a final report. The SOSNI can prohibit disclosure even without giving reasons to the ICRIR, let alone others, in certain instances. There is also no provision for a merits-based appeal (although there is review akin to judicial review); and it appears that the court cannot itself permit disclosure of any sensitive material where the SOSNI's permission has been withheld." (para [234])

[46] For these reasons, the Court of Appeal held that ICRIR was not capable of delivering an article 2 compliant investigation into deaths in instances where it is acting in place of a coroner's inquest. It made a declaration of incompatibility under section 4 of the HRA in relation to the disclosure provisions.

(iii) Public Inquiries

[47] Section 1 of the 2005 Act states:

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

(b) there is public concern that particular events may have occurred."

[48] This clearly vests a broad discretion in the Minister concerned to determine whether or not to cause an inquiry to be held.

[49] Section 19 of the 2005 Act provides that restrictions on the disclosure or publication of evidence may be imposed either by way of a restriction notice given by a Minister or restriction order made by a chairman. These must be limited to restrictions required by statutory provision or rule of law or those which the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or in the public interest. In doing so, the decision maker must have regard to, inter alia, the risk of harm to national security.

[50] By section 22(2), the rules of law under which evidence or documents are permitted or required to be withheld on grounds of public interest immunity apply in relation to an inquiry as they apply in relation to civil proceedings.

[51] Rule 12 of the Inquiry Rules 2006 is concerned with "potentially restricted evidence" which is subject to an application for a restriction order, restriction notice or public interest immunity.

Caselaw

(i) Amin

[52] This case concerned the murder of a prisoner by his cellmate and the steps taken by the relevant authorities to investigate. There was a criminal prosecution and conviction but the inquest which had commenced had been adjourned and was never resumed. The family sought an order requiring, inter alia, the holding of a public inquiry. At first instance ([2001] EWHC Admin 719) Hooper J made the following declaration:

> "On the facts known to the Secretary of State (including the fact that the inquest would not be resumed), an independent public investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses, must be held to satisfy the obligations imposed by Article 2 of the European Convention on Human Rights."

[53] The Court of Appeal overturned that decision but the Law Lords restored the declaration made by Hooper J. The Lords held that whilst there was no single model of investigation, certain irreducible minimum standards had to be met. Lord Bingham emphasised the importance of the nature of the inquiry to be undertaken:

> "The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others." (para [31])

(ii) Litvinenko

[54] In *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin) the widow of an individual allegedly poisoned by Russian agents in London sought to judicially review the refusal by the Home Secretary to cause a public inquiry to be held pursuant to section 1 of the 2005 Act. With strong echoes of the instant case, much of the relevant material considered by the coroner was the subject of a successful PII application and he then determined that he was unable to carry out a proper inquest into the death. The coroner then wrote to the Lord Chancellor requesting that a statutory inquiry be established which, in his opinion, was necessary if the death were to be properly investigated. He noted that sections 19 and 20 of the 2005 Act would allow evidence to be received in closed session, enabling the relevant material to at least be the subject of consideration and analysis.

[55] This was not an article 2 challenge (save for a limited issue around the *Menson* duty which had been fulfilled on the facts of the case). Rather, the applicant challenged the rationality of the decision made by the SSHD and successfully persuaded the Divisional Court that:

> "… the reasons given by the Secretary of State do not provide a rational basis for the decision not to set up a statutory inquiry at this time but to adopt a "wait and see" approach. The deficiencies in the reasons are so substantial that the decision cannot stand." (para [74])

[56] As a result the decision was quashed. Richards LJ concluded:

> "The case for setting up an immediate statutory inquiry as requested by the Coroner is plainly a strong one. The existence of important factors in its favour is acknowledged, as I have said, in the Secretary of State's own decision letter. I would not go so far, however, as to accept Mr Emmerson's submission that the Secretary of State's refusal to set up an inquiry is so obviously contrary to the public interest as to be irrational, that is to say that the only course reasonably open to her is to accede to the

> Coroner's request. If she is to maintain her refusal she will need better reasons than those given in the decision letter, so as to provide a rational basis for her decision. But her discretion under section 1(1) of the 2005 Act is a very broad one and the question of an inquiry is, as Mr Garnham submitted, difficult and nuanced. I do not think that this court is in a position to say that the Secretary of State has no rational option but to set up a statutory inquiry now." (para [75])

[57] Later that year, the Home Secretary announced a public inquiry would be held.

(iii) Finucane

[58] In *Re Finucane's Application* [2019] UKSC 7 the Supreme Court concluded that an independent review conducted by Sir Desmond de Silva into the murder of Patrick Finucane by loyalist paramilitaries had not been article 2 compliant. The court made a declaration to that effect but declined, in the circumstances, to order a public inquiry of the type advocated by the deceased's family. Lord Kerr concluded:

> "It is for the state to decide … what form of investigation, if indeed any is now feasible, is required in order to meet that requirement."

[59] In the subsequent case, *Re Finucane's Application* [2022] NIKB 37, the applicant complained that the state had failed to take any action to remedy the failure to carry out an article 2 compliant investigation identified by the Supreme Court. The approach adopted by the state had been one of 'wait and see' pending the outcome of further police and PONI investigations. Scoffield J held:

> "… it is not open to the respondent to adopt this 'wait and see' line. That is because, in light of the additional delay, which is inevitable in this approach, it breaches the article 2 requirement of reasonable expedition and, in so doing, also inevitably increases the risk of rendering an article 2 compliant investigation unfeasible." (para [122])

[60] The applicant sought a mandatory order compelling the holding of a public inquiry as the only means by which the failure could be rectified. However, whilst recognising the force in this argument, Scoffield J declined to make such an order for a number of reasons. Firstly, he held that the state ought to be afforded the opportunity to consider the matter again with the benefit of the judgment of the court. Additionally, he identified:

(a) The Supreme Court declined to make an order in these terms on the basis that it was a matter for the state to decide what form of investigation is required in order to meet the requirements of article 2;

(b) Public inquiries are time-consuming and expensive, and the High Court is constitutionally reticent about mandating the expenditure of considerable sums of public money;

(c) To do otherwise may serve to give undue priority to the applicant's case or unfairly divert limited resources from other equally deserving cases;

(d) There were no authorities cited to the court where such a mandatory order had been made. The judge accepted that such an order could be made but that it would be "highly unusual; indeed, truly exceptional";

(e) Even if such an order were made, the court could not fix the terms of reference for such an inquiry, which itself may cause more contention and litigation. (para [124])

[61] Scoffield J did postulate the possibility of a more limited, bespoke, inquiry building upon the investigative work which had already been carried out.

[62] This judgment was handed down in December 2022 and the court ordered that the SOSNI communicate a further decision of the UK Government in response to the decision of the Supreme Court by 31 March 2023. The time for this was later extended to 12 May 2023.

[63] In dismissing the appeal of the SOSNI in July 2024, the Court of Appeal held that there were a "number of options open" to the SOSNI as to how he should go about establishing an article 2 compliant inquiry. However, in the event of any undue delay in setting up such inquiry, the court indicated it may make a mandatory order. In doing so, it directed the parties to put forward their proposals for how a compliant investigation be carried out and, in the event of disagreement, it would rule on the issue. In the event, in September 2024, the SOSNI announced that a public inquiry would be held.

(iv) Gallagher

[64] In *Re Gallagher's Application* [2021] NIQB 85, the applicant sought judicial review regarding the SOSNI's refusal to hold a public inquiry into the Omagh bombing. Horner J held that:

> "Ministers are in the best position to make such an assessment given their "constitutional role as accountable

> public representatives charged with acting in the public interest." They are also best placed logistically given the resources at their disposal to obtain all necessary information to make the decision fairly and to then implement it." (para [308])

[65] In February 2023 SOSNI announced that a public inquiry would be held, focusing on the handling of intelligence and the preventability of the bomb.

The grounds of challenge

[66] The applicant contends that in the context of an inadequate police investigation and discontinued inquest, the only means to provide an effective and compliant article 2 investigation is, as the law stands, by setting up a public inquiry under the 2005 Act.

[67] Whilst it is accepted that section 1 of the 2005 Act confers a wide discretion on the relevant Minister, the case is forcefully advanced that, in the context of this case, the choice is a binary one between:

(i) Establishing a public inquiry in compliance with section 6 of the HRA and international law; and

(ii) Continued illegality.

[68] In light of the finding in *Dillon* that ICRIR was not capable of delivering an article 2 compliant investigation, the applicant says that a public inquiry is the only feasible option open to SOSNI. Only it could satisfy the minimum irreducible requirements referred to by Lord Bingham in *Amin*.

[69] The respondent says in rebuttal:

(i) He has sought permission to appeal the decision in *Dillon* to the Supreme Court, and a decision is awaited;

(ii) In that appeal he seeks to challenge the court's findings in relation to ICRIR and there is therefore at least a possibility that the judgment of Colton J at first instance in this regard will be restored;

(iii) The UK Government is committed to ensuring that ICRIR is ECHR compliant;

(iv) There is no authority which supports the mandating of a public inquiry by the courts;

(v) The courts should be constitutionally reticent in this field since it necessarily engages the question of resources and resource allocation which are matters for Ministers;

(vi) There are a number of other cases in which inquests have been stopped, for reasons similar to those which pertain to this case, and others which have been halted by operation of the Legacy Act and therefore any determination in favour of the applicant could have precedent effect;

(vii) The respondent ought to be afforded the opportunity to consider how to address any shortcomings in ICRIR through the legislative process;

(viii) Overall, the decision is a multifactorial one in an area which considerable deference ought to be shown to decision makers.

[70] I have no hesitation in finding that the United Kingdom remains in breach of its article 2 investigative obligation in relation to the death of Sean Brown. Indeed, this is not seriously contested by anyone.

[71] In addition to this important foundation, there are a number of significant features of this case:

(i) This is not a case where there is a mere allegation of collusion by state agents in a Troubles-related death. A statement has been made in open court, following a careful analysis of sensitive documents to the effect that a number of individuals linked through intelligence to the murder were agents of the state;

(ii) This cries out for detailed and forensic examination of evidence by an impartial and independent tribunal. It gives rise to an allegation of the utmost gravity that the state colluded with terrorists in the murder of one of its citizens, an entirely innocent man;

(iii) This information came to light in 2024, some 26 years after the police investigation was closed. It is quite apparent that the information was withheld from PONI and from the second investigation which followed the PONI report;

(iv) A High Court judge, sitting as a coroner, has requested that SOSNI establish a public inquiry into the death pursuant to section 1 of the 2005 Act, which was accompanied by detailed reasons;

(v) Previous efforts to investigate this death have been wholly inadequate. The shortcomings in the police investigation were such that the Chief Constable apologised to the Brown family in the High Court;

(vi) The inquest process was frustrated at every turn by the failure of the state to comply with statutory disclosure obligations. These failings were so egregious that it led Kinney J to question whether the non-compliance was part of a deliberate effort to prevent the inquest from discovering the truth; and

(vii) The Chief Constable of the PSNI is on record as supporting the establishment of a public inquiry, despite the fact that this would shine a light on the failings of his force.

[72] Even if permission to appeal to the Supreme Court were to be granted in the case of *Dillon*, it will be many months before there is a judgment addressing the ICRIR issues. This will only serve to cause yet further delay whilst no article 2 compliant investigation is held. It is no defence to an action asserting breach of section 6 of the HRA to say that the public authority in question is waiting to see if the law is changed to enable a solution to be found. I am bound by the Court of Appeal decision in *Dillon* and I propose to determine this application on the basis that ICRIR is not fit for purpose insofar as article 2 investigations are concerned.

[73] A similar analysis applies to the mooted legislative changes. The Government has asserted that it intends to make the ICRIR ECHR compliant but to do so, in the absence of a successful appeal in *Dillon*, will require primary legislation. The only indication of a timetable for this course of action is a general assertion that it will occur when parliamentary time allows. This could, of course, be months or years of further delay whilst the Brown family's article 2 rights continue to be breached.

[74] The repeated claim that no court has previously mandated a public inquiry only advances the respondent's position so far. It is recognised in the authorities that such an order can be made, albeit it may only be in exceptional circumstances. Moreover, in *Amin*, the court did order that an independent public investigation, with specific procedural requirements, must take place to satisfy the article 2 obligation. This case was decided prior to the 2005 Act.

[75] Whilst delay and expense are relevant factors for any decision maker to take into account, they cannot serve to trump the article 2 obligation. Indeed, on the evidence before the court, it is not clear that any investigation by ICRIR would be quicker than a public inquiry given the need for a Supreme Court decision or legislative change before it could even begin such work. It is clear that much of the preliminary work of a public inquiry has already been undertaken by the inquest process. Witness have been identified and statements taken. Disclosure from state bodies has taken place. The documents have been collated and analysed by the legal teams on behalf of the coroner and the state bodies. The scope of the inquest was set out and agreed. These are very considerable foundations upon which the work of a public inquiry could build. Indeed, by virtue of section 17(3) of the 2005 Act, any chair of a public inquiry is duty bound to act with regard to the need to avoid unnecessary cost.

[76] Floodgates arguments are rarely successful. It could scarcely be a defence for a state to resist a case of manifest breach of article 2 on the basis that others may successfully assert article 2 rights. The courts have already placed limits on the article 2 investigative obligation through the genuine connection test. If the complaint relates

simply to remedy, the position is that each case must be examined on its own merits. It must be recalled that responsibility for the breach rests exclusively with the state. In this particular case, there are a number of seriously aggravating factors (set out at para [71] above). Some of these may be present in other situations. It will be a matter for the courts to determine whether, and to what extent, this decision represents a precedent for others.

[77] There is no doubt that the establishment of a public inquiry would lead to expenditure, probably of significant sums. Reliance is placed on the Court of Appeal decision in *Department of Justice v Bell* [2017] NICA 69, a challenge to the failure by the Department to provide sufficient funding to PONI. The court accepted that the questions around the allocation of resources are generally non-justiciable, given the policy issues at play and the multifactorial nature of such decision making. However, Gillen LJ did note that where ECHR rights were at stake (which were not in issue in *Bell*), the court may be required to consider the allocation of resources and the effectiveness of administration.

[78] In *Re McEvoy's Application* [2022] NIKB 10, I recognised that resources were a factor to take into account into considering how to approach the whole vexed issue of legacy investigations. However, I also stated:

> "…it is well established that it is a matter for the state to organise itself so as to be able to comply with Convention requirements - see Buxton LJ in *Noorkoiv v Secretary of State for the Home Department* [2002] EWCA Civ 770 (an article 5 case) and the ECtHR in *Guleç v Turkey* [1998] 28 EHRR 121at para [81] (article 2). Moreover, such considerations could not trump the need to promptly investigate, in particular, allegations of collusion in murder." (para [49])

[79] In terms, SOSNI has decided to 'wait and see' if ICRIR can be rendered article 2 compliant either by a successful appeal to the Supreme Court or primary legislation amending the Legacy Act. Neither of these has any particular timescale. In the meantime, as a result, the state will remain in continuing breach of its article 2 obligation. This proposed course of action did not find favour with the courts in either *Litvinenko* or *Finucane*. It flies in the face of the promptness and expedition requirement of article 2, a matter of some significance when the state has already been responsible for egregious delay.

[80] As the cases acknowledge, Ministers enjoy a broad discretion under section 1 of the 2005 Act. However, no discretion in public law is unfettered. It must always be exercised lawfully and rationally. The breadth of a discretion narrows significantly when the lawful options open to the decision maker reduce. When one is left with only a binary choice between a lawful and an unlawful course of action, then the discretion reaches vanishing point. Where there is only one lawful decision to take, there is no discretion to exercise.

[81] After 27 years, the United Kingdom has manifestly failed to investigate the murder of Sean Brown in which state agents were allegedly involved. An 87 year old widow does not know how, why or by whom her husband was killed. Previous investigations have been fundamentally flawed. Information has been deliberately withheld. The inquest process has been repeatedly frustrated by the failures of state agencies to comply with their statutory obligations. It simply cannot be the case that the state can cite resources and ignore the duty it owes to the Brown family.

Remedy

[82] In *R (Iman) v London Borough of Croydon* [2023] UKSC 45, Lord Sales considered whether the courts should grant a mandatory order against a local authority which was in breach of its statutory duty in relation to the provision of suitable housing. The authority pleaded that it was unable to comply with its obligations due to budgetary constraints. The court observed:

> "When it is established that there has been a breach of such a duty, it is not for a court to modify or moderate its substance by routinely declining to grant relief to compel performance of it on the grounds of absence of sufficient resources. That would involve a violation of the principle of the rule of law and an improper undermining of Parliament's legislative instruction." (para [40])

[83] However, it remains the case that public law remedies are discretionary so the court can always weigh up the rights of the individual, the public body and the public interest more generally in determining what relief, if any, to grant.

[84] In relation to the making of mandatory orders, Lord Sales stated:

> "Different remedies have different degrees of impact on the capacity of a public authority to carry out its functions. A quashing order is the usual remedy in public law, which obliges the authority to re-take a decision in a lawful way. Such an order allows the authority to exercise its own judgment in re-taking a decision, having regard to all relevant interests affected thereby. On the other hand, a mandatory order takes a matter out of the hands of the authority and, to that extent, makes the court the primary actor. Accordingly, when deciding in the exercise of its discretion to grant a mandatory order to require the authority to do a particular thing, the court has to have regard to the way in which an order of that character might undermine to an unjustified degree the ability of the authority to fulfil functions conferred on it by Parliament

> and act in the public interest. The proper separation of powers may be in issue as well as enforcement of the law. The effect of this is that the ambit of the court's discretion whether to grant a mandatory order as opposed to a quashing order may be somewhat greater. If the court makes a quashing order or issues a declaration, but declines to grant a mandatory order, the matter remains in the hands of the public authority which may be best placed to take account of all interests with full relevant information about them. Having said that, the nature of a breach of a legal duty on the authority may be such as to call for the grant of mandatory relief in order to compel the authority to do what it has a clear legal duty to do." (para [44])

[85] This is not a case where there is any plea of impossibility. I have concluded that there is a clear and unambiguous obligation on the state to carry out an article 2 compliant investigation. No viable alternative to a public inquiry has been advanced. In these circumstances, there can be only one lawful answer, a public inquiry must be convened to satisfy the state's article 2 obligation. Bearing in mind the importance of the rule of law, the breach of duty in the circumstances of this case is such as to call for the grant of mandatory relief to compel the state to fulfil its clear legal duty.

[86] I accept that this is an unusual and exceptional course to take. However, it is fully justified on the facts of this case and on a proper application of legal principle. The features I have set out at para [71] above clearly bring this case into the realm of the exceptional.

[87] I therefore make an order of mandamus compelling the Secretary of State for Northern Ireland to cause a public inquiry to be held, under the Inquiries Act 2005, into the death of Sean Brown on 12 May 1997.

[88] I will hear the parties on any consequential orders or directions and on the issue of costs.