Neutral Citation No: [2025] NICA 16	*Ref:*	**KEE12709**
	ICOS No:	**24/046606**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**03/04/2025**

IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY BRIDIE BROWN FOR JUDICIAL REVIEW

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

---

Before: Keegan LCJ, Treacy LJ and Horner LJ

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] The starting position in this appeal is that both the appellant and the respondent agree that to date, there has been no effective, article 2 European Convention on Human Rights ("ECHR") compliant investigation into the murder of Sean Brown in 1997. This means that the United Kingdom has remained in continuous breach of the procedural limb of the article 2 obligation since 1997. This is a shocking state of affairs in that a quarter of a century has passed since Sean Brown was murdered and yet there has been no lawful inquiry into the circumstances of his death.

[2] This appeal is against the order and judgment of Mr Justice Humphreys, ("the judge") delivered on 17 December 2024 where he made an order of mandamus requiring the Secretary of State of Northern Ireland ("SOSNI") to establish a public inquiry into the murder of Sean Brown, on 12 May 1997.

[3] The facts of this case are not in dispute and as they are set out comprehensively by the judge at first instance, we will not repeat them in full. In summary, Sean Brown, the chairman of Bellaghy Wolfe Tones GAA Club, was locking the gates to the training ground when he was 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.

[4] Sean Brown's widow Bridie (referred to as "the applicant" for convenience in this judgment) is now aged 87 and has six children one of whom is deceased. She attended this appeal hearing which was her 57th attendance at a court. Mr Fahy has helpfully sent us a schedule of all previous inquest hearings and, while we note that the SOSNI was not directly involved in those, it is uncontroversial to observe that disclosure was discussed from an early stage. The evidence contained in the affidavit provided by Mrs Brown highlights the grave concerns she harboured in relation to the efficacy and diligence of the police investigation from its very beginning. She also recalls the insensitive approach adopted by officers who came to her house. The police investigation was closed in July 1998, and no one was ever charged. At the time, the family believed that Mr Brown had been murdered by members of the Loyalist Volunteer Force. The Brown family now have reason to believe that he was murdered by agents of the state.

Summary of investigative steps taken in the case thus far

[5] There is a long history of interventions in this case, none of which have led to any finality. First in time is the Police Ombudsman for Northern Ireland ("PONI") investigation which led to publication of 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.

Pausing at this point, a reasonable inference to make is that the accumulation of errors and omissions outlined above was not due to gross carelessness but instead was part of a deliberate ploy to conceal the circumstances of Sean Brown's murder.

[6] 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.

[7] An inquest into the death of Sean Brown was opened in 1997. As we have seen from the papers and press reports, over 40 preliminary hearings were held during which in 2006 the senior coroner in Northern Ireland John Leckey forcefully criticised state agencies for failing to comply with their disclosure obligations. The same sentiment was echoed eighteen years later by Mr Justice Kinney after he was appointed coroner as part of the five-year plan to hear outstanding inquests.

[8] In November 2021 the Brown family brought judicial review proceedings in relation to the failure to commence an inquest and were awarded damages. They also commenced civil proceedings against the Chief Constable of the Police Service of Northern Ireland ("PSNI") and the Ministry of Defence ("MOD") in 2015. These proceedings settled on 12 May 2022. The following statement was made in open court 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."

[9] On 27 March 2023 Kinney J set out a draft scope of the inquest. As 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.

[10] On 22 November 2023 the Crown Solicitor's Office ("CSO") wrote to the applicant's solicitors in relation to the issue of disclosure and a proposed application for public interest immunity ("PII"). By this correspondence it was revealed that during disclosure work, the PSNI had "encountered issues arising from what can broadly be described as intelligence coverage."

[11] As a result, the letter states that in the absence of a Closed Material Procedure ("CMP") 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. The letter 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 ("NIO") were all represented by counsel who raised no objection to this course. 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] In her affidavit filed for these proceedings 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. Summarising, he described their actions as:

> "Deplorable, and frankly inexcusable."

[16] Kinney J 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 stated his intention to write to the 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.

[19] After consideration of this ruling, the 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 Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, ("the Legacy Act") once they came into effect on 1 May 2024. This legislative provision enabled a coroner who was responsible for an inquest closed by virtue of the Act to ask the Independent Commission on Reconciliation and Information Retrieval ("ICRIR") to "review" the death.

[20] On 13 March 2024 the coroner replied 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.

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

[22] In parallel, the applicant's solicitors made it clear that the Brown 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.

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

The first instance decision

[24] In a comprehensive and focussed judgment the judge allowed the application for judicial review and granted an order of mandamus based on what he described as "the unique facts of the case." Specifically, he found that several features of the case made it exceptional and justified him taking an "unusual and exceptional" course of action.

[25] At para [71], the judge's core reasoning is found as follows:

> "(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."

This appeal

[26] The order was made on 17 December 2024 and shortly thereafter the SOSNI ("the appellant") filed a notice of appeal. The notice posits grounds of appeal in a narrative form which we have not found particularly helpful. However, by virtue of the supplementary note we can see that the appellant brings this challenge on the basis that (i) the judge was incorrect to find that the SOSNI's refusal to hold a public inquiry into the murder of Sean Brown was wrong, and (ii) that the judge was wrong to make the order of mandamus.

[27] During the argument before us Mr McGleenan maintained that part of the appeal was against the judge's refusal to adjourn the case on 22 October 2024 pending an appeal in *Re Dillon* [2024] NICA 59. However, an appeal from the adjournment refusal was out of time and so required an application to extend time. This ground was ultimately abandoned. We proceed on the points of appeal argued before us in relation to whether the decision by the SOSNI to refuse a public inquiry was wrong and the judge's grant of mandamus was wrong.

The test on appeal

[28] This court must determine whether the judge was wrong in finding the SOSNI's decision not to order a public inquiry unlawful and in breach of ECHR obligations. We approach this first question applying the public law principles discussed from para [31] below to effectively decide whether the SOSNI has

misdirected himself and therefore reached an unlawful decision and whether he has acted in breach of the obligations upon him to comply with article 2 ECHR. We are also cognisant of the dicta found in *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7, at para [80] and its application to a case such as this which proceeded by way of judicial review without oral evidence.

> "[80] …On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in *Anderson* that the first instance trial should be seen as the "main event" rather than a "tryout on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent …"

[29] When assessing the second substantive ground of appeal against the order of mandamus, what we are assessing is a judge's discretionary choice about a particular remedy. This will only be overturned if it was based on wrong principles, as noted in *De Smith, Judicial Review*:

> "Where the exercise of discretion as to remedy by a judge at first instance is challenged on appeal, the Court of Appeal will normally intervene only if the judge below proceeded on the basis of the wrong principles" (See *De Smith, Judicial Review, 9th edn*, para 18-049, page 909).

[30] It is a general rule that granting an order of mandamus is a matter of discretion for the court (affirmed in *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141, [1982] 1 WLR 1165, HL.) *Supperstone, Goudie and Walker, Judicial Review, 7th edn*, have characterised mandamus at pages 656-657 as, "a discretionary remedy [that] may issue in cases where, although there is an alternative legal remedy, that mode of redress is less convenient, beneficial and effective." The authors go on to state that:

> "A mandatory order which requires a particular result will usually only be ordered where the court concludes that it is the sole result that is legally permissible. Even in such circumstances, the court repeatedly affirms the principle of deference to public authority decision-making."

Applicable legal principles

[31] We begin with what the European Court of Human Rights ("ECtHR") has said about the nature of the procedural obligation to investigate deaths committed by state agents pursuant to article 2 of the ECHR, the right to life.

[32] 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.

[33] A coroner's inquest is one means by which the article 2 procedural obligation may be satisfied. It is not, however, the only one. 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 satisfy the obligation.

[34] Applying the principles found in *Jordan v UK* (2003) 37 EHRR 2, the Supreme Court observed in *Re Dalton's Application* [2023] UKSC 36:

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

[35] Whilst *Jordan* deals with international standards, *Amin v Home Secretary* [2003] UKHL 51 considered domestic compliance in a case concerning a prison death. The House of Lords considered whether an independent public investigation into the

death of a prisoner in custody had to be held in order to satisfy the UK's obligations under article 2. The family of the deceased had sought a public inquiry, as other investigations into his death had proved inadequate. Hooper J made a declaratory order at first instance in the following terms:

> "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."

[36] The Court of Appeal overturned this order. However, when the case was brought before the House of Lords, the declaratory order was restored. Delivering judgment, Lord Bingham referred to *Jordan v UK*, as follows:

> "[32] Mr Crow was right to insist that the European Court has not prescribed a single model of investigation to be applied in all cases. There must, as he submitted, be a measure of flexibility in selecting the means of conducting the investigation. But Mr O'Connor was right to insist that the court, particularly in *Jordan* and *Edwards*, has laid down minimum standards which must be met, whatever form the investigation takes. Hooper J loyally applied those standards. The Court of Appeal, in my respectful opinion, did not. It diluted them so as to sanction a process of inquiry inconsistent with domestic and Convention standards."

[37] Lord Bingham observed that there had been several investigations into the death, however, they did not meet Convention standards. A particular focus was placed on the fact that investigations had been conducted in private, without any participation from the deceased's family members. As per para [32] of *Amin* Lord Bingham is quite clear in stating that international standards cannot be watered down domestically. In *Amin* the court was therefore able to define what needed to happen to achieve ECHR compliance. The declaratory order made at first instance which we set out at para [35] above was upheld by the House of Lords. It was clear in its terms as to what was required.

[38] To our mind the following points of principle which Lord Bingham articulates apply with equal, if not, increased force to a murder involving state agents:

> "[30] A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and

must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. The state owes a particular duty to those involuntarily in its custody. As Anand J succinctly put it in *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 at 767:

> 'There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life.'

Such persons must be protected against violence or abuse at the hands of state agents. They must be protected against self-harm: *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360. Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm.

[31] The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred: *Menson v United Kingdom,* page 13. It can fairly be described as procedural. But in any case, where a death has occurred in custody it is not a minor or unimportant duty. In this country, as noted in paragraph 16 above, effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. 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.

[32] Mr Crow was right to insist that the European Court has not prescribed a single model of investigation to be applied in all cases. There must, as he submitted, be a measure of flexibility in selecting the means of conducting the investigation. But Mr O'Connor was right to insist that the Court, particularly in *Jordan* and *Edwards,* has laid down minimum standards which must be met,

> whatever form the investigation takes. Hooper J loyally applied those standards. The Court of Appeal, in my respectful opinion, did not. It diluted them so as to sanction a process of inquiry inconsistent with domestic and Convention standards."

[39] Reading *Amin* it is apparent that an issue also arose as to the statutory powers available to a coroner and other legal limitations. However, that did not stop the House of Lords restoring the first instance declaration. Lord Hope at para [65] expressed his view in trenchant terms as follows:

> "I agree that the various investigatory processes into Mr Mubarek's killing which have been conducted so far fall well short of providing the effective public scrutiny that is needed in a case of this kind. Substantial changes in the existing system for the investigation of deaths by coroners have been proposed: *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review* (Cm 5831) (June 2003). But they will require legislation, and it must be assumed that these changes will not be applied retrospectively to deaths which have already occurred. The only alternative in these circumstances is for the Secretary of State to order the holding of an independent public inquiry into the circumstances which led to Mr Mubarek's death. Subject to the observations at the end of Lord Bingham's speech with which I am in full agreement and to the fact that the person who conducts it will lack the powers which could only be given by statute, I suggest that the conduct and scope of this inquiry should be as close to the Scottish model as possible."

[40] Another decision of importance in this area is *R (ex parte Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin). In that case the widow of Alexander Litvinenko sought a judicial review of the Secretary of State for the Home Department's ("SSHD") refusal to order a statutory inquiry under section 1 of the Inquiries Act 2005 ("the 2005 Act"). Mr Litvinenko had died from ingesting polonium 210 at a restaurant in London, which was allegedly administered by two Russian nationals.

[41] At an inquest into the death, the coroner held that due to material covered by PII, a statutory inquiry was the only means by which the issue could be investigated. This decision was made against a backdrop of allegations of state agent involvement in the murder of Litvinenko. The SSHD decided not to hold a statutory inquiry, due to concerns about cost and the potential for overlap with ongoing investigations.

[42] In assessing the SSHD's reasons for the decision, Richards LJ held at para [74] that:

> "Taking everything together, I am satisfied 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. The appropriate relief is a quashing order."

[43] The Divisional Court in England and Wales therefore held that a statutory inquiry was the only means to satisfy the state's article 2 procedural obligation. However, the court declined to grant relief in the form of a mandatory order, despite noting that, "The case for setting up an immediate statutory inquiry as requested by the coroner is plainly a strong one." The court noted that:

> "[75] …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."

[44] The Divisional Court in *Litvinenko* emphasised the broad discretion on the Minister as to whether to mandate a public inquiry. The decision highlights that while a mandatory order to conduct a public inquiry is possible, it will likely be restricted to situations where there is no rational (or lawful) option but to establish a public inquiry. The court did not make a mandatory order. However, following the ruling the Home Secretary announced a public inquiry would be held.

[45] We have also considered relevant jurisprudence in this jurisdiction. In *Re Gallagher's (Michael) Application* [2021] NIQB 85, the applicant sought a judicial review challenging the SOSNI's refusal to hold a public inquiry into the Omagh bombing. Horner J refused leave, noting that the decision to hold a public inquiry is a discretionary matter which Ministers are best equipped to decide:

> "[307] The Inquiries Act 2005 provides a framework for the setting up and conduct of public inquiries. It confers a power solely on Ministers (section 1) and Parliament's choice reflects the multi-factorial nature of the decision to establish an inquiry, central to which is an assessment of the public interest at the relevant time.
>
> [308] I agree with the submission of the respondent 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.
>
> [309] In the circumstances I refuse leave to the applicant to challenge the Secretary of State's decision not to hold a public inquiry on the basis that it offends common law reasonableness."

[46] In *Re Geraldine Finucane's Application for Judicial Review* [2019] UKSC 7, the appellant appealed against the refusal of judicial review of the SOSNI's decision not to hold a public inquiry into the murder of her husband, a Northern Ireland based solicitor, by paramilitaries. The Supreme Court held that the state had failed to conduct an article 2 compliant inquiry.

[47] The Supreme Court declined to grant relief in the form of a mandatory order requiring the Secretary of State to hold a public inquiry into the death of Patrick Finucane. Rather, the court made a declaration stating that there had not been an article 2 compliant inquiry into the death of Patrick Finucane. Lord Kerr emphasised the state's discretion in deciding whether to hold a public inquiry:

> "[153] …It is for the state to decide, in light of the incapacity of Sir Desmond de Silva's review and the inquiries which preceded it to meet the procedural requirement of article 2, what form of investigation, if indeed any is now feasible, is required in order to meet that requirement."

[48] Following this Supreme Court decision, the SOSNI on 30 November 2020 again declined to establish a public inquiry, and instead, decided to await the outcome of the reviews and investigations being carried out by the PSNI and the PONI. This gave rise to further proceedings brought by Patrick Finucane's widow,

challenging the SOSNI's decision not to hold a public inquiry and seeking relief in the form of a mandatory order.

[49] In those proceedings before the High Court in Northern Ireland, Scoffield J again declined to make a mandatory order compelling the holding of a public inquiry (*Re Finucane* [2022] NIKB 37). The judge considered the reasons for and against granting an order and found that the arguments against had more weight. He noted initially at para [124]:

> "…I have concluded that it would not be appropriate to grant a mandatory order compelling the establishment of a public inquiry for a number of reasons. As a matter of first principle, it is right that the respondent be given an opportunity to consider the matter first, with the benefit of the judgment of the court, provided that this opportunity is not permitted to give rise to significant additional delay. Leaving that aside, however, there are weighty considerations weighing against the grant of any such order."

[50] The other considerations the judge took into account might be summarised as follows:

(a) the Supreme Court refused to make this order in *Re Finucane* [2019] UKSC 7;

(b) public inquiries are time consuming and expensive, and the court should be hesitant to dictate public funding;

(c) the issue of resources is particularly relevant in the field of legacy investigations in Northern Ireland, as noted by Humphreys J in *Re McEvoy's Applications* [2022] NIKB 10 (at para [52]);

(d) no other courts have made such an order, and while such an order would be in principle within the court's power, it would be highly unusual and truly exceptional; and

(e) even if an order was made, the court could not dictate terms of reference for the public inquiry, that is for the minister to decide.

[51] Scoffield J, therefore, declined to grant a mandatory order and instead issued a quashing order together with a declaration which stated:

> "[126] …At the date of this judgment, there has still not been an article 2 compliant inquiry into the death of Patrick Finucane."

[52] When Scoffield J's decision was reviewed before the Court of Appeal (*Re Finucane* [2024] NICA 55), the appellate court considered what relief was available to the appellant. Determining that issue Horner LJ stated:

> "[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.
>
> …
>
> [121] …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."

[53] In *Re McQuillan's Application* [2021] UKSC 55, the Supreme Court considered the nature of the investigative obligation in article 2. In so doing, it referred back to the decision of Kerr LCJ in *Re Kelly* [2004] NIQB 72, where he decided to dismiss an application for judicial review of an investigation which had not yet been completed. The Supreme Court accepted this approach, stating at para [200]:

> "But we share the Court of Appeal's view that it is correct as a general rule to adopt the approach in Kelly of awaiting the outcome of an investigation before ruling on its effectiveness, provided it has the capacity to fulfil the procedural requirement of independence…The court should generally intervene before the conclusion of an investigation only if it can be shown that the arrangements for the investigation as envisaged and any arrangements which could or might sensibly be put in place as the investigation proceeds would not have the capacity to fulfil the article 2/3 investigative obligation by

being an effective investigation, thereby giving rise to the need for a fresh investigation."

[54] The final case which featured heavily in argument is *Rex (Imam) v Croydon London Borough Council* [2023] UKSC 45. This case concerned Croydon London Borough Council's failure to exercise a statutory duty to make provision for accommodation for a disabled woman. The Council had been in default of its obligation for six years. The appellant sought a mandatory order against the Council for breach of its duty.

[55] In *Imam* the court considered whether a local authority's lack of financial or other resources should be considered when deciding whether to grant a mandatory order. At para [41], Lord Sales emphatically stated that:

> "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.
>
> [42] However, remedies in public law are discretionary: see, eg, *R (Edwards) v Environment Agency* [2008] 1 WLR 1587, para 64; De Smith's Judicial Review, 8th ed (2018), para 18-047. The existence of a discretion as to the relief to be granted allows a court which finds there has been a breach of a public body to decide, in the light of all the circumstances as appear to the court <u>at the time</u> it applies the law, how individual rights and countervailing public interests should be reconciled." [our emphasis]

[56] Lord Sales then went on to consider the remedy of a mandatory order, and the question of whether it impedes on the discretion of the public authority:

> "[44] 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." [our emphasis]

[57] Lord Sales also opined on the difference between the role of the court and a local authority when deciding to make a mandatory order:

> "[61] In my view, however, this would be to go further than is justified, bearing in mind the appropriate balance between the role of the court and the role of a local authority… In planning its affairs and setting its budgets, an authority has to balance all the demands placed upon it by Parliament and match these with the sources of income available to it. A court cannot carry out that function itself, since it lacks the democratic authority, detailed knowledge of the range of demands and range of funding options available and the administrative expertise required for this…
>
> [62] Yet if a court makes a mandatory order which has the practical effect of requiring an authority to divert funding from allocations already made in its annual budget, it would unduly disrupt that balancing exercise carried out by the local authority as regards the funding for due performance of its different functions."

[58] Of course we recognise that the duty owed by the Council in *Imam* was immediate, non-deferrable, and unqualified. This is a different obligation to that owed by the SOSNI in this case. He has a power under section 1 of the 2005 Act and a discretion whether or not to exercise it to order a public inquiry.

[59] However, Lord Sales' articulation of general principles in *Imam* has an application wider than housing policy. This is particularly so when a supervisory court is considering what relief to grant after a successful judicial review of administrative or ministerial decisions. For instance, in *M McD*, *(a child)* [2024] IESC

6 the Irish Supreme Court cited para [40] of *Imam* with approval at para [124], applying the same principle established in *Imam* to a case about child protection.

[60] Dealing with mandamus, in 1762, Lord Mansfield observed in the case of *R v Barker* [1762] 3 Burr 1265, that the order:

> "…was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore, it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

Lord Mansfield went on to note that within that past century the order of mandamus had been "liberally interposed for the benefit of the subject and advancement of justice."

[61] *De Smith, Judicial Review, 9th edn,* pages 900-901, para 18-024, refers to mandatory orders, as follows:

> "The modern approach to remedies – in which the function of remedial orders is simply to give effect to the judgment of the court on the substance of a claim – means that it is no longer necessary at this stage to describe the kinds of decision in which mandatory orders may be granted. If the court has found there to be breach of a duty, a mandatory order may be granted if in all the circumstances that appears to the court to be the appropriate form of relief. Mandatory orders will not lie to compel the performance of a mere moral duty, or to order anything to be done that is contrary to law." [our emphasis]

[62] Footnote 75 to the above section also refers to circumstances where mandamus has been granted:

> "Striking examples of mandatory orders include that the DPP should promulgate a specific policy in relation to assisted suicide (*R (On the Application of Purdy) v DPP* [2009] UKHL 45; [2010] 1 AC 345 at [56] (Lord Hope)) and that the claimant's son should be admitted to the faith school which had excluded him on racial grounds (*R (on the application of E) v Governing Body of JFS* [2009] UKSC 15; [2010] 2 AC 728). In *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] UKSC 28; [2015] 4 All ER 724 at [30]-[31] and

> [35], the SC made a mandatory order requiring the Secretary of State to prepare new air quality plans for London and to deliver the plans to the European Commission by the end of the year (*R (on the application of Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin); [2023] 1 WLR 225). The difficulties in obtaining a mandatory order in relation to the investigation of criminality was emphasised in *R (on the application of Soma Oil & Gas Ltd) v Director of the Serious Fraud Office* [2016] EWHC 2471 (Admin). Some of the reasons for not granting a mandatory order in a highly charged political context (including the need for continued judicial supervision) were emphasised in *Re Napier's application for Judicial Review* [2021] NIQB 120."

[63] In *Re Napier's Application* [2021] NIQB 120, Scoffield J summarised the five basic principles relating to the decision to grant mandatory orders as follows:

> "[59]…
>
> (1) Rarity in general: As noted above, mandatory or coercive orders are rare in judicial review. The just result is more often achieved by the grant of a constitutive remedy such as a quashing order and/or an educative remedy by way of declaration. Nonetheless, *mandatory orders remain an important tool within the courts' toolkit to do justice in an appropriate case and where there is a proper basis for compelling a particular action on the part of the respondent.*
>
> (2) Need for clarity as to obligation: *Mandatory orders are most appropriate in cases where the relevant public authority has a clear statutory duty to do a certain thing* (see Supperstone, para 16.47; and Lewis, para 6-051). This means that, in practice, the situations where the courts are willing and able to order a public authority to do a specific act are limited. A mandatory order is most suitable where the obligation to act is clear and the act to be performed is also clear. That is not to say, however, that an implied statutory duty may not be enforced by way of mandatory order where the court has identified the relevant obligation.
>
> (3) Rare where discretion involved: Generally, a mandatory order will not be granted compelling a particular outcome where the public body in question

enjoys a discretion – *unless (exceptionally) the discretion may only lawfully be exercised in one particular manner in the circumstances of the case* – although an order may be granted securing performance of the duty to exercise the discretion (see Supperstone, para 16.47; and *Auburn*, para 30.73).

(4) Need for clarity as to act required: A mandatory order will also not normally be granted unless the court can specify precisely what the public body needs to do in order to perform its duties; and such an order should be framed in terms which make it clear what the public body is required to do and also therefore to allow a clear assessment to be made as to whether the order has been complied with (see Lewis, para 8-009; and *Auburn*, para 30.08). That is not to say that a court may not, for instance, grant an order requiring a particular purpose to be achieved within a particular timescale (where there is a public law obligation to achieve the purpose in question); but the court will be more cautious as the complexity of the result to be achieved or the steps required for that purpose increases.

(5) Presumption against continuing supervision: In general, a mandatory order will not issue to compel the performance of a continuing series of acts which the court is incapable of superintending (see *De Smith*, para 18-036). Nor will a mandatory order be granted if it will require close supervision by the court to ensure that it is being observed, or ongoing monitoring of the exercise of the public body's functions (see *Lewis*, para 8-009; and *Auburn*, para 30.08)."

Discussion of the issues

[64] In the Order 53 statement the applicant challenged the legality of the decision of the SOSNI not to establish a public inquiry. The applicant sought a declaration that this decision was unlawful as being contrary to section 1 of the 2005 Act and an order of mandamus compelling SOSNI to establish a public inquiry.

[65] Section 1 of the 2005 Act provides a discretionary power to a Minister to order a public inquiry as follows:

"Power to establish inquiry

(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.

(2) In this Act "Minister" means—

(a) a United Kingdom Minister;

(b) the Scottish Ministers;

(ba) the Welsh Ministers;

(c) a Northern Ireland Minister;
...

(3) References in this Act to an inquiry, except where the context requires otherwise, are to an inquiry under this Act."

[66] On appeal the appellant contended that the judge erred in finding that the choice whether to grant the order of a public inquiry was a 'binary' one, between a lawful and unlawful course of action. It is submitted that by viewing the SOSNI's decision in a binary way, the judge ignored the other considerations available to the SOSNI at the time of making his decision.

[67] In support of the argument the SOSNI relied heavily on a series of ministerial advice which form the basis of his decisions. Given the reliance upon this advice by Mr McGleenan we have carefully considered it and will discuss both the trajectory and substance of it as follows.

[68] First the trajectory. On 16 May 2024 the appellant'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 2024 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.

[69] 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.

[70] Officials prepared advice to SOSNI on 7 September 2024 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 2024. On the same date a similar letter was sent to the coroner.

[71] On 20 September 2024 the Court of Appeal handed down its judgment in *Re Dillon's Application*. In the light of this decision, officials provided a further ministerial submission to SOSNI to permit him to consider whether a different decision should be reached. Following from this the recommendation to the Minister was that he agree and affirm the previous decision and encourage the Brown family to meet with ICRIR. On 12 November 2024 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."

[72] On the eve of the hearing at first instance, SOSNI announced on 4 December 2024 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. The Court of Appeal refused leave and an application for leave to appeal is now pending before the Supreme Court.

[73] Next, we examine the substance of the ministerial advice relied upon. First, Mr McGleenan referred to the 19 August 2024 ministerial advice entitled "Options for troubles-related inquest." This is an interesting document as although it does not specifically relate to the *Brown* public inquiry request it covers all remaining legacy inquests and groups them into four categories with proposals for disposal before the ICRIR.

[74] "Group A" includes the *Brown* case and is described as follows:

> "3. As the Act's prohibition on Troubles-related inquests approached, coroners in five cases *(Brown, Thompson, Marshall, McCusker, McKearneys and* Foxes) completed PII processes in which MoD, MI5 and/or PSNI asserted PII over some sensitive information. The

> coroners agreed that the information held by the applicants was relevant to proceedings, that its disclosure would cause a real risk of serious harm to an important public interest, and that the reasons for non-disclosure outweighed the public interest in disclosure for the purposes of the inquests. The coroners consequently concluded that they could not conduct sufficient investigations without the information and halted the inquests. Thus, even if the prohibition on Troubles-related inquests was lifted, these five cases could not proceed any further as inquests under the Coroners Act (Northern Ireland) 1959 ('the Coroner's Act'). The primary question here is **whether you refer these cases to the ICRIR or seek to establish public Inquiries as requested …"**

[75] Para 8 of this document refers to an "enhanced inquisitorial process" which appears to have been created by the ICRIR. It is described as follows:

> "The ICRIR's operational policy on Enhanced Inquisitorial Proceedings (EIP) details that any inquests that had reached an advanced stage by 1 May 2024 which are brought to the ICRIR within its first year of operation will be prioritised in terms of resource allocation to ensure that the Commission is able to complete the work on those cases as 'promptly and expeditiously as possible.' To further build confidence in this process you have indicated that you wish to explore placing the EIP process on a statutory footing - a move that is supported by the ICRIR. This may require legislation - initial advice from the Speaker's Office suggests that the Joint Committee on Human Rights may take a liberal approach to the inclusion of new provisions in any Remedial Order, while the ICRIR believes that the EIP provisions could be delivered through transitional regulations – both of which would provide much quicker routes than primary legislation, though require further testing. We will continue to explore all options."

[76] Para [9] refers to interaction between the SOSNI and ICRIR:

> "Following your initial meeting with Sir Declan Morgan engagement with the Commission has continued at official level. As part of those discussions, the ICRIR has suggested a number of further measures that it believes

are required to progress these cases effectively and with the confidence of families:

(a) The recruitment of a retired High Court judge(s) (or retired GB coroner/ circuit judge) to oversee the cases. This individual(s) would be employed as an ICRIR officer via the current provisions in the legislation, allowing the powers of the Chief Commissioner/Commissioner of Investigations to be delegated.

(b) The ability to engage Special Advocates to provide independent oversight of the Commission's approach to sensitive material. The ICRIR would need to be provided access to the pool of Special Advocates, with approval by the Attorney General, as well as assurance that you (SoSNI) would allow the disclosure of information to Special Advocates under Schedule 6 to the Act.

(c) Exploring the use of your s.33 power to give statutory guidance to the Commission on both the identification of sensitive information, and the exercise of their duties in relation to national security. This is a delicate issue that will require careful discussion and consideration, and further advice will be provided shortly.

(d) The provision of legal aid for families (a devolved matter)."

[77] Then a number of questions are asked, namely:

"Do you agree with the proposed approach to Group A cases?

Do you agree that the Government should explore a legislative solution which allows Group B cases to continue via the coronial system, while seeking to encourage families to consider referral to the ICRIR EIP process?

Do you agree that we should encourage the referral of Group C cases to the ICRIR's standard procedures, while

not discounting the future possibility of allowing these to proceed through the coronial system?

Do you agree that we should encourage the referral of Group D cases to the ICRIR's standard procedures, while not discounting the possibility of allowing these to proceed through the coronial system?

Are you content that we do not seek to reinstate the AG power at this stage, noting that we will give you lines to use should the issue be raised during engagement?"

[78] The above questions are not answered in the documentation we have received.

[79] The first specific advice on the *Brown* case is dated 7 September 2024. Under the section "options for investigation" the following points are made:

"8. On the specific facts of this case, only an approach which involves something more than police investigative powers is likely to discharge the state's obligations under Article 2. This should be considered in light of the investigations to date and the following public interest factors:

- Public concern;
- Transparency;
- Promptness and reasonable expedition;
- Likely costs and impact on public finances.

…

11. Regardless of whether a statutory Inquiry would ultimately result in the discovery of new evidence or establishment of previously unknown facts, it is at least possible in an Inquiry with broader powers to compel the production of witnesses and documents (without the need to form a reasonable suspicion of criminality before securing witness testimony or documentary evidence). A statutory Inquiry would therefore provide a means by which to obtain further information, insofar as that is possible - and, therefore, would *clearly* be an adequate means of discharging outstanding Article 2 obligations.

12. However, if you are satisfied that there are alternative means by which the government can discharge

outstanding Article 2 obligations in this case, the effectiveness and possible outcome(s) of a statutory Inquiry must be considered in the light of public interest factors, including the likely duration; the costs; and the burden it would place upon government departments and agencies and devolved investigative authorities." [our emphasis]

[80] Under a sub heading of "ICRIR investigation" it states:

> 29. ICRIR is capable of dealing with sensitive information in a manner akin to that of a statutory inquiry and of delivering an Article 2 compliant process for investigation of how Mr Brown met his death. In your recent meeting with the Chief Commissioner of ICRIR, you tested that he had the sufficient powers and capabilities to do so. The level of ambitions for ICRIR were discussed in some detail during that meeting.
>
> …
>
> 33. ICRIR has yet to demonstrate at a practical level that its investigations will be in full compliance with Article 2 and it would be arguable that a restored inquest or a statutory inquiry would provide, at least at this stage, more certainty of an Article 2 compliant process for investigation. However, the powers available to a statutory inquiry and to ICRIR are broadly comparable. Each has similar legally enforceable powers to secure access to documents and witnesses. ICRIR can compel witnesses for questioning without suspicion of criminality to the same extent as a statutory Inquiry. There is also the possibility of a beneficial "mosaic" effect in that ICRIR could benefit from if given carriage of this case, as it would have an overview of other legacy cases with potential overlapping lines of enquiry to pursue.
>
> 34. The Inquiries Act (2005) goes further by providing in statute for members of the public to have access to the Inquiry and to its proceedings and the evidence (subject to Restrictions ordered by either the Chairman or the Secretary of State). However, the Northern Ireland Troubles Act (2023) does not preclude ICRIR from holding hearings or from allowing members of the public to have access to those proceedings and the evidence.

You have previously been briefed on ICRIR's Enhanced Inquisitorial Proceedings (EIP) mechanism, which will follow the same approach as for Inquiries conducted under the Inquiries Act, including public hearings. ICRIR has publicly set out that EIP would apply to inquests, such as the Brown case, that were at an advanced stage on 1 May. In these cases, the independent Commission has said it will work to avoid unnecessary delays to concluding what the Inquest started.

35. ICRIR has sufficient powers to receive and consider sensitive information, in a manner akin to that of a statutory Inquiry. ICRIR is also bound by statutory national security safeguards, again, in a manner akin to that of a statutory Inquiry. In practice, officials expect the conduct of an ICRIR EIP investigation would be at least comparable to that of a statutory Inquiry." [our emphasis]

[81] Under a subheading "Timing and Resourcing":

"37. You could have reasonable confidence that an ICRIR investigation into the death of Sean Brown would be completed sooner, with less cost, and <u>be less onerous for government departments and agencies and devolved authorities than a restored inquest or statutory inquiry.</u> The operational functions of ICRIR are already established and it has the capabilities to begin an investigation promptly. An ICRIR investigation would be expected to be completed in a shorter timeframe than a statutory Inquiry, given its operational readiness and flexibility and the requirement not to duplicate previous investigations. It would not be possible to definitively confirm the amount of dedicated resources that would be available for this single case, nor how long an ICRIR investigation might take, but ICRIR has publicly set out that it will work to avoid unnecessary delays to concluding what the Inquests started." [our emphasis]

[82] Under a subheading "Potential wider implication":

"46. It is difficult to see how the Brown case would be distinguished to any similar extent from many other Troubles-related cases. In particular, you have previously been briefed on the other Troubles-related Inquest cases that were halted by coroners before the 1 May prohibition

and for which public inquiries are now sought. That being so, a decision to establish a statutory Inquiry could have significant implications for other cases and ICRIR in the absence of any basis to draw such a significant distinction between them."

[83] Under a subheading "Whitehall views":

> "47. NIO officials have discussed the Brown case with colleagues from relevant government departments and agencies. All have made clear their preference for an ICRIR investigation. Ministry of Defence and MI5 officials have raised concerns about resourcing their responses to an additional separate process if another Troubles-related statutory Inquiry were to be established, and that once any Inquiry would be established that any focused Terms of Reference agreed across government could be expanded - as they consider is happening in the Omagh Bombing Inquiry and other non-Troubles-related inquiries. Home Office officials raised consideration of the Birmingham Pub Bombings case in particular, and a large number of other cases, as well as the costs and impact on public finances. You have already been briefed this week on Treasury officials' concerns on the costs and impact on public finances and understand that engagement at the political level may be required, depending on the strength of feeling of Treasury Ministers about funding and costs."

[84] The recommendations to the SOSNI were formulated in the following way:

> "52. That you:
>
> - agree not to establish a statutory Inquiry;
>
> - agree to reiterate your commitment to restore inquests;
>
> - agree to encourage the Brown family to meet with ICRIR to hear how the independent Commission would complete the investigation into Mr Brown's death;
>
> - agree to write to Mrs Brown and to the Honourable Mr Justice Kinney to communicate your decision;

- note the likelihood that the Brown family would refuse to engage with ICRIR and would reject referring for - or co-operating with – an ICRIR investigation;

- note you may refer the case to ICRIR at a future point should the Brown family decide not to do so."

[85] The decision letter is dated 13 September 2024. It is a detailed letter which clearly focuses on the ICRIR and the SOSNI's view that it was "capable of discharging the Government's human rights obligations" and has "powers comparable to those contained in the 2005 Act to compel witnesses and to secure the disclosure of relevant documents by state bodies." The SOSNI referred to documents published by ICRIR explaining its processes and encouraged Mrs Brown and her family to meet Sir Declan Morgan.

[86] The legal landscape altered after the *Dillon* decision in the Court of Appeal and so the SOSNI received a second advice, which was dated 11 November 2024. This advice largely replicates the first advice which we have set out above and so we will not repeat the substantive sections. The only difference is that this second advice discussed the implications of *Dillon*, given that the court found that the ICRIR was incapable of holding article 2 compliant investigations in certain circumstances. Again, it was indicated to the SOSNI that a statutory inquiry would satisfy the state's article 2 obligations. However, the SOSNI was advised that following the Court of Appeal's ruling in *Dillon*:

> "As matters currently stand ICRIR is not considered by the Northern Ireland Courts to be capable of providing an Article 2 compliant process. The original High Court ruling also identified certain deficiencies in respect of Convention compatibility of the Northern Ireland Troubles (Legacy and Reconciliation) Act. The appeal against those findings was withdrawn in July 2024 and officials had commenced work on addressing those issues by way of a section 10 HRA remedial order. This process was well advanced in September 2024 when the Court of Appeal delivered its judgment. The remedial order was not progressed further at that stage, whilst we consider the Court of Appeal's findings."

[87] The submissions to the SOSNI continued:

> "On the state of the law as it currently stands ICRIR does not offer an Article 2 compliant process for the

> investigation into this death. That position may change if (i) an appropriate remedial order is made addressing the declarations made by the Court of Appeal in *Dillon and Others* or (ii) the ECHR findings in *Dillon and Others* are reversed by the Supreme Court…In either of those scenarios, ICRIR would be capable of delivering an Article 2 compliant process." [our emphasis]

[88] This advice stated that it was "highly likely" that a public inquiry under the 2005 Act would be able to deliver an article 2 compliant investigation. We pause to observe that this advice has inexplicably diluted the recognition of such an inquiry as being "clearly" an article 2 compliant means which appear in the original advice and which we set out at para [87]. However, recommendations were made to the SOSNI to again refuse to hold a public inquiry and encourage the Brown family to meet with the ICRIR. In a response dated 12 November 2024 the SOSNI indicated that he was content with the recommendations, given that the Government had made a clear commitment to make the ICRIR, ECHR compliant.

[89] The appellant contended that the SOSNI was not presented with a binary choice, as the judge found at para [80] of his decision. It is argued that the judge ignored the other considerations available to the SOSNI at the time of his decision, namely, to make the ICRIR article 2 compliant through legislation, and to exercise appeal rights in *Re Dillon and Others*. Therefore, SOSNI weighed up the competing factors in the options before him, and made the decision that a public inquiry was not the most effective means to satisfy the article 2 obligation.

[90] The respondent adopted the same opinion as the judge. Mr Fahy submitted that the SOSNI was presented with a binary choice. He also highlighted that in the submissions to the SOSNI dated 11 November 2024, the SOSNI was informed that a public inquiry could meet article 2 requirements, and that the ICRIR was not currently capable of doing so. Moreover, the submission was made that the course of action chosen by the SOSNI involves many unknown variables, such as whether the UK Supreme Court will grant leave in *Dillon*, what its determination will be, and the legislation which will be required following its decision. The point was also made that it is unclear when the ICRIR would begin an article 2 compliant investigation and that any decision to further delay an article 2 compliant investigation should also be viewed in light of the delay which has been ongoing for nearly 28 years. Thus, Mr Fahy submitted that the only lawful option open to the SOSNI to satisfy the article 2 obligation, based on the law as it stood at that time, was to order a public inquiry. Having refused to do so, it was submitted that the SOSNI was choosing to preside over a continuing state of illegality.

Our conclusions

[91] This case is framed by the duty upon the UK to hold an article 2 compliant investigation into the death of Sean Brown. To comply with that duty, the SOSNI has been specifically asked to exercise his discretion to direct a public inquiry. It is accepted by all that the circumstances pertaining to this case are such that the SOSNI had the power to establish a public inquiry pursuant to section 1 of the 2005 Act.

[92] Further, there is consensus among all parties as to the "disturbing" (to use Mr McGleenan's word) manner in which the inquest was terminated as a result of the withholding by the police of plainly relevant materials. Indeed, this material was only uncovered due to the dogged perseverance of the coroner's office, coroner's counsel and the coroner himself. Kinney J was forced to observe that the relevant state authorities may have intended that he would conduct and conclude the inquest without having seen these obviously relevant documents.

[93] As to the specifics of this challenge, it is apparent from the briefing documents that the SOSNI had, that he declined to order a public inquiry into the death of Sean Brown on several bases which we summarise as (i) a purported alternative route namely the ICRIR, (ii) cost and logistics and (iii) the setting of a precedent for other legacy cases. We will deal with each of these arguments in turn in this judgment.

[94] The primary question for us to decide is whether having the power contained in section 1 of the 2005 Act the SOSNI unlawfully refused to exercise it.

[95] In determining this question we recognise that ministers have a broad discretion when deciding whether to order a public inquiry (see *Litvinenko*; *Re Gallagher's Application*; *Re Finucane* [2019] UKSC 7). However, this is not an unfettered discretion and is subject to the supervision of the courts in judicial review.

[96] The appellant contended that the discretion has been exercised lawfully and in compliance with article 2 of the ECHR relying upon the ministerial advice put to the SOSNI by officials which we have discussed above. However, the interpretation of article 2 must be guided by the fact that the object and purpose of the Convention is to protect individual human rights. As such, its provisions must be interpreted and applied in a manner which makes its safeguards practical and effective. This is particularly true given the fundamental nature of the right at stake and the fact that no derogation from article 2 is permitted in peacetime; see *Lester & Pannick, Human Rights Law and Practice, 3rd edn,* page 138, section 4.2.2.

[97] As should be well known article 2(1) imposes three different duties on the State:

(i) The negative duty to refrain from taking life (save in the exceptional circumstances of article 2.2 which are irrelevant to this case).

(ii) The positive duty properly and openly to investigate deaths for which the state might be responsible. Per Baroness Hale in *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74 *:*

> "[76] …There is not much point in prohibiting police and prison officers …from taking life if there is no independent investigation of how a person in their charge came by her death."

(iii) The positive duty of the state to take steps to safeguard and protect the lives of those within its jurisdiction.

[98] All three of these duties are in play in the circumstances of this case. This inquest was taking place against the background of decades of delay and unsatisfactory investigations. This inquest was intended to be the article 2 compliant response where the independent high court judge sitting as a Coroner would investigate, explore and report. We have summarised the key elements of an article 2 compliant investigation at para [32] herein. As is well known, in *Jordan* and *McKerr v The United Kingdom* (Application no. 28883/95) the ECtHR held that the effective investigation required by article 2 implied a requirement of promptness. A prompt response by authorities in investigating a use of lethal force "may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion or tolerance of unlawful acts" as per *Jordan* at para [108].

[99] In this case a prompt response was not forthcoming notwithstanding that such a response was essential to achieve the aims of maintaining public confidence and preventing the appearance of collusion or tolerance of unlawful acts. The judgments in *McKerr* and *Jordan* were delivered in May 2001. It was not until 2023 that the inquest to be presided over by Kinney J was established. The Brown family had great hopes that finally they would get an article 2 compliant inquiry before an independent judge. But the withholding of the documents and the inevitable collapse of the inquest shattered their hopes and justifiably raised questions about why the material indicating the involvement of an unspecified number of state agents in the murder was not being addressed.

[100] Thus, it is that Mrs Brown finds herself in the position where everyone agrees she has not had an article 2 compliant investigation into the murder of her husband at any time over the last 28 years. She appeared before Humphreys J and asked for a remedy to address that problem.

[101] The purposes of such an investigation are clear as Lord Bingham said in *Amin* at para [30]

> "…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."

Although the passage quoted above was dealing with a death in custody it is plainly of more general application.

[102] The means selected by the State to investigate the murder of Sean Brown were:

- Police criminal investigation or prosecution.
- PONI investigation.
- The second investigation following the PONI statutory report
- The Inquest proceedings.

It is common case that all of these investigations have been inadequate.

[103] At this juncture we recall the context of this case borrowing and supplementing the reasoning of Humphreys J as follows:

- This case is beyond a mere allegation of collusion by state agents. A statement has been made in open court "following a careful analysis of sensitive documents" by the Coroner, High Court judge Kinney J, that a number of individuals linked to the murder were agents of the state.

- These circumstances clearly require a 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 own citizens, an entirely innocent man.

- The key information came to light in 2024, 26 years after the police investigation was closed. This information was withheld from PONI and from the second investigation which followed the report.

- The errors and omissions in the police investigation were identified by PONI in its 2004 report which concluded that as a result "an earnest effort to identify the murders could not be evidenced from the investigation file."

- The police investigation was closed in 1998, and no one was ever charged with his murder.

- At the conclusion of civil proceedings against the PSNI and the MOD which were settled on 12 May 2022 the Chief Constable apologised to the Brown family in the High Court:

> "The PSNI wish to apologise to Mrs Brown and her family for inadequacies in the original investigation and continues to engage fully with the ongoing inquest proceedings." [our emphasis]

- Despite that apology and assurance from Chief Constable of the PSNI the information only came to light in 2024 and only as a result of the persistence of the coroner and his legal team.

- The 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.

In the light of the above, the obvious question is simply what are the options available to allow the investigation into Sean Brown's murder to be completed?

The binary choice

[104] The ministerial advice of 19 August 2024 set out at para [76] above was that the Brown case (and 4 others) "could not proceed" any further as an inquest even if the prohibition on inquests was to be lifted. In those circumstances the SOSNI was clearly advised of a binary choice in clear and unambiguous language which we repeat for convenience:

> "…the primary question here is whether you refer the cases to the ICRIR *or* seek to establish public inquiries as requested."

This was a binary choice presented to the SOSNI.

ICRIR

[105] The ICRIR structure is set out in the *Dillon* judgments at first instance and in the Court of Appeal. Several deficiencies were identified by the Court of Appeal in relation to inquest cases given disclosure provisions and lack of effective representation of the next of kin. Since then, the UK Government has committed to the restoration of inquests in some cases. However, it seems clear from the

ministerial advice that this commitment does not extend to the Brown case. By virtue of the ministerial advice the SOSNI intended to refer each of the Group A cases including Brown to the ICRIR for "enhanced inquisitorial processes" ("EIPs"). However, the structure of the ICRIR differs from that afforded by inquests or public inquiries

[106] Counsel for the ICRIR has helpfully referred us to the relevant documentation. From this we can see that it is proposed that EIPs will be used in cases which have already undergone significant investigative procedures, such as inquests that have commenced and are part-heard but were unable to finish. The Chief Commissioner will decide whether to enter a case into EIPs. The ICRIR's Operational Policy for EIPs refers to other matters such as whether required oral information could be provided in public. Failure to answer questions may result in financial penalties although the ICRIR is not currently empowered to administer an oath. The questions may be asked by Commission officers on behalf of bereaved families or impacted persons.

[107] In its Operational Policy, the ICRIR states that it will consider how to use the power to employ or second persons as its officers to ensure an appropriate degree of next of kin involvement. Moreover, the policy document later notes that "provision of legal aid so that individuals can be represented in proceedings conducted by the Commission is not within the Commission's ambit. In Northern Ireland this is a matter for the Legal Services Agency to consider on application from the individual." The policy document suggests that similar procedures to those under the 2005 Act could be adopted to allow sensitive information to be shown to an independent, special advocate, who can then make representations to the Commission on behalf of bereaved families.

[108] To our mind a proper statutory scheme is required if investigations which meet the requirements for a public inquiry are to be dealt with in this way. There would need to be specific legislation (given the fact that public inquiries are currently governed by the 2005 Act and associated rules) and rules which go far beyond the original Legacy Act provisions. The limitations with the ICRIR are apparent from the discussion above of its non-statutory processes. We also assume there would have to be consultation with interested parties if a new process were to be developed.

[109] As can be seen from para 8 of the August 2024 ministerial advice, the SOSNI has indicated that he wishes to explore placing the EIP process on a statutory footing which it is acknowledged may require legislation.

[110] Importantly, para 9 of the same advice refers to a number of further measures that the ICRIR itself believes are required to progress Group A cases "effectively and with the confidence of families." The further measures sought are:

"(a) The recruitment of a retired High Court judge(s) (or retired GB coroner/circuit judge) to oversee the cases. This individual(s) would be employed as an ICRIR officer via the current provisions in the legislation, allowing the powers of the Chief Commissioner/Commissioner of Investigations to be delegated.

(b) The ability to engage Special Advocates to provide independent oversight of the Commission's approach to sensitive material. The ICRIR would need to be provided access to the pool of Special Advocates, with approval by the Attorney General, as well as assurance that you (SoSNI) would allow the disclosure of information to Special Advocates under Schedule 6 to the Act.

(c) Exploring the use of your section 33 power to give statutory guidance to the Commission on both the identification of sensitive information, and the exercise of their duties in relation to national security. This is a delicate issue that will require careful discussion and consideration, and further advice will be provided shortly.

(d) The provision of legal aid for families (a devolved matter)."

[111] There is a commitment from the UK government to amend the disclosure procedures in the ICRIR, creating a regime that is "fair and transparent and allows the greatest possible disclosure of information while ensuring that proportionate safeguards remain in place to protect the security of the state." In theory, CMP would be a likely appropriate mechanism to achieve this. However, the ministerial submissions lack any definition as to the substance of change or timescales as to how the ICRIR would deal effectively with sensitive material.

[112] So, like inquests, the ICRIR is not currently equipped to deal with sensitive material and is requesting, comparable powers to CMPs such as;

- Legislation required to underpin the non-statutory EIP's.
- The ability to engage Special Advocates.
- Access to the pool of Special Advocates.

- Approval by the Attorney General for such access.

- An 'assurance' from the SOSNI that he would allow disclosure to Special Advocates appointed by the ICRIR.

- Statutory 'guidance' to the ICRIR on both the identification and the exercise of 'its' duties in relation to national security.

- Provision of legal aid for families.

[113] This means that the ICRIR, as presently constituted, is not fit for purpose in Mrs Brown's case. Moreover, some of the measures sought and indeed the effective transfer of power from inquests to the ICRIR are likely to prove controversial. Specifically, under current proposals some families will in future have the benefit of inquests and others, ironically in those cases where sensitive material arises, will not. True it is that there are promises that in the future the ICRIR will be improved its powers strengthened, and remedies found to address the flaws in its current constitution. However, the gaps are significant. It is also recognised by everyone that delivering the promises will likely require Parliamentary time to be found and then allocated for the purpose of legislative measures. Mrs Brown is 87 years old. She has been pursuing her remedy for 28 of those years. So, in this case, the ICRIR is not fit for the purpose of delivering the remedy she needs now.

2005 Act inquiry

[114] The sole remedy, that currently exists on the statute book and is therefore, in principle, immediately available, is a public inquiry under the 2005 Act. The SOSNI has refused access to this remedy which is the only remedy that our current law can offer in the Brown case because it encompasses interrogation of sensitive materials by virtue of the statutory regime. The procedures for handling sensitive material under the 2005 Act offer a "black box" mechanism that enables sensitive materials to be examined in a manner that is recognised by all as offering proper protection under the law.

[115] Ultimately, Humphreys J had to decide if the refusal of access to an available legal remedy, which was and is the only legal remedy that could do the job required, was a proper decision for the SOSNI to make. The judge decided that it was not and issued an order of mandamus requiring the SOSNI to set up a public inquiry so Mrs Brown could have the remedy that the statute book says is there for people like her. In this appeal we are asked to decide whether or not Humphreys J got that wrong.

[116] However, before we get to remedy there is the question as to whether the SOSNI decision to refuse a public inquiry was lawful. When the evidence is analysed, the answer to this question may lie in the advice that was provided by the

civil servants whose job it is to ensure the SOSNI has the material he needs to make a properly informed decision. The recommendations given in the advice which we have discussed above includes that the SOSNI:

(1) refuse a public inquiry to Mrs Brown.

(2) reiterate his commitment to restore inquests.

(3) encourage Mrs Brown to meet with the ICRIR.

(4) write to Mrs Brown and Mr Justice Kinney to communicate his decision.

(5) note that "you may refer the case to the ICRIR at a future point should the Brown family decide not to do so." [our emphasis]

[117] As noted above one of the recommendations contained in the advice was that the SOSNI reiterate his commitment to restore inquests. This is an empty recommendation since the advice to the SOSNI is predicated on the proposition that the Brown and other Group A cases "could not proceed" as inquests and that, therefore, a restored inquest would never be available in her category of case.

The ministerial advice

[118] As we see it the principal reasons put forward and ultimately relied upon for not having a public inquiry were (i) costs and (ii) the administrative burden that would be imposed on the state agencies that might be required to appear before an "additional separate process."

[119] The origins of this line of reasoning appear in the first submission to the SOSNI set out at para [70] herein. For ease of reference, we set it out again here. Under the subheading "Whitehall views" the ministerial advice states:

> "47. NIO officials have discussed the Brown case with colleagues from relevant government departments and agencies. All have made clear their preference for an ICRIR investigation. Ministry of Defence and MI5 officials have raised concerns about resourcing their responses to an additional separate process if another Troubles-related statutory Inquiry were to be established, and that once any Inquiry would be established that any focused Terms of Reference agreed across government could be expanded - as they consider is happening in the Omagh Bombing Inquiry and other non-Troubles-related inquiries. Home Office officials raised consideration of the Birmingham Pub Bombings case in particular, and a

> large number of other cases, as well as the costs and impact on public finances. You have already been briefed this week on Treasury officials' concerns on the costs and impact on public finances and understand that engagement at the political level may be required, depending on the strength of feeling of Treasury Ministers about funding and costs." [our emphasis]

[120] NIO officials discussed the Brown case with various government departments and agencies who 'all made clear their preference for an ICRIR investigation.' It is of note that the advice specifically refers to the concerns of the MOD and MI5. The MOD was one of the interested parties in the collapsed inquest. Properly analysed, it is clear that the claims raised above could be nothing other than speculative in relation to resourcing their responses to "an additional separate process" and the risk that focused Terms of Reference "could be expanded." There is then reference to costs and the impact on public finances, all underpinned by an evidence-free assumption that an "additional separate process" conducted via the ICRIR would cost less and be less demanding of input from these interested parties and agencies.

[121] The advice to the SOSNI as to the mechanism by which the state should fulfil its article 2 obligations ought not to have been tainted or influenced in this manner. That is because there is a risk that such advice will be skewed in order to protect the various interests in play and, therefore, it would not be safe or appropriate for the minister to rely on such advice. At the very least there was failure to warn the SOSNI of such considerations and of the need to be cautious in relying upon or attaching undue weight to such advice.

[122] The response of MOD and MI5 raising concerns about resourcing their responses to an "additional separate process" as well as the "costs and impact on public finances" is interesting not least since these reasons appear to have been adopted by the SOSNI in rejecting an article 2 compliant 2005 Act public inquiry. Moreover, the 'preference' of the agencies for the ICRIR has to be set against the consideration that this process is inchoate, not currently fit for purpose and is currently not article 2 compliant. Trying to make it fit for purpose will involve costs which are likely to significantly impact public finances. It will also necessarily lead to further delay. The disadvantage which the submission to the SOSNI purports to be trying to avoid, namely cost, is baked into the solution they recommend ie referral to an additional separate process in the form of the ICRIR. It follows that the acceptance of the MOD/MI5 concerns does not add up.

[123] The concerns of the MOD and MI5 about resourcing an "additional separate process" make little sense since the solution they favour (reference to the ICRIR) is itself a referral to an additional separate process. However, it is implicit that MOD does not consider the ICRIR to be an "additional separate process" that might cause them concern.

[124] We recognise that in the past some inquiries have been costly. The advice, however, proceeded on the assumption that the same would necessarily be true in this case. This assumption does not withstand scrutiny given that the coroner had already undertaken the bulk of the work. In the Brown case, an inquest was part heard before it had to stop. All of the sensitive material has already been reviewed in detail by Kinney J. A global gist was furnished. It is also important to remind ourselves what an inquest is. It is not a 'lis inter partes.' It is primarily a fact-finding operation just as a public inquiry is a fact-finding operation. Kinney J had already set out the scope of the inquiry he would make and the areas that required to be investigated. All sides were signed up to that scope. The next of kin and all interested parties had publicly funded legal representation. This included the PSNI and the MOD. The coroner had his own legal team.

[125] The inquest was well advanced and significant public funds have already been expended to bring it to an advanced stage. The coroner ultimately, it appears, had the material he needed, including the sensitive material, required in order to reach conclusions in this case. However, in the absence of a CMP procedure he was unable to conclude the inquest. By reason of the architecture of inquests he was prevented from using the sensitive material or reaching any conclusions based upon it. It was the absence of the CMP procedure which led the PSNI to argue successfully that the inquest, in that form, was no longer considered to be the appropriate vehicle. The ministerial advice wrongly assumed that that the gap could not be closed by an appropriate mechanism allowing the coronial investigation to be completed. This case is all about promptly closing a gap rather than starting from scratch.

Closing the gap

[126] Under the 2005 Act public inquiries already have the necessary mechanisms built into their architecture to deal with sensitive material – unlike inquests or the ICRIR.

[127] Under the terms of the 2005 Act it is for the Minister to establish the terms of reference for the inquiry and to set it up with a chairperson and appropriate administrative support. There is nothing in the 2005 Act which prevents the SOSNI from adopting as the terms of reference of a public inquiry the scope documents previously established in the aborted inquest and the additional matters identified by Kinney J following the disclosure revelation. There is nothing in the 2005 Act which prevents the inquiry from incorporating into its work all the material that has already been collected via the inquest process. There is nothing to prevent Kinney J from being appointed as chairperson of such a public inquiry. There is nothing in the 2005 Act to prevent an inquiry from being established for the purpose of closing the gap in the inquest's capacity to complete its investigation by enabling the Kinney

J investigation to be completed using the bespoke statutory procedures under the 2005 Act, that already exist for addressing such sensitive material.

[128] To our mind such a bespoke inquiry, already fully armed by statute with the powers to address sensitive material, and building on the work of Kinney J, would be capable of delivering a remedy for Mrs Brown within a timescale that is relevant to her.

[129] However, the approach outlined above was never canvassed with the SOSNI either properly or at all. Mere assumptions about costs and administrative burdens were included in the submission to the SOSNI without any accompanying consideration or analysis of whether those assumptions would necessarily or likely be true in her case. We consider that the decision to refuse Mrs Brown access to this extant remedy is flawed and proceeded on an incomplete marshalling of the options, unevidenced assumptions and a failure to consider or analyse their applicability in the circumstances of her case.

[130] The decision of the SOSNI to refuse the Brown family a public inquiry into the murder of Sean Brown therefore cannot stand for a number of reasons. Firstly, the SOSNI based his decision on foot of advice from civil servants which was flawed. The advice cited costs and public finances as principal concerns, and a claim, which lacked the requisite evidential support, that the ICRIR would be a less costly process for investigation. The advice failed to acknowledge the fact that many of the necessary components for a public inquiry already existed by virtue of the very advanced nature of the inquest proceedings carried out by Kinney J. No consideration or due weight appears to have been given to how this might reduce the relevant costs and impact on public finances. Moreover, the weight given to the interests of MOD and MI5 officials in the advice and ultimate decision of the SOSNI raises questions about the independence of such advice, particularly as the MOD acted as an interested party in the inquest proceedings. That is because the decision refuses access to the only currently available mechanism our statute book offers.

[131] In addition, the decision cannot stand as the SOSNI has failed to give proper weight to the current inadequacy of the ICRIR to carry out article 2 compliant investigations. Proposals to reform and address the flaws in the ICRIR's constitution demands parliamentary time to be allocated. Furthermore, the proposed EIP is not legislatively underpinned. Any changes and reform will also inevitably be costly. Furthermore, any new process remains undefined and unsupported by this family in circumstances where previous investigations have failed over 28 years. Hence, we find that the SOSNI's decision as it stands is unlawful and not compliant with article 2 obligations.

[132] The lower court judge was therefore correct to find that the choice before the SOSNI was a binary one. The only lawful option available to the SOSNI to remedy the egregious delay in providing the Brown family with an article 2 compliant

investigation was to order a public inquiry. The reasons against doing so are not evidence-based or well-founded, and the advice he received was incomplete and flawed for the reasons we have given.

[133] An inquest is not currently fit for the purpose of providing an effective investigation at present in this case as the inquest which started could not be completed. Inquests in Northern Ireland have never been equipped with the CMP or equivalent procedures, needed to deal safely with sensitive material. Although inquests operate as inquiries, in public, with the aim of discovering how and why incidents causing concern have happened, they have never been equipped with the tools needed to properly and safely investigate such sensitive material. Inquests in Northern Ireland, as currently constituted, are one mechanism away from being empowered to fulfil their purposes in a case such as the murder of Sean Brown.

[134] Another alternative which appears to have been ruled out in the briefing documentation would have been to augment the Coroners Act 1959 and Coroners Rules to allow for a CMP. That, again, would solve the problem of inquests such as this being stalled because of the absence of a statutory closed material procedure. However, the State is proposing legislative intervention to empower the ICRIR to do that which a 2005 Act inquiry can already do without any further legislative enactment and the associated delay.

[135] The second substantive reason for refusing a public inquiry relates to costs and logistics. The applicant validly took issue with the lack of structured costing analysis provided in evidence by the appellant. It is markedly absent from the ministerial submissions. During this hearing we were told that ICRIR has approximately £50million of funding per year and would receive more as Mr McGleenan expressly stated if having to take on other cases which would have been heard by way of public inquiry. The ministerial advice did not address or take into account the foreseeable costs of a public inquiry that would build on the work already done by Kinney J. Therefore, it is unclear what the difference in cost would be between establishing a public inquiry and reforming the ICRIR.

[136] Next we address the floodgates argument. Such an argument was roundly rejected by Lowry LCJ in *Re McKiernan* [1985] NI 385, para [6]:

> "The floodgates argument is a last resort which is not in high judicial favour, and which certainly does not impress me in this kind of case. (It may have relevance where the question is one of degree and the problem is where to draw the line.) If Parliament finds it necessary to block the prisoner's road to a certiorari remedy, if it can do so by legislation: there are precedents for this course, which, if legitimate, must be preferable to expecting the judges to

> avoid allegedly inconvenient or undesirable consequences by cutting down on prisoners' legal rights."

[137] In response to the appellant's argument that there will be an influx of cases seeking public inquiries on the same grounds as Sean Brown, the applicant submits that this case is exceptional in nature. We agree. Proper reliance was placed upon one unique feature which elevates this case above the others namely the 'global gist', which was produced during the inquest hearing. The gist, which was agreed unequivocally, and which we have referenced earlier but repeat now given its importance, states:

> "The documentation produced to the Coroner in the inquest by the various agencies of the State consists of extensive relevant non-sensitive and sensitive material … The material indicates that in excess of 25 individuals were linked, through intelligence, to the murder of Sean Brown … 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."

[138] We agree that the above gist is an exceptional feature of the case. This material, now in the public domain, indicates an unspecified number of individuals linked through intelligence were agents of the state and patently requires an article 2 compliant investigation without further delay.

[139] A further exceptional feature of this case is the state's continued involvement in illegality at every stage of the investigations. In this respect, the respondent referred to a letter written by the coroner (which is unusual and possibly unprecedented) to the SOSNI at the time, Chris Heaton-Harris. He stated:

> "In light of what has now been disclosed to me through the inquest process, serious questions arise as to whether those who conducted the previous investigations were misled, and, if they were misled, why that occurred, and who was responsible for it.
>
> In my open ruling on 4 March 2024, I addressed the unsatisfactory manner in which the police have dealt with the disclosure process in the inquest. This also bears on the above issues; why was the disclosure process in this inquest handled so unsatisfactorily? In this inquest more and more relevant material was disclosed over time. Eventually, after much resistance, highly important and relevant material was finally disclosed to me. I formed

> the view that if my legal team had not identified and pursued the relevant issues, the police may never have disclosed this material to me pursuant to its statutory duty. It is this highly important and relevant material, and the issues that would require to be investigated arising from it, that has brought an end to the inquest."

[140] Mr Fahy also rightly highlighted the fact that there have been requests or support for a public inquiry from the coroner (who is a High Court Judge), the Chief Constable of the PSNI, the Police Ombudsman, and now the High Court Judge who heard this case at first instance. The coroner in his letter to the SOSNI of 13 March 2024 stated unequivocally that:

> "(vi) In light of the circumstances known to him concerning the death of Sean Brown he did not regard ICRIR as the appropriate mechanism to investigate; (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." [our emphasis]

[141] In addition, the then Minister of State for Northern Ireland, Mr Baker's handwritten comments on his ministerial certificate referred to at para [11] offer implicit support. No one suggested that this level of affirmation for a public inquiry is a feature of other cases in the pipeline. Plainly, this is another exceptional feature of the case.

[142] Furthermore, the argument that the article 2 rights of the respondent Mrs Brown in this case cannot be diluted simply because others might also claim article 2 rights is compelling. However, whether those claims are realistic will depend on the facts of each case. Thus, the other cases that have been lodged and which have not been determined are largely irrelevant. It is possible that these cases will be adjourned pending the resolution of *Dillon*. But these other cases do not speak to the issues in the present case. In any event no evidential foundation in respect of these other cases has been established and on behalf of the Brown family the case is made that this case is truly exceptional. It would be wrong of us to make assumptions about the other four cases. In our view the concern of setting a precedent for other cases is exaggerated.

[143] We have also considered the argument that to impose a form of investigation on the state abrades with the bespoke statutory scheme under the HRA relating to the effect of section 4 declarations and potential remedial orders. We are not convinced that this assists the SOSNI given his firm commitment to reform of the ICRIR by way of remedial order to deal with the High Court and Court of Appeal

orders and further legislative amendment to deal with the issues raised by the Court of Appeal on disclosure and effective participation of the next of kin.

[144] Hence, for the reasons we have given which expand on those of the judge, we find that the decision to refuse a public inquiry is unlawful and in breach of article 2 obligations.

Remedy

[145] The appeal against the relief which the judge ordered is twofold, based upon a submission that that the "learned judge acted contrary to a long line of settled authority and overstepped the constitutional boundaries in doing so having regard, *inter alia*, to the separation of powers" (appeal point 9) and that the judge misapplied the authority of *Imam* (appeal point 7).

[146] Properly analysed, the first appeal point effectively suggests that a court can never make a mandatory order in the exercise of its discretion in circumstances where a public inquiry is refused. We cannot agree with such a suggestion. That is because the primary function of the court is to adjudicate between all comers. That duty is particularly acute when the dispute is between the state and the citizen, when fundamental article 2 rights are engaged and when all the parties accept that the state has been in breach of these duties on an ongoing (and continuing) basis for almost three decades.

[147] As Horner LJ observed in *Re Finucane* at paras [120]–[121]:

> "…Mandatory orders are much more likely to be granted where there is only one course of action lawfully open to the decision maker … should there be any undue delay in setting up an inquiry, then this court may be driven to make a mandatory order"

[148] Further, in *Imam* Lord Sales expressly recognised that:

> "[44] …the nature of a breach of 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 duty to do."

[149] We are cognisant of the jurisprudence which highlights that ministers have a broad discretion when deciding whether to order a public inquiry (see *R Litvinenko; Re Gallagher's Application; Re Finucane)*. The discretion is not unlimited, it is subject to the application of public law principles and as Lord Steyn famously said, "in law context is everything." The exercise of such a discretion is very context sensitive. In such a case where the decision-maker has broad discretion, a mandatory order should only be granted in exceptional cases, for example, where the discretion may

only be lawfully exercised in one particular manner (see *Re Napier's Application* [2021] NIQB 120, para 59(3); *Re Finucane* [2022] NIKB 37, para 124(d); *Re Finucane* [2024] NICA 55, para 120).

[150] Furthermore, some relief was plainly justified in this case given that the judicial review succeeded before the trial judge. *De Smith* also refers at 18-047 to the need for effective relief in the following terms:

> "The general approach ought to be that a claimant who succeeds in establishing the unlawfulness of administrative action is entitled to be granted a remedial order. The court does, however, have discretion-in the sense of assessing "what is fair and just to do in the particular case" - to withhold a remedy altogether or to grant a declaration (rather than a more coercive quashing, prohibiting or mandatory order or injunction which may have been sought by the claimant) or to grant relief in respect of one aspect of the impugned decision, but not others. But the requirements of the rule of law mean that "the discretion of the court to do other than quash the relevant order or action where such excessive exercise of power is very narrow."…
>
> The discretion may be narrower still where Convention rights are in issue as the court will need to consider the relevance of ECHR art. 13 which, while not incorporated into national law by the Human Rights Act 1998, has a pervasive influence in requiring effective remedies for breaches of Convention rights."

[151] Given the exceptional facts of this case the claim that a mandatory order may not have been made before in relation to a public inquiry cannot dictate the outcome. Furthermore, we do not find that the judge misapplied *Imam* or wrongly used that case to support a mandatory order. To our mind the judge was aware of the different context of that case and the different obligation in play. He was entitled to utilise the points of principle set out by Lord Sales in *Imam* particularly at paras [65]-[70].

[152] It must be remembered that the appellant and the respondent agree that to date, there has been no effective, article 2 ECHR compliant investigation into the death of Sean Brown. This means that the United Kingdom remains in continuous breach of the article 2 obligation. Therefore, the case for setting up an immediate public inquiry as requested by the Brown family is plainly a strong one. The Brown family are entitled to a bespoke independent public investigation, capable of dealing with sensitive material, with the family legally represented, provided with the

relevant material and able to examine the principal witnesses. The investigation must also be held without further delay to satisfy the obligations imposed by article 2 ECHR.

[153] The House of Lords in *Amin* warned against the dilution of investigative standards which sanction a process of inquiry inconsistent with domestic and Convention standards. We too deprecate any dilution of those standards. As we have said, the ICRIR cannot meet these standards at present or within any known timescale. Rather, an immediate bespoke investigation into Sean Brown's murder must take place.

[154] The tension in this case arises because the SOSNI has reached a decision not on the current state of the law but by way of forecasting what the law might be in some unspecified future time. This is problematic as a court must apply the law prevailing at the time of its decision, as *Imam* at para [41] refers. Thus, we can well see how the judge reached his decision on account of there being only one currently available option. Allied to that is the fact that the there is a further requirement to avoid delay by virtue of the article 2 obligation.

[155] We acknowledge that the UK government is implementing a remedial order and considering further legislative changes "when parliamentary time allows." However, this commitment without even an indicative timeframe fails to bring to an end the state of non-compliance that the UK has been in for 28 years. It does little for the Brown family who have already endured many obstacles and suffered from delays in trying to establish the truth about the death of their loved one. In such circumstances we can well see why the court has been asked to intervene.

[156] Whilst the SOSNI prefers the ICRIR, it requires legislative change and is currently not able to deliver. There is nothing to suggest that this reform will be a swift or straightforward process. In addition, the Brown family are clearly opposed to the ICRIR, and it was not suggested during the hearing before us that the ICRIR process would be foisted upon them. The restoration of inquests will not assist the Brown family as this is a Group A case which would fall outside the inquest process.

[157] In terms of relief, certiorari was not sought or argued by any party as an alternative form of relief which would require the SOSNI to reconsider the matter himself as happened in other cases such as *Litvenenko*. Rather, the choice seems to have been presented to the judge by all parties as effectively one between an immediate declaratory or mandatory order. We do not consider that this was the best approach because in a case which concerns the exercise of a discretionary power there is a need to maintain the appropriate balance between the functions of the court and the SOSNI even if there is effectively only one option available.

[158] We are mindful of constitutional boundaries and what Lord Reed said in *Craig v HM Advocate* [2022] UKSC 6 at para [46]:

> "The Government's compliance with court orders, including declaratory orders, is one of the core principles of our constitution, and is vital to the mutual trust which underpins the relationship between the Government and the courts. The court's willingness to forbear from making coercive orders against the Government, and to make declaratory orders instead, reflects that trust. But trust depends on the Government's compliance with declaratory orders in the absence of coercion."

[159] So, whilst there is much to commend in Humphreys J's judgment, we adopt a more staged approach. Our finding that the appellant acted unlawfully in refusing a public inquiry may be thought to reinforce the need for such an order. However, we will not contemplate that step without first allowing the SOSNI to reflect upon the judgment of the court.

[160] In the meantime, we will make a declaration in the following terms:

> "An independent public investigation, dealing with the coroner's concerns, capable of dealing with sensitive material, with the Brown family legally represented, provided with the relevant material and able to examine the principal witnesses, must be held without further delay in order to satisfy the obligations imposed by Article 2 of the European Convention on Human Rights which all parties agree the UK Government is in breach of."

[161] Accordingly, we will adjourn the case for four weeks to give the SOSNI time to consider the judgment and the terms of the declaration and to confirm the mechanism which he proposes to comply with the declaratory order. We stress that there can be no further delay in this case. Our disposal reflects the court's view of what should happen in this case whilst respecting the role of the SOSNI.

[162] On the resumption of the case on 2 May 2025, we will consider whether any further remedy by way of mandamus or otherwise is required. We will reserve on costs.