Neutral Citation No: [2024] NICA 55 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* *ICOS No:* *Delivered*:	**HOR12531** **21/14639** **11/07/2024**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND KING'S BENCH DIVISION (JUDICIAL REVIEW)

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BETWEEN:

THE SECRETARY OF STATE FOR NORTHERN IRELAND

Respondent/Appellant

and

GERALDINE FINUCANE

Applicant/Respondent

_____

AND IN THE MATTER OF AN APPLICATION BY GERALDINE FINUCANE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

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Fiona Doherty KC and Aiden McGowan BL (instructed by Madden & Finucane, Solicitors) for the Respondent
Paul McLaughlin KC and Philip McAteer KC (instructed by the Crown Solicitor's Office) for the Appellant
Tony McGleenan KC and Leona Gillen BL (instructed by the Crown Solicitor's Office) for the Chief Constable of the Police Service of Northern Ireland, Notice Party
Andrew McGuinness BL (instructed by the Legal Directorate with the Office of the Police Ombudsman) for the Police Ombudsman for Northern Ireland, Notice Party

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Before: Horner LJ, McFarland J and Rooney J

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HORNER LJ (*delivering the judgment of the court*)

Introduction

[1] This appeal relates to the callous and brutal murder of Patrick Finucane ("PF"), a well-known Belfast solicitor, on 12 February 1989. His widow, Geraldine Finucane ("GF"), challenges the decision of the Secretary of State for Northern Ireland ("the Secretary of State") made on 30 November 2020 not to establish a public inquiry to look into and investigate the circumstances of her husband's, PF's, death. This impugned decision followed on from the judgment of the Supreme Court in *Re Finucane's Application* [2019] UKSC 7. Initially the Secretary of State had decided to await the outcome of a "process of review" by the Police Service of Northern Ireland ("PSNI") and the investigation being carried out by the Police Ombudsman for Northern Ireland ("PONI"). Scoffield J, the learned trial judge ("LTJ"), at [2022] NIKB 37 had found this course of action at first instance to be unlawful and had issued a quashing order to that effect together with a declaration as follows:

> "At the date of this judgment, there has still not been an article 2 compliant inquiry into death of Patrick Finucane."

[2] The LTJ had further decided that the Secretary of State's subsequent failure to reconsider his decision after he had discovered that the PSNI review process had concluded in May 2021 to be unlawful. The decision of PONI was not expected until 2025. An order was made requiring the Secretary of State to reconsider the Government's response to the aforementioned Supreme Court decision without delay.

[3] The LTJ then issued a further ruling on a number of post-judgment issues, [2023] NIKB 42, wherein he made an award of damages under section 8 of the Human Rights Act 1998 ("HRA 1998") in the sum of £5,000 in favour of GF. Both judgments are the subject of this appeal.

[4] We should record here our gratitude for the quality of the written and oral submissions made by all the legal teams of counsel and solicitors. The Secretary of State's team was led by Paul McLaughlin KC. Philip McAteer BL was the junior counsel. Ms Fiona Doherty KC led Aiden McGowan BL and they acted for GF, the respondent. Dr McGleenan KC, leading Leona Gillen BL, acted for the Chief Constable of the PSNI. Finally, Andrew McGuinness BL, junior counsel, acted for the PONI. Both the Chief Constable and PONI were notice parties to this judicial review appeal.

[5] We understand that the present position of the Secretary of State is that he does not now intend to delay making the decision until PONI has reported back, which as I have pointed out is likely to be at least another year away. Instead, the

Secretary of State will look to this court for guidance as to how he can ensure that he complies with the letter of the law.

General background facts

[6] PF was murdered on 12 February 1989. He was shot in his family home some 14 times. His wife, GF, the present respondent to this appeal, was also struck by a ricocheting bullet, although fortunately she escaped serious injury.

[7] This was a deliberately cruel and vicious murder designed to cause maximum hurt and upset to the family and friends of PF. Thirty-five years later, even when viewed against Northern Ireland's bloody past, this murder stands out as a truly barbarous act, the murder of a man in his own home in the presence of his wife and in the company of his very young children. It was also an overt attack on the rule of law. PF was a solicitor dedicated to protecting the rights of his clients, regardless of their political or religious views.

[8] In September 1989 the Chief Constable of the RUC appointed John Stevens (later to become Sir John Stevens and then Lord Stevens, but hereinafter, 'Stevens') to investigate, inter alia, allegations that there had been collusion between members of the security forces and loyalist paramilitaries. The first investigation, Stevens 1, did not specifically address PF's murder and its circumstances.

[9] In April 1990, three people were convicted of possession of one of the weapons used in the murder of PF and of membership of the Ulster Freedom Fighters ("UFF") a Protestant paramilitary organisation. None of them could be linked to the murder of PF. A UDR colour sergeant was convicted in 1987 of the theft of the weapon used in the shooting. It had been stolen from Palace Barracks, Holywood in 1987. He was sentenced to five years' imprisonment.

[10] The inquest of PF took place on 6 September 1990 and lasted one day. Its immediate and primary concern was that of the cause and immediate circumstances of the death of PF and avoided any consideration of State collusion or of any of the circumstances, other than those events immediately preceding PF's death.

[11] Stevens 1 unearthed the existence of the military intelligence agent, Brian Nelson. He was arrested and prosecuted for various offences. He received a total sentence of 10 years after pleading guilty. None of the offending for which he was charged involved the murder of PF.

[12] GF commenced legal proceedings on 12 February 1992 arising out of PF's murder. On 8 June 1992 a Panorama programme suggested that Brian Nelson had been involved in various murders, including that of PF, but had not been prosecuted for them.

[13] Stevens investigated the issues raised in the Panorama programme and he submitted his final report to the DPP on 21 January 1995. This report was known as Stevens 2.

[14] In 1995, nearly 30 years ago, GF filed an application with the European Court of Human Rights ("ECtHR") against the UK, complaining there had not been an investigation of the murder of her husband which had complied with the provisions of article 2 of the European Convention of Human Rights ("ECHR").

[15] In April 1998 the UN's Special Rapporteur on the Independence of Judges and Lawyers, inter alia, called for a public inquiry into the murder of PF in a report he prepared for the UN. The London based NGO, British Irish Rights Watch ("BIRW") presented the Secretary of State in February 1999 with a report which included a chapter devoted to the murder of PF and made various allegations against the RUC, the Force Research Unit ("FRU") and Brian Nelson. It was alleged that the army through FRU and Brian Nelson had deliberately manipulated the loyalist paramilitaries to carry out a murder by proxy campaign against republican terrorists. PF was murdered as a consequence of this campaign.

[16] FRU was a covert military intelligence unit of the British Army's Intelligence Corps. It was established in 1982 during the Troubles and obtained intelligence from terrorist organisations in Northern Ireland by recruiting and running informants. It was subsequently renamed the Joint Support Group following the Stevens inquiries into allegations of collusion between the security forces and the Protestant paramilitary groups. Stevens did find collusion. Brian Nelson turned out to be a double agent working for both FRU and the Protestant paramilitaries. Indeed, former FRU operative, Martin Ingrams, alleged that an arson attack which destroyed the offices of the Stevens Inquiry was carried out by FRU in order to destroy any evidence of its operating activities which had been collected by the Stevens team. This claim remains unproven. However, there is strong evidence that Brian Nelson had infiltrated the UDA on behalf of FRU and was involved in a terrorist campaign operating under the flag of convenience of the UFF. FRU helped Brian Nelson gather information on various targets to enhance his reputation and ease his progress through the loyalist terrorist ranks. The intelligence which was gathered by Brian Nelson spread rapidly through the various loyalist paramilitary groups.

[17] The Secretary of State for Northern Ireland, Mo Mowlam asked Anthony Langdon, a senior Home Office civil servant, to investigate the allegations contained in the BIRW report. This resulted in Stevens being asked to conduct an investigation specifically into the murder of PF. This was known as Stevens 3.

[18] On 23 June 1999 William Stobie was arrested and charged, inter alia, with the murder of PF. His trial went ahead but it collapsed on 26 November 2001. The prosecution offered no evidence. He was acquitted of all charges. On 12 December 2001 he was murdered by an unknown gunman.

[19] In the summer of 2001 the Weston Park Agreement resulted in the appointment of Judge Peter Cory, a former Justice of the Canadian Supreme Court, to review, inter alia, the PF case.

[20] On 10 June 2003 the ECtHR handed down its judgment in the application made to it by GF (at [2003] 37 EHRR 29). On 7 October 2003 Judge Cory's report was delivered to the Secretary of State recommending a public inquiry, but also advising that this should be postponed until the conclusion of any ongoing prosecutions arising out of PF's murder.

[21] On 16 September 2004 Ken Barrett pleaded guilty to the murder of PF and was sentenced to life imprisonment. One week later the then Secretary of State made a statement to the House of Commons announcing that the Government would take steps to enable the establishment of an inquiry into the death of PF under the new legislation, which was to be known as the Inquiries Act 2005 ("the 2005 Act") which became law on 7 June 2005.

[22] However, PF's family were not satisfied with the nature of the inquiry proposed under the 2005 Act and any plans for an inquiry were suspended. In 2007 the Director of Public Prosecutions ("DPP") announced that there would be no other prosecutions arising out of Stevens 3 and published a statement of his reasons.

[23] On 17 March 2009 the Committee of Ministers decided that its examination of the specific measures taken by the UK on foot of the decision of the ECtHR should be closed. However, this decision was based on the premise that the UK was actively working on proposals for establishing a statutory public inquiry.

[24] On 25 October 2011 the Secretary of State and the family met with the Prime Minister who apologised to the Finucane family for the death of PF and accepted the findings of the Stevens 3 investigation and the Cory report that the murder of PF had involved State collusion. They explained to the Finucane family that they were not going to set up a statutory inquiry but rather they were going to establish an independent review. On 12 October 2011 the Secretary of State told the House of Commons of its decision and Sir Desmond de Silva QC was appointed to carry it out.

[25] Fourteen months later on 12 December 2012 the de Silva report was published. On the same day the Prime Minister made a statement to Parliament summarising its findings and apologising on behalf of the UK Government to the Finucane family. The Chief Constable of the PSNI also made a statement which included an apology described as "complete, absolute and unconditional." The initial findings of Sir Desmond were set out at paras 115 and 116 where he stated:

> "115. … I am left in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands

> of involvement by elements of the State. The significance is not so much, as Sir John Stevens concluded in 2003, that the murder could have been prevented, although I entirely concur with this finding. The real importance, in my view, is that a series of positive actions by employees of the State actively furthered and facilitated his murder and that, in the aftermath of the murder, there was a relentless attempt to defeat the ends of justice. …"
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> 116. My review of the evidence relating to Patrick Finucane's case has left me in no doubt that agents of the State were involved in carrying out serious violations of human rights up to and including murder. However, despite the different strands of involvement by elements of the State, I am satisfied that they were not linked to an overarching State conspiracy to murder Patrick Finucane. Nevertheless, each of the facets of the collusion that were manifest in this case – the passage of information from members of the security forces to the UDA, a failure to act on threat intelligence, the participation of State agents in the murder and the subsequent failure to investigate and arrest key members of the West Belfast UDA – can each be explained by the wider thematic issues which I have examined as part of this review."

[26] In September 2015 following the judgment of Stephens J at [2015] NIQB 57 in respect of a further judicial review, GF invited the Committee of Ministers to reopen its examination of the whole case. This was followed in November 2015 by the PSNI completing its review of the de Silva report. By interim resolution of 8 December 2015 the Committee of Ministers decided that it would consider the request to reopen supervision of the judgment once the outcome of the then ongoing litigation was known and the PSNI/DPP consideration of the new materials referenced by de Silva had been completed.

[27] In December 2016 PSNI submitted to the Public Prosecution Service ("PPS") a detailed report outlining its considerations of all the evidence identified by the de Silva review, including new and significant materials. According to the PSNI these did not create any credible new opportunities to bring offenders to justice and that the original Stevens' investigation prosecutorial recommendation remained unaffected.

[28] A further report on all the materials considered in the de Silva review was submitted to the PSNI by the PPS in May 2017 and this related to misconduct in public office. This also did not result in any further action against any member of the security services. In May 2018 the PPS confirmed its agreement with the PSNI recommendation.

[29] On 27 February 2019 the Supreme Court at [2019] UKSC 7 upheld GF's appeal and found that there had not been an article 2 compliant investigation into her husband's death. However, it left it open to the UK Government in light of the perceived weaknesses of the de Silva review as to how it would meet the UK's obligations under article 2.

[30] In June 2019 the Secretary of State determined that a review of previous investigations (including an examination of the extent to which the crimes identified by the Supreme Court had been considered and investigated) should proceed stressing the fact that she considered this to be essential before she formed a final view.

[31] The Secretary of State received a copy of the review report on 26 September 2019 and after the provision of further information a short addendum was added to the report by Spring 2020. Meanwhile under the pressure of litigation, the Secretary of State (now Julian Smith MP) undertook on 12 October 2020 to make a decision by 30 November 2020 in respect of what he was going to do regarding the investigation into the murder of PF. It was acknowledged by the Secretary of State that there had been further delay which was in breach of article 2 and an apology was delivered on behalf of the Secretary of State who also agreed to pay £7,500 damages on foot of this further breach.

[32] The Secretary of State received further advice on 30 November 2020. He then took the following steps:

(a) He met with GF remotely before making a statement to Parliament.

(b) In the statement to Parliament he explained that he did not intend to establish a public inquiry but to await the outcome of ongoing PSNI and PONI reviews/investigations.

(c) He then took questions.

(d) The Government also published a document responding to the Supreme Court's judgment providing details of investigations undertaken.

(e) PONI, the Chief Constable and GF made statements in response to the judgment.

[33] Four months later in March 2021 the Committee of Ministers decided it would reopen its consideration of PF's murder "in order to supervise the ongoing measures to ensure that they are adequate, sufficient and proceed in a timely manner."

[34] On 6 May 2021 the Chief Constable concluded that a full review of the case was not merited and that there were no further investigative opportunities available.

On 18 March 2022 PONI advised that she would not be reporting until 2025 at the earliest. By affidavit of 7 October 2022 the Secretary of State confirmed that he did not intend to defer or review a decision until the conclusion of the PONI process. Rather it was thought better to review the matters once the outcome of these proceedings had been published and the nature of the Secretary of State's legal obligations had been clarified. The judgment and ruling of the LTJ then followed in which he allowed GF's application for judicial review and made a declaration as follows:

> "At the date of this judgment, there has still not been an article 2 compliant inquiry into the death of Patrick Finucane."

He then made further consequential orders.

[35] On 30 March 2023, some 3 months later, he gave a ruling on post judgment issues and, inter alia, awarded to GF £5,000 damages for the delay which had occurred between the period from November 2020 to represent an appropriate sum to afford just satisfaction for the delay which had occurred up to that time.

[36] On 23 February 2023 the Secretary of State appealed the judgment of the LTJ and the declaration that he had handed down, namely that there had as yet not been an article 2 compliant inquiry into the death of PF and that it was unlawful for the Secretary of State to fail to reconsider his decision at the point when he learned that the PSNI review process had concluded in May 2021. It is the judgment of the LTJ and his ruling on damages that are the subjects of this appeal. Perhaps the most important detail to be taken from this involved and labyrinthine narrative is that to date, some 35 years after PF's death, no article 2 compliant inquiry or investigation has taken place, although there have been numerous bodies appointed who have looked into various aspects of the circumstances of his death.

The decision of the Supreme Court

[37] On 27 February 2019 the Supreme Court handed down its judgment in the judicial review application brought by PF's wife, GF at [2019] UKSC 7. Lord Kerr in the main judgment (and with whom all the other Supreme Court Justices agreed) gave essential guidance as to how an article 2 compliant inquiry might be achieved in the United Kingdom.

[38] The unanimous analysis handed down identifies the following key ingredients:

(i) The investigation must be independent.

(ii) The inquiry must have the means available to identify those "implicated in the death." It should also have "the will and the opportunity to expose them" (see para [131]) and "brought to account" (see para [138]).

(iii) "The need for an effective investigation into a death goes well beyond facilitating prosecution." It follows that the decision of the authorities not to investigate further or prosecute (on which the Northern Ireland Court of Appeal had relied) while relevant "cannot be determinative of that issue." The court should not be distracted from the issue of whether an effective investigation has taken place by "the decision not to undertake further prosecution" (see para [137]).

(iv) It is important to concentrate on the weaknesses of previous inquiries under article 2 instead of speculating about where this new material might lead (see paras [137] and [149]). The de Silva review was not "an in-depth probing investigation with all the tools that would normally be available to someone tasked with uncovering the truth of what actually happened." The result was that the investigation was essentially toothless and the result was that many critical findings were expressed in "qualified and tentative terms." This was ample demonstration that it was not article 2 compliant (see paras [92], [114], [119], [130]-[134], [137] and [140]).

(v) Whenever there was a "plausible and credible" allegation or evidence which had "the potential to undermine the conclusions of an early investigation or to allow an earlier inconclusive investigation to be pursued further" (see para [117]), the obligation to reopen the investigation arose. Indeed, new evidence would trigger a compliant article 2 investigation regardless of the fact that there had been a previous article 2 compliant inquiry. The finding by Sir Desmond de Silva that "a series of positive actions by an employee of the State actively furthered and facilitated (PF's) murder and, that in the aftermath of the murder, there was a relentless attempt to defeat the ends of justice" (see para [115]) while it expressed a doubt about the role actually played by State agents met this test (see para [118]).

(vi) Finally, an article 2 compliant investigation should give the opportunity to identify lessons to be learned so as to prevent similar occurrences in the future: see para [138] and especially *Bamforth and Hoyano* on 'ECHR and Common Law Accountability for Failure to Investigate State Collusion: in Northern Ireland Legacy Cases': 136 LQR [2020] (at 24-29).

[39] We have some difficulty in accepting the submission that the Secretary of State now requires further advice from this court about what steps he must take to ensure that any investigation is article 2 compliant. Firstly, the instructions given by the Supreme Court were clear and comprehensive. No one should have any difficulty following them. We have set them out in some detail. Secondly, it does raise the issue, given the lengths to which Lord Kerr took to set out what was

required, and given the decision of the judge at first instance (see below), as to whether there is a genuine bona fide appeal or an attempt to procrastinate in the hope that the difficult decision of whether the State colluded in the murder of PF will fall to be made by someone else or indeed a different Government, which is now the case.

[40] The declaration made by the Supreme Court was to the effect that:

(i) There never had been an article 2 compliant investigation into the death of PF.

(ii) A public inquiry does not necessarily have to be ordered.

(iii) The State must decide in light of the incapacity of previous investigations which failed singly or cumulatively to achieve an article 2 compliance what is needed to best meet the requirement.

The judgment of Scoffield J

[41] The challenge before the LTJ was the decision of the Secretary of State made on 30 November 2020 not to establish a public inquiry at this time in relation to the death of PF but instead to await the outcome of two different processes being conducted separately by:

(i) PSNI; and

(ii) PONI.

[42] Both PSNI and PONI were made notice parties. There was a further challenge to the decision of the Secretary of State not to review his earlier decision following the conclusion of the PSNI's process of review on 6 May 2021.

[43] The LTJ notes that on 23 September 2004 the then Secretary of State had made a commitment to the House of Commons to hold a public inquiry into the death of PF. The LTJ emphasised that that commitment was not "delivered upon." As the LTJ points out it is important to record that, for a time at least, part of the reason for a public inquiry not being established was the Finucane family's opposition to the type of public inquiry which was proposed, namely one operating under the provisions of the 2005 Act.

[44] On 12 October 2011 the then Secretary of State made a further statement to the House of Commons outlining that Sir Desmond de Silva QC had been asked to carry out a review of any State involvement in PF's murder. In the statement the Secretary of State made it clear that the Government accepted the "clear conclusions" of the many previous inquiries and investigations that there had been State collusion leading to the death of PF and stated categorically that it was "committed to establishing a further process to ensure that the truth is revealed." The Secretary of

State accepted the general public was entitled to know "the extent and nature of that collusion." As I have already recorded the Supreme Court was unimpressed with Sir Desmond de Silva's review as a means to achieve an article 2 compliant investigation because of, inter alia, the limited powers given to Sir Desmond de Silva to find the truth. The arguments advanced by GF on article 2, as we have seen, were vindicated.

[45] It was pointed out forcibly on behalf of GF that the Supreme Court had "expressly identified the vital steps which were necessary to secure an article 2 compliant inquiry but which had not yet been secured by the State" and "expressly rejected the Government's submission that the de Silva review, alongside the other investigations and reviews in the case, fulfilled the requirements of article 2." It is true that the Supreme Court was aware of some of the later processes only, and indeed was aware of their outcome, but was not aware (by reason of how the case had developed and how the evidence to meet it was assembled), of much of the detail of the investigative steps undertaken in some of those inquiries: see para [13] of the LTJ's substantive judgment.

[46] The LTJ then examined in detail the judgment of Lord Kerr. He records at para [20] that the Secretary of State's case was that he had not refused to establish a public inquiry but instead had deferred a decision on whether to establish one until after the PSNI and PONI processes had been completed. However, as we have noted the PONI process remains unfinished and the Secretary of State has indicated that he would be guided by the outcome of these proceedings. The LTJ commented on the Committee of Ministers' interest in the progress of the proceedings and its expression of "its deep concern" following a meeting on 8-9 March 2022.

[47] The LTJ drew attention to the host of inquiries, investigations and reviews into the death of PF to date which had included:

(a) The initial RUC investigation.

(b) The inquest.

(c) The Stevens 1, 2 and 3 inquiries.

(d) The BIRW report.

(e) The Langdon report.

(f) The Cory report.

(g) The de Silva review.

(h) The PSNI reviews of 2015, 2016 and 2017.

(i) The PONI review which was ongoing.

[48] There is no doubt that many of these reports had uncovered deeply troubling evidence of State collusion in PF's death. Judge Cory, for example, found strong evidence that collusive acts were committed by the Army (FRU), the RUC and the Security Services. Judge Cory noted the difference between the evidence he had heard and the documents he had examined about, for example, whether the Army (FRU) had advanced warning of the targeting of PF. He was in no doubt, and he was particularly well placed to reach an opinion, that the only solution was to have a public inquiry (see para [49] of his report).

[49] The LTJ noted that the Chief Constable supported the Secretary of State in making the argument that the flaws identified by the Supreme Court in previous investigations "have on analysis been addressed in previous investigations" (at para [56]), PONI complained that because of resource issues any investigation of PF's murder would be "many years away."

[50] The LTJ noted that the requirements of promptness and reasonable expedition could not always be achieved because of "obstacles or difficulties which prevent progress and investigation in a particular situation" (see para [63]). He noted:

(i) There was no evidence (as in the present appeal) that it would not now be feasible to carry out an article 2 compliant investigation.

(ii) The argument that the relevant responsibility for the investigation of suspicious deaths is devolved or that the Secretary of State was only one organ of the State, which as a matter of international law, bears responsibility for securing an article 2 compliant investigation into PF's death. The fact is that it was the Secretary of State who responded to the Supreme Court's judgment and it was the Secretary of State who ultimately refused to hold a public inquiry. Indeed, the Secretary of State on behalf of the British government has refused to set up an article 2 compliant investigation.

(iii) There is no doubt that over 35 years have passed since PF's murder. There has been an acceptance by the Government of State collusion in his murder, but the precise nature and extent of that collusion remains to be discovered.

(iv) The Supreme Court's decision is admirably clear as to what was required. The suggestion that further guidance is required is unacceptable.

(v) The Secretary of State's delay in setting up an article 2 compliant inquiry gives rise to grave suspicion on the part of GF that "there is an unspoken strategy to delay matters on every turn until either an article 2 compliant investigation into her husband's death is unfeasible or until she is no longer able or willing to press for it."

[51] It was against this background that the LTJ professed himself to have no hesitation in concluding that "the UK Government represented in these proceedings by the respondent (the Secretary of State)" remains in breach of article 2 on the basis of the ongoing delay in completing investigations which satisfy the requirement of that provision. The LTJ went on to make the obvious point that the workloads of both PONI and the Legacy Investigation Branch ("LIB") of the PSNI "are considerable and, regrettably, are notoriously beset with systemic delay." He was clear that there was no prospect of PONI reporting any time soon in respect of PF's murder.

[51] The LTJ further concluded at paras [85]-[94]:

(i) A further police investigation could not remedy nor comply with article 2 as identified by the Supreme Court in this case.

(ii) Given the Supreme Court's finding that the Stevens inquiries, taken together with the de Silva review, did not result in article 2 compliance, it was extremely difficult to see how a further police investigation would be considered adequate in the very particular circumstances of this case.

(iii) The Supreme Court was clear that the Stevens' inquiries even supplemented by the Cory and de Silva reviews together with the further PSNI reviews and the extant PONI investigation were insufficient to achieve article 2 compliance. In the instant case they would not be "practical and effective in securing State accountability."

(iv) Further PONI investigations were unlikely to be sufficient in view of the fact that only serving officers can be the subject of disciplinary action and PONI lacks power to compel them to co-operate with her investigations.

[52] The LTJ went on to note that in essence the Secretary of State's submission was that the Supreme Court was wrong "in its judgment to conclude that article 2 obligations remained unmet in light of the investigative processes which had by then been concluded": see para [95]. The LTJ emphatically disagreed that these "further processes of which the Supreme Court was unaware" (assuming that to be the case) even taken together with those upon which the Secretary of State relied in making the impugned decision have discharged or were capable of discharging the State's article 2 obligations in terms of remedying the deficiencies identified in the Supreme Court judgment.

[53] The LTJ then explained that while the Supreme Court might not have been aware of the full detail of some of what had happened (in relation to, for instance, the PSNI 2015 review and resulting recommendations) "it was well aware of the basic nature of the processes which had been undertaken or were in contemplation."

[54] As the LTJ remarked at para [96]:

> "… the Supreme Court's conclusion that the Stevens' inquiries did not cut the mustard in article 2 terms in the *particular circumstances of this case* lead me to conclude that further investigative action on the part of the PSNI could similarly not remedy the remaining article 2 investigative deficiencies." [emphasis in original]

[55] The LTJ noted the huge expense and effort expended over the years investigating the circumstances of PF's death and commented that:

> "The sooner a comprehensive and robust independent investigation occurs, the better; and that a piecemeal approach may well prove to be a false economy." (See para [97])

[56] The LTJ then went on to note how the Secretary of State's response to the Supreme Court was to attempt to demonstrate that the deficiencies identified did not exist because each of the areas highlighted had been considered by previous investigations. Far from being an unattractive attempt by the Secretary of State to sidestep the finding against him by the final court of appeal in proceedings against the same party on the same issue it suffered from two fatal flaws. These were identified by the LTJ at para [98]:

> "(i) First, it fails to properly recognise that the factual issues identified in the Supreme Court's judgment which had not been adequately resolved were not, nor did they purport to be, exhaustive. They were *examples* of how the procedures adopted up to that point had not adequately resolved issues going to potential state responsibility for the death (demonstrated by the use of the phrase 'for instance' in para [131] of Lord Kerr's judgment).
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> (ii) Second, and more importantly, it fails to grapple with the central holding in the Supreme Court judgment, namely that the processes which had been adopted up to that point were not, in the circumstances of this case, adequate to meet article 2 demands. The article 2 investigative obligation, as is well known, is one of means rather than result. The Supreme Court has held that the state has not yet provided an adequate means of getting to the bottom of the core contentious issues in this case. To suggest – which might of course be the case – that a different procedure equipped with the powers Lord Kerr envisaged would not make any further investigative headway is not the point. That cannot be

> assumed unless and until an adequate investigative process has been given an opportunity to run its course. For this reason, many of the detailed submissions eloquently and forensically made by Mr McLaughlin on the substance of what may have happened in Mr Finucane's case and the previous steps taken by Stevens and de Silva to probe these were (in my judgement) beside the point. He accepted that some gaps remained. However, even where he contended that little if anything more could be uncovered, in the absence of making a case that an article 2 compliant investigation is now unfeasible, that does not meet the objection that the Supreme Court has determined what has gone before to have been incapable of meeting the state's obligations in the particular circumstances of this case: both because of an insufficient focus on accountability, rather than criminal prosecution, and, crucially, a lack of the requisite powers to compel and probe evidence, such that doubts remained about the key aspects of state involvement. And that is to say nothing of the finding in the de Silva review that RUC officers, RUC special branch and army officers obstructed the Stevens investigations (upon which the respondent principally relies) and lied to his investigation team."

[57] The LTJ did not consider it necessary to go on to consider whether the Secretary of State was estopped from making a case on the basis it was res judicata. Certainly this court can see great force in the argument that the "Secretary of State should simply not be permitted to maintain, as in substance he has, that the Supreme Court misunderstood the nature and depth of the Stevens inquiries and/or what followed the de Silva review in 2015 to such a degree that it was wrong to conclude that article 2 requirements had not been met (or had not been met in at least some of the respects it identified)." The crucial issue is whether these previous investigations were compatible with an article 2 compliant investigation: see paras [93], [134] and [149].

[58] The LTJ accepted the submission on behalf of GF that the argument amounted to "an inappropriate attempt to relitigate or circumvent the clear findings of the Supreme Court, which form part of the reasoning leading to the declaration it made." He then drew attention to the wording used by Lord Kerr when he referred to the "incapacity of Sir Desmond De Silva's review *and the inquiries which preceded it* to meet the procedural requirement of article 2" (LTJ's emphasis). Further he did not consider the Secretary of State's arguments to be well-founded and thought it better to deal with it on the merits, rather than by dismissing it *in limine*.

[59] The LTJ then highlighted the refinement in the argument made by the Secretary of State that the PSNI and PONI processes could make a material contribution to an article 2 compliant investigation failed because given the delays to date they could not possibly comply with the requirement of due expedition.

[60] The LTJ also rejected the arguments that the decision of the Secretary of State was vitiated by mistakes of fact. He said that:

(a) The nature of the PSNI review was not sufficiently clearly established at the time of the Secretary of State's decision for it to be "vitiated by error as to material fact in relation to that stage."

(b) He was not persuaded that the Secretary of State harboured any misconception about PONI's powers; and

(c) He was not satisfied that the Secretary of State was mistaken as to the identity of the police, military or intelligence officers who had failed to warn PF in 1981 and 1985 about threats to his life had been investigated by Lord Stevens.

[61] Finally, the LTJ did not consider that the claim by GF that the decision of the Secretary of State not to hold a public inquiry was irrational, added much to the article 2 arguments referred to above. If, the article 2 requirements were capable of being satisfied by the LIB (and PONI processes) which the Secretary of State was expecting to be carried out, then it could not be said that the decision was irrational. There was no requirement on the Secretary of State to hold a public inquiry and it was possible for him to look at other ways of satisfying his article 2 obligations.

[62] The LTJ also rejected the argument advanced on the grounds that the Secretary of State's decision was in "contravention of the rule of law." The rule of law underpins judicial review but is not generally recognised as a separate ground of judicial review.

[63] We have spent considerable time setting out the findings and conclusions of the LTJ to demonstrate the considerable care taken by him in dealing with the various arguments and issues that were advanced before him and to explain the careful reasoning which lies behind each of his particular decisions and his judgment, which is the subject of this appeal.

Rosaleen Dalton

[64] This court was asked to await the decision of the Supreme Court in *Re Dalton's Application for Judicial Review* [2023] UKSC 36. It was contemplated that one matter for consideration by the Supreme Court was whether the circumstances involving the death of PF were outside the temporal reach of article 2 of the ECHR.

[65] Rosaleen Dalton's father had been killed on 31 August 1988 when he accidentally detonated a bomb planted by the IRA with the intention of killing members of the Security Services. Rosaleen Dalton challenged the decision of the Attorney General for Northern Ireland not to order a further inquest into her father's death. She claimed that such conduct was not compatible with the State's responsibility under article 2 of the ECHR and which the UK Government had implemented through the HRA 1998. The Attorney General in response had argued that there was no procedural obligation on the Government to investigate deaths which had occurred more than 12 years before 2 October 2000, the date when HRA 1998 had come into effect except in exceptional circumstances not present either in Rosaleen Dalton's case or indeed in GF's case. In giving judgment, the Supreme Court rejected a submission that it should depart from its previous decision in *Re Finucane* [2019] UKSC 7 and in *Re McQuillan* [2021] UKSC 55 even though the death had occurred outwith the time limit of 10 years under the genuine connections test.

Grounds of appeal

[66] Essentially, there were two main grounds of appeal advanced by the Secretary of State.

First ground of appeal

Secretary of State's position

[68] The challenge here was to the alleged failure of the LTJ to fully and fairly consider the Secretary of State's position. The submission on behalf of the Secretary of State was that the LTJ was wrong to conclude that the Secretary of State believed that the PSNI (LIB) and PONI investigations "would (or might)" fulfil the State's article 2 obligations.

[69] The Secretary of State claims that he was faced with two options. Firstly, he could set up a public inquiry. Secondly, he could defer any decision until after the further reviews being carried out by PSNI (LIB) and PONI. He argued that both options were in line with the decision of the Supreme Court. Consequently, and crucially, the Secretary of State was not advised to rely upon the PSNI and PONI processes on their own. He was advised that he would have to give further consideration to whether an inquiry would be necessary. In those circumstances any decision to defer pending further reviews could not be contrary to article 2.

[70] The Secretary of State had said:

> "… Critically, a [PSNI] review would consider whether further investigative steps could be taken in this case and whether the PSNI should do this – these were key elements of the Supreme Court judgment … Such a

> process in addition to the ongoing investigation being conducted by the Police Ombudsman can play an important role in addressing the issues identified by the Supreme Court. I want to be clear; I am not taking the possibility of an inquiry off the table at this stage. It is important that we allow the PSNI and Police Ombudsman processes to move forward and that we avoid the risk of prejudicing any emerging conclusions from their work. I will then consider all options available to me to meet the Government's obligations …"

[71] The Secretary of State had argued that this was consistent with article 2. Further in relying on the decision of the Grand Chamber in *Tunk v Turkey* [2015] ECHR 24014/015 and the Supreme Court decision in *McQuillan* at para [109], he accepted that where agents of the State are involved in any death, those responsible must be held to account, which can mean a criminal prosecution or disciplinary measures. The Secretary of State submitted, however, that the potential for fulfilment of these obligations is precisely what the Secretary of State's decision facilitated. The evidence obtained by the Secretary of State from previous reviews, inquiries and investigations made it clear that these areas had not been ignored and that they had been covered by substantial prior investigations. Indeed, the PSNI and PONI processes had the capacity to address any previous investigative deficiencies. Accordingly, these processes came within the ambit of the State's article 2 obligations and had the ability to make a material contribution to the satisfaction of those very obligations themselves.

[72] The Secretary of State argued that this approach was consistent with *Re Finucane*. The Supreme Court had not been prescriptive about how article 2 obligations could be satisfied and did not preclude further investigations whether by the PSNI or PONI. Indeed, there was no way such investigations could be excluded given the central role of a criminal investigation in the article 2 architecture and the independent decisions of the authorities to take further investigative steps. It followed that the LTJ erred in concluding that further investigative action on the part of PSNI could not similarly remedy the remaining article 2 deficiencies. In other words, the Secretary of State's understanding was not mistaken as to what he was required to do under article 2 when he deferred a public inquiry. He knew a further decision would be required in the future and the decision to await the completion of the PSNI and PONI processes was entirely consistent with his article 2 obligations and a legitimate component of the UK Government's response to the decision of the Supreme Court.

[73] The Secretary of State also argued that the LTJ was wrong to cite the different standard of review when considering article 2. The Secretary of State's challenge was based around the mandatory order compelling the Secretary of State to establish a public inquiry. That claim was extant when the PSNI process review ended in May 2021. Accordingly, it was not irrational in those circumstances for the Secretary

of State to defer its decision until GF's claim had been determined. The same logic should have applied when considering the prospect of delay within the article 2 framework.

GF's position

[74] Ms Doherty KC on behalf of GF drew attention to the Secretary of State's alleged change in the argument he now seeks to make. Before the LTJ, the Secretary of State had made the case that he knew much more about the previous investigations than the Supreme Court. Further that the Secretary of State was well-placed to assess whether the PSNI and/or PONI processes "could either complete or contribute to the outstanding investigative obligations" (per Secretary of State's skeleton argument before the LTJ). Before this court, as set out above, the Secretary of State's claim was that he did not have an erroneous understanding of his article 2 obligations when he made the impugned decision and that the decision taken was simply the result of a desire to await the outcome of the further investigative processes and that a decision would have to be made either way. This change of argument was contrary to the principles set out in *DB v Chief Constable* [2017] UKSC 7. Lord Kerr at para [80] had advised that "the first instance trial should be seen as the 'main event' and that there was a 'case for reticence' on the part of an appellate court" when interfering with arguments presented before the first instance judge. Accordingly, the court should tread carefully before deciding to accept any revised arguments advanced by the Secretary of State.

[75] On the issue of delay, Ms Doherty KC emphasised the duty of the Secretary of State to respond to the Supreme Court's decision, and that by delaying his formal response, the Secretary of State was failing to discharge his article 2 obligations with promptness or due expedition. The claim that the Secretary of State should await the outcome of the tardy PSNI and PONI processes should be disregarded because the Secretary of State had a duty to act expeditiously. If it were true that the Secretary of State did understand his article 2 obligations, then his conduct was "all the more shocking."

[76] Further failure on the part of the Secretary of State to review the impugned decision after the PSNI process had completed in May 2021 was wrong in law. GF's case was that the Secretary of State was bound to make a decision with reasonable promptitude and that the section 6 HRA 1998 obligation was immediately re-engaged when the PSNI process ended. The failure to review, according to GF, was an additional aggravating breach of article 2. The Secretary of State now sought further guidance from the courts on what he was required to do, but he had been given all the guidance he needed by the Supreme Court and yet had chosen to ignore it.

[77] GF also sought to attack the LTJ's finding that the decision of the Secretary of State was not irrational. She highlighted the collusion and the delay, coupled with the inadequacy of the timeframes of the PSNI and PONI's processes to rectify the

State's failures to date, all of which combined to produce the decision of the Secretary of State which was manifestly irrational.

Discussion

[78] At the heart of the present proceedings lies the decision of the Secretary of State to defer the decision on whether to establish a public inquiry into the death of PF until the PSNI and PONI processes had been completed and he was in possession of their outcomes. The Secretary of State's position is now different. He has made it clear that rather than await the completion of the PONI process, which is now not due until 2025 at the earliest, he seeks guidance from this court as to his future course.

[79] There can be little doubt that the Secretary of State would have had access to considerable caselaw detailing the responsibilities of a State under article 2 when it is alleged there has been State involvement in the unauthorised death. The caselaw emanates from both Strasbourg and the Supreme Court's consideration of article 2 of the ECHR.

[80] A classic statement on article 2 investigative obligations was set out by the ECtHR in *McCann v United Kingdom* [1995] 21 EHRR 97. At para [141], the court stated that "the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective." Accordingly, although that case concerned the legality of the British State's actions in preventing an IRA bombing in Gibraltar (and therefore dealt primarily with the legality of the use of lethal force), the court observed that:

> "[161] … a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art 2), read in conjunction with the State's general duty under Article 1 (art 2+1) of the Convention to '**secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention**', requires by implication that *there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State*." [emphasis added]

[81] This principle was further developed by the ECtHR in *Finucane v United Kingdom* [2003] EHRR 29, where it was stated:

> "… The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures."

[82] The court then outlined the characteristics of an article 2 compliant investigation: see paras [68]-[71].

[83] In the domestic context, the article 2 investigative obligation was considered in *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51. At para [31], Lord Bingham said:

> "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."

[84] Further guidance was provided by the Supreme Court in *McQuillan*, where, at para [109] Lord Hodge confirmed in an authoritative statement the application of the general principles which have been outlined above.

[85] It was from those sources that the LTJ set out in his own judgment a complete and accurate summary of the article 2 obligations. The LTJ also highlighted the relevant and complementary authorities as to the requirement of promptitude and reasonable expedition. They are, for completeness, *Kelly v UK (Application 30054/96)* see paras [97] and [130]-[134]; *Jordan v UK (Application 24746/94)* at paras [108] and [136]-[140]; *McKerr v UK (Application 28883/95)* at paras [114] and [152]-[155]; and *Shanaghan v UK (Application 37715/97)* at paras [91] and [119]-[120].

[86] The focus of this court must be on the requirement of a prompt response. The Secretary of State was responding formally to Lord Kerr's declaration in *Finucane* that there had not been an article 2 compliant investigation. The LTJ highlighted the

presumption, outlined in *Mocanu v Romania (Applications 10865/109, 45886/07 and 32431/08),* that delay has to be seen in the proper context. Thus, where there has been previous delay, the State authorities must act with greater urgency so as to ensure that any effective investigations are completed with due expedition. In this case some 35 years have passed since PF's murder. The Secretary of State knew, or should have known, that by deferring his decision until after the PSNI and PONI processes had been completed, that there was bound to be excessive delay. The Secretary of State knew, or should have known, that the PONI process would almost certainly be hopelessly delayed on the basis of past experience. If he had made any inquiries of PONI, and he was duty bound to do so in the circumstances, then he would have been told that any investigation would not be completed until 2025 at the earliest. Obviously, the Secretary of State must accept that such a delay would be both inordinate and a breach of article 2.

[87] The Secretary of State should also have appreciated from Lord Kerr's judgment that the PSNI and PONI processes were not going to be the end of the matter in all likelihood. There would almost certainly have to be some further process necessary given the nature of the PSNI and PONI processes to ensure that all the obligations under article 2 were covered. This would inevitably have led to further delay. Accordingly, the original decision of the Secretary of State to await the completion of the PSNI and PONI processes was almost certainly not going to satisfy the Secretary of State's obligation to proceed with due expedition and he should have appreciated this.

[88] It was the duty of the Government through the Secretary of State (or through whatever minister it chose) to respond appropriately and promptly to the decision of the Supreme Court. It was not the duty of the PSNI or PONI or any other body that might be required to carry out any further investigation or inquiry. The Secretary of State had to ensure that whatever process (or processes) he put in place was going to be completed with due expedition. Of course, the Secretary of State had to await the decision of the Supreme Court in *Dalton*, but there was no excuse for any further delay after that decision was published. The choice available to the Secretary of State was not a binary one as the Secretary of State suggests, that is to say establish a public inquiry on 30 November 2020 or to defer the decision until after the PSNI and PONI decisions. The Secretary of State had available to him a third option. He could fashion an article 2 compliant investigation and put into effect the clear advice offered to him by the Supreme Court.

[89] The Secretary of State had allowed matters to drift by not agreeing binding timescales for the work to be completed. The Secretary of State should have been aware of what was required of him in setting up an article 2 investigation. He told the House of Commons on 30 November 2020:

> "The State's article 2 obligations can be met through a series of processes taken by independent authorities on the initiative of the State, which, cumulatively, can

> establish the facts and identify the perpetrators or hold them to account where sufficient evidence exists."

Further he continued:

> "I am today publishing further information that was considered by the independent counsel in their review since the Supreme Court judgment, some of which has not previously been released into the public domain. That includes information pertaining to a Police Service of Northern Ireland review conducted in 2015."

He then added:

> "It is, quite properly, for the Chief Constable of the PSNI to determine the precise scope and format of any review, in accordance with their own priorities and review procedures, and the police have indicated that they expect that any review would need to be conducted independently of the PSNI. Such a process, in addition to the ongoing investigations being conducted by the police ombudsman, can play an important role in addressing the issues identified by the Supreme Court. I want to be clear: I am not taking the possibility of a public inquiry off the table at this stage. It is important that we allow the PSNI and police ombudsman processes to move forward, and that we avoid the risk of prejudicing any emerging conclusions from their work. I will then consider all options available to me to meet the Government's obligations."

[90] A fair reading of the passages suggests that the Secretary of State considered that:

(i) The independent authorities could fulfil the State's article 2 obligations;

(ii) Investigations completed prior to the Supreme Court's determination supplemented the reviews already considered in the judgment to the extent that had the Supreme Court considered these further aspects, the article 2 investigative obligation may have been found to be satisfied; and

(iii) The Secretary of State should not interfere with other processes that may result in compliance with article 2.

[91] It cannot be said that the Secretary of State was plainly wrong to believe that the independent authorities could fulfil the State's article 2 obligations. The problem

arises with (ii) and (iii) which reveal a mischaracterisation of the Secretary of State's obligations. Further support for this conclusion is provided by the Government's official response to the *Finucane* decision, the key paragraph is contained at para [20] where it is stated:

> "Having carefully considered the facts of this case; the Supreme Court judgment, the outcome of the independent counsel review and the United Kingdom's obligations under article 2 of the European Convention of Human Rights, the Secretary of State for Northern Ireland has concluded that it is right and appropriate to determine *what further steps are appropriate and necessary should any obligations under the ECHR remain outstanding when assessed in light of the police and OPONI processes.*" (Emphasis added)

[92] At paragraph 21 the Government response goes on to say:

> "In particular, other than as referenced in the de Silva report, the Supreme Court was unaware of the detail of the investigative methodology followed. In addition to the upcoming police review process and ongoing OPONI investigations, the Government has therefore set out below further detail not previously in the public domain of the investigative steps taken in respect of the issues identified by the Supreme Court and the independent report."

[93] The response then continued on to set out in detail as to how this new information assuaged the concerns found in the judgment of Lord Kerr.

[94] It rather appears that reading the official Government response to the *Finucane* judgment as a whole that:

(i) The Secretary of State was suggesting that the Supreme Court's finding was, in practical terms, incomplete and therefore wrong.

(ii) Paragraph 20 of the Government's response when considered in context suggests that the Government's intention following the completion of the PSNI and PONI processes may well be read as "what further steps *if any are appropriate and necessary.*" As Lord Steyn said in *R(Daly) v Secretary of State for the Home Department* [2001] UKHL 26 "In law context is everything."

[95] Of course, the aim of the 30 November deadline was to provide certainty to the *Finucane* family and allow the Government to meet its obligations under international law. That the Secretary of State sought to rely instead on the outcomes

of the PSNI and PONI processes when he had no indication of when those processes might be completed, nor whether any further process or processes would be required and if so when they could be completed, served only to frustrate the Government's compliance with the ECHR. Not only will the decision to defer have caused understandable upset to the *Finucane* family, it also represented both a further failure on the part of the United Kingdom Government to comply with its international obligations to secure a prompt and effective investigation into the murder of PF. On any view the failure to ensure compliance with its article 2 obligations represented a most unfortunate derogation of its domestic and international responsibilities.

[96] The court is driven to conclude that whatever way one looks at what has happened, the following conclusions can be reached with some degree of confidence:

(i) The Supreme Court gave clear instructions as to what was needed to have an article 2 compliant investigation.

(ii) Those comprehensive instructions for whatever reason have not been followed and this court will not attempt to improve upon them.

(iii) To date there has still not been an article 2 compliant investigation and waiting until the PONI process is completed in 2025 (at the earliest) was never going to be the answer.

(iv) The Secretary of State made insufficient effort to assess what further process(es) might be necessary after PONI had reported and how this could be achieved, and what the likely timescale(s) was going to be.

[98] For the avoidance of any doubt, we do not consider that GF's claim based on irrationality adds any substance to her other arguments for the reasons highlighted by the LTJ in his judgment.

Second ground of appeal

Secretary of State's position

[97] The Secretary of State also argued that there had been no culpable delay on the part of the Government because, inter alia, the Secretary of State could not be responsible for institutional delay, namely that for which the PSNI and PONI were responsible. It was submitted that it would be wrong to hold him responsible in damages for delay which was consequent upon the practices and/or resource shortfalls within those bodies. Further and relatedly, it was averred that any delay could not be culpable because the Secretary of State cannot be precluded from relying upon the work of the devolved investigative authorities which they have voluntarily decided to undertake when assessing whether the State as a whole has complied with its article 2 obligations. Any other conclusion would run contrary to

the constitutional arrangements within Northern Ireland. Instead, it was argued that the Secretary of State was entitled to allow those procedures to run their course before deciding what more, if anything, required to be done or could feasibly be done. Such an approach would accord with the Supreme Court's decision in *Finucane* that it was for the State to decide how best to proceed when securing article 2 compliance.

[98] The Secretary of State further argued that he was not the sole appropriate person to respond to the Supreme Court's decision. It did not follow from his position as a member of the Government that the next step by the State authorities in responding to the Supreme Court judgment must be an action initiated by him or under his direction. Rather it was submitted to the court that there was no reason why the Secretary of State could not decide that the appropriate next step was for the devolved investigative authorities to continue with the relevant work which they had independently decided to undertake.

[99] Alternatively, if the court was satisfied there was undue delay, then just satisfaction did not require a further award of damages.

[100] Mr McLaughlin KC advanced six arguments in this respect:

(i) Firstly, GF had initially sought a declaration or mandatory order by way of relief, thereby setting this case apart from the situation in *Alseran v Ministry of Defence* [2018] 3 WLR 95.

(ii) It was contended that there was a lack of clear and consistent practice of the European Court on the issue of successive damage claims for ongoing investigative delay.

(iii) The case was made that the trial judge failed to consider the overall passage of time when making his award. In this vein, the Secretary of State pointed out that it has been the practice of the court to only consider the period of time between the alleged unlawful act and the commencement of proceedings (see, for example, *Jordan v PSNI* [2019] NICA 61). As proceedings in this case were issued just two months after the date of the impugned decision, just satisfaction in this case would not necessitate a further award of damages.

(iv) Fourthly, as the court had already ordered the Secretary of State to reconsider its position, it was suggested damages were not necessary.

(v) The appellant indicated that the recent action by the Committee of Ministers pointed away from a conclusion that just satisfaction required damages to be awarded, contrary to the findings of the trial judge.

(vi) Finally, it was said that the trial judge erred in concluding that GF had experienced feelings of frustration, anxiety and distress sufficient to warrant an award of damages.

[101] The Secretary of State's concluding argument was that even if the court considered it appropriate to award damages in this case, it would not be appropriate to do so at this time. The Secretary of State contended that the court should exercise its case management powers until such time as the issue of delay could be assessed alongside the progress of the investigation.

GF's position

[102] GF contended that the LTJ had everything he required to assess damages. The argument was:

(i) There was culpable delay of more than two years.

(ii) The delay had caused feelings of frustration, anxiety and distress.

(iii) The delay had to be seen in the context of still more delay, the decision of the Supreme Court and the further declaration of the High Court.

[103] According to Ms Doherty KC, ECtHR caselaw demonstrated that where there was a finding of breach of the obligation to carry out a prompt and effective investigation, an award of damages is warranted in order to afford just satisfaction for the resultant feelings of frustration, distress and anxiety: see *Shanaghan v UK (Application 3715/97; McKerr v UK (Application 28883/95; Jordan v UK (Application 24746/94)* and *Kelly & Ors v UK (Application 30054/96)*. She also pointed to the Court of Appeal's own decision in *Jordan v PSNI* [2019] NICA 61 as evidence of such an approach.

[104] Further, there was a clear and consistent line of authority in Strasbourg caselaw that indicated an award of damages for second or subsequent article 2 delays was permissible. GF disputed the claim that *Jordan v PSNI* resulted from a finding that the passage of time of over a decade was the exceptional circumstance warranting a second award of damages. Rather, para [27] of that decision made it clear that the Court of Appeal had expressly directed such a reading of the passage of time argument.

[105] Further, it was argued that the LTJ correctly dismissed the argument that the declaration was sufficient to amount to just satisfaction. GF further urged the court to resist the Secretary of State's request to stay the issue of damages.

Chronology

[106] The court has to decide whether it is appropriate to award a subsequent set of damages. In those circumstances it is important to look at the chronology of the delay and the damages which have already been awarded. The appropriate start date must be the date of the Supreme Court decision.

(i) On 27 February 2019 the Supreme Court decision in *Finucane* [2019] UKSC 7 was handed down and a declaration made against the Secretary of State.

(ii) On 10 October 2020 the Secretary of State acknowledges delay, provides an apology and agrees to pay damages of £7,500 and commits to a decision by 30 November 2020.

(iii) On 30 November 2020 the impugned decision is made. The Secretary of State defers the decision of the public inquiry until after the PSNI and PONI processes have been completed.

(iv) On 7 January 2020 pre-action correspondence begins.

(v) On 19 February 2021 the Order 53 statement is lodged.

(vi) On 15 April 2021 leave is granted by the High Court.

(vii) On 6 May 2021 the Chief Constable writes to the Secretary of State confirming that no further investigations would take place. PONI had already indicated to the public the PONI report was not envisaged until 2025 at the earliest.

(viii) On 7 June 2022 the Secretary of State confirms that he will review the matter once the outcome of these proceedings is known and the nature of these legal obligations have been clarified.

(ix) Following a hearing before Scoffield J a substantive judgment [2022] NIKB 37 is delivered on 21 December 2022.

(x) On 30 March 2023 the damages judgment [2023] NIKB 42 is handed down.

Consideration of the damages issue

[107] The framework for judicial remedies for the unlawful acts of public authorities is section 8 of the HRA 1998. There is a presumption against damages as just satisfaction, but section 8 does allow for damages being awarded where the circumstances merit such award. The starting point is section 8(3) and 8(4):

> "(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including -

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining -

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

[108] Accordingly the relevant test is whether any award of damages would be in line with the practice of the Strasbourg Court. The supplementary domestic legal principles are well-known, and, in this instance, largely uncontroversial. Those principles were set out by the Supreme Court in *R(Faulkner & Sturnham) v Secretary of State for Justice & Anor* [2013] UKSC 23 when Lord Reed, giving the judgment of the court, having set out and analysed the law, said:

> "39. Three conclusions can be drawn from this discussion. First, at the present stage of the development of the remedy of damages under section 8 of the 1998 Act, courts should be guided, following *Greenfield*, primarily by any clear and consistent practice of the European court. Secondly, it should be borne in mind that awards by the European court reflect the real value of money in the country in question. The most reliable guidance as to the quantum of awards under section 8 will therefore be awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living. Thirdly, courts should resolve disputed issues of fact in the usual way even if the European court, in similar circumstances, would not do so."

[109] It is also worth considering the guidance provided by the Northern Ireland Court of Appeal in *Jordan v PSNI,* a case that expressly considered damages following a breach of article 2. Morgan LCJ summarised the principles as follows:

> "[19] The application of the principles on the award of damages for breach of Convention rights was considered by the House of Lords in *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14. That was a case where the issue arose in the context of Article 6 breaches but the House was able to give general guidance:
>
> (i) Domestic courts when exercising their power to award damages under section 8 should not apply domestic scales of damages.
>
> (ii) Damages did not need ordinarily to be awarded to encourage high standards of compliance by member states since they are already 8 bound in international law to perform their duties under the Convention in good faith.
>
> (iii) The court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made and it follows that an award of damages should be just and appropriate.
>
> (iv) Section 8(4) of the HRA required a domestic court to take into account the principles applied by the ECHR under Article 41 not only in determining whether to award damages but also in determining the amount of the award."

[110] The court further explained at para [21] that:

> "There is an important structural difference between a claim for damages pursued in the ECtHR and such a claim arising in domestic law. Whereas under the Convention liability rests upon the state, the HRA has devised a procedure broadly similar to that in tort claims where liability falls directly upon the public authority which the court finds has acted unlawfully. In a claim based on delay that can lead to a circumstance where two public authorities are each responsible for the same

> period of delay or alternatively each is responsible for separate periods of delay."

[111] It will be noted that the LTJ pays particular reliance on *Jordan* in his judgment on damages: see para [8].

[112] Finally, Keegan LCJ in giving judgment in the recent decision of *In Re McEvoy* [2023] NICA 66 at para [26] outlined the role of an appeal court when reviewing the trial judge's award of damages:

> "Turning to the substantive case, the trial judge has properly applied the legal principles in relation to the establishment of a claim for damages. We see no good reason why we should interfere with the exercise of his judgement on the point of principle which was the primary focus of this appeal. The judge had a full knowledge of the history of this case and made findings of fact which were not appealed. He was entitled to consider and award damages once the issue of just satisfaction for delay was raised. We discern no error of law in his analysis."

[113] In this case the LTJ:

(a) Took into account the previous awards made as part of his section 8(3) requirement to take account of all of the circumstances.

(b) Made clear that the award was for the period between November 2020 to the date of his judgment (see para [23]).

(c) Recognised that GF, as PF's widow, is bound to have experienced feelings of frustration, anxiety and distress on learning that the Government was going to delay still further any prospect of an effective investigation into her husband's death.

[114] It is important not to forget what Stephens J said in *Jordan* [2014] NIQB 71:

> "It would be lamentable if a premium was placed on protestations of misery. At this level of respect for human existence and for the human dignity of the next of kin of those who have died there should be no call for a parade of personal unhappiness" (see para [27]).

[115] It is true that there is a lack of a clear and consistent practice from Strasbourg on the issue of second and subsequent awards of damages. The LTJ did appreciate the unique nature of the circumstances he faced. But he was also aware of:

(a) The consistent findings that the UK Government had failed to adequately investigate the death of her husband.

(b) The Secretary of State had failed to secure an effective investigation despite past promises.

(c) It was against this background of a failure to honour past commitments and the passing of time that this court has to look at what relief it is appropriate to give. In the present unique set of circumstances it would do well to heed the advice offered by Lord Reed in *R(AB) v Secretary of State for Justice* [2021] UKSC 28 that:

> "In situations which have not yet come before the European court, they can and should aim to anticipate, where possible, how the European court might be expected to decide the case, on the basis of the principles established in its case law."

[116] In those circumstances we have no hesitation in concluding that a second award of damages is appropriate given the culpable delay which we have highlighted earlier in the judgment. The Secretary of State chose originally to await the outcome of processes which notoriously were beset by delay. He took no steps whatsoever to ensure that either the PSNI or PONI were able to deliver their respective process with due expedition. As the LTJ said at para [18]:

> "I accept the respondent's point that he is not responsible for the delay inherent in either the LIB's or PONI's legacy investigations. These are systematic issues and devolved responsibilities in respect of which it would not be appropriate to award damages against the Secretary of State if at all. However, this is to miss the point. In the particular circumstances of this case, the Secretary of State had taken upon himself the responsibility of responding on behalf of the Government to the declaration made by the Supreme Court. It is his decision to *await* the outcome of other processes which were known to be tardy – or, in his words, to defer a final decision – which gives rise to article 2 liability."

[117] The LTJ goes on to make it clear that the Secretary of State is "the appropriate respondent to represent the State authorities in response to the present claim and either bears or has assumed, responsibility for the State's response to the declaration issued by the Supreme Court": see para [77]. We can find no fault in the LTJ making the further award of damages. The Secretary of State should have anticipated, at the very least, that there was a real risk of delay given what had happened in the past.

Despite this, no steps were taken to prevent such delay blighting these proceedings. It should have come as no surprise to the Secretary of State that, for example, the PONI process was hopelessly delayed.

[118] In all the circumstances we see no basis, to interfere with the award of £5,000 damages for the period of November 2020 to the date of the LTJ's decision to afford just satisfaction to GF.

Other relief

[119] It is important to remember that it was to the unanimous judgment of the Supreme Court that the Government and its representative, the Secretary of State, were duty bound to respond. The Supreme Court could reasonably have expected the Secretary of State to set out a clear strategy as to how the State was going to implement the judgment which had been handed down. It is of course true to say that the Secretary of State (and the Government) was placed under no direct obligation to establish a public inquiry, which remains GF's preferred course.

[120] We consider that it would be constitutionally inappropriate to grant a mandatory order to establish a public inquiry in the present circumstances. The Secretary of State took one particular course of action when there are others which remain lawfully open to him. This is most certainly not a case in which there is only one course of action lawfully open to the Secretary of State. Indeed, it is rare to make orders of mandamus when there are choices open to the decision-maker as to how to satisfy a particular duty. Mandatory orders are much more likely to be granted where there is only one course of action lawfully open to the decision-maker. As Scoffield J has elsewhere put it:

> "The simpler, cleaner and crisper the act to be required on the part of the public authority, the more likely it is that a mandatory order will be granted": see *Re Napier's Application* [2021] NIQB 120 at para [60] and see also 8.12 of Anthony's Judicial Review in Northern Ireland (3rd ed).

[121] In the present case there are a number of options open to the Secretary of State as to how he should go about establishing an article 2 compliant inquiry. These will involve the Secretary of State exercising a discretion and considering such issues as cost and expense and potential delay. The discretion vested in the Secretary of State militates against this court making a mandatory order: see 8.12 of *Anthony on Judicial Review*. However, should there be any undue delay in setting up an article 2 inquiry, then this court may be driven to make a mandatory order. In the circumstances we propose to set the following timetable:

(i) The parties have three weeks from the date of this judgment to agree on an article 2 compliant process for investigation of the relevant aspects of PF's death.

(ii) In the absence of agreement the parties have a further three weeks to submit their own proposal as to how such an article 2 compliant investigation should be carried out.

(iii) The court will endeavour to select from the two choices put forward by the respective parties.

(iv) In the unlikely event that the court is unable to choose either of the choices put forward, the court will reserve its position as to what the appropriate course is for the Secretary of State to take.

Conclusion

[122] For the reasons which have been outlined above, this court dismisses the appeal of the Secretary of State. The court will give the parties an opportunity to agree an article 2 compliant process to investigate the circumstances of the death of PF. In the absence of such agreement the court will endeavour to select a satisfactory solution from either of the proposals. However, the court reserves the right to order its own article 2 compliant process for the investigation into the death of PF as a last resort. We will receive written submissions from the parties as to the appropriate order for costs when they have had an opportunity to digest the contents of this judgment.