# Judicial Communications Office

**3 April 2025**

## COURT DELIVERS JUDGMENT IN SEAN BROWN PUBLIC INQUIRY APPEAL

### Summary of Judgment

The Court of Appeal[1] today upheld the decision of Mr Justice Humphreys that the Secretary of State for Northern Ireland's ("SOSNI") refusal to hold a public inquiry into the death of Sean Brown who was murdered on 12 May 1997 was unlawful. The court made a declaration that an article 2 compliant, independent public investigation must be held without further delay and gave the SOSNI four weeks to consider the judgment of the court and confirm the mechanism by which he proposes to comply with the court's order.

**Background**

The court summarised the investigative steps taken to date into the death of Sean Brown in paras [5] to [23].

On 27 February 2024 the coroner (Mr Justice Kinney) concluded that he could not carry out a full investigation as the disclosure of sensitive material that indicated a number of individuals linked through intelligence to the murder were agents of the state and their handling would fall to be investigated. This would create a real risk of serious harm to the public interest in terms of damage to national security. The coroner asked the SOSNI to establish a public inquiry which would allow the sensitive material to be examined and tested in a closed hearing. No answer was forthcoming from the SOSNI within the timeframe set by the coroner and Bridie Brown ("the applicant"), the widow of Sean Brown, brought judicial review proceedings challenging the legality of the decision of the SOSNI not to establish a public inquiry.

At the core of the applicant's case is the state's obligation to conduct an effective investigation into the death of her husband under article 2 ECHR. She contended that in the context of an inadequate police investigation and discontinued inquest, the only means to provide this is, as the law stands, a public inquiry under the Inquiries Act 2005 ("the 2005 Act"). The applicant also contended that, in light of the Court of Appeal's finding in *Dillon*[2], the ICRIR is not capable of delivering an article 2 compliant investigation.

On the evening before the hearing of the judicial review, the SOSNI announced that a remedial order would be laid before Parliament to remedy the deficiencies in the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 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 said it would seek leave to appeal to the UKSC in respect of these matters.

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[1] The panel was Keegan LCJ, Treacy LJ and Horner LJ. Keegan LCJ delivered the judgment of the court.
[2] *In re Dillon and others* [2024] NICA 59.

On 17 December 2024, Mr Justice Humphreys ("the judge") allowed the application for a judicial review and granted an order of mandamus requiring the SOSNI to establish a public inquiry into the killing of Sean Brown[3]. He found that several features of the case justified him taking an "unusual and exceptional" course of action.

**The appeal**

The SOSNI ("the appellant") filed a notice of appeal challenging the decision on the basis that the judge was incorrect to find that the SOSNI's refusal to hold a public inquiry was wrong and that he was wrong to make the order of mandamus. In paras [31] – [63] the court analysed the applicable legal principles in respect of the grounds of appeal.

***The ministerial advice dated 19 August 2024***

The SOSNI ("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 was 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. In support of this argument the SOSNI relied on a series of ministerial advice which formed the basis of his decisions.

The first advice was dated 19 August 2024 and entitled "Options for troubles-related inquest." It placed all the remaining legacy inquests into four groups with proposals for disposal before the ICRIR. "Group A" comprised five cases (Brown, Thompson, Marshall, McCusker, McKearneys and Foxes) in which the MoD, MI5 and/or PSNI asserted PII over some sensitive information. The coroners in those cases agreed that the sensitive information was relevant, 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 concluded that they could not conduct sufficient investigations without the information and halted the inquests. Even if the prohibition on Troubles-related inquests was lifted, these five cases could not proceed any further as inquests. The advice stated that the question for the SOSNI was "whether you refer these cases to the ICRIR or seek to establish public Inquiries as requested …"

Para [8] of the advice referred to an "enhanced inquisitorial process" ("EIP") which appears to have been created by the ICRIR and 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

[3] *In re Bridie Brown's Application* [2024] NIKB 109

> transitional regulations – both of which would provide much quicker routes than primary legislation, though require further testing. We will continue to explore all options."

Para [9] stated that the ICRIR had suggested further measures that it believed are required to progress these cases effectively and with the confidence of families including the recruitment of a retired High Court judge(s) (or other judicial figure) to oversee the cases; the ability to engage Special Advocates to provide independent oversight of the ICRIR's approach to sensitive material; exploring the use of the SOSNI's power to give statutory guidance to the ICRIR on both the identification of sensitive information, and the exercise of their duties in relation to national security; and the provision of legal aid for families (a devolved matter).

***The ministerial advice dated 7 September 2024***

This was the first specific advice on the Brown case. It referred to the investigations to date and the public interest factors: public concern; transparency; promptness and reasonable expedition; and likely costs and impact on public finances. It said a public inquiry would provide an adequate means of discharging outstanding article 2 issues but that if the SOSNI was satisfied that there are alternative means by which the government can discharge its outstanding 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."

The advice stated that, while the ICRIR has yet to demonstrate at a practical level that its investigations will be in full compliance with article 2, 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.

The advice referred to the EIP procedure and said that in practice, officials expected this would be at least comparable to that of a statutory inquiry. It added that the SOSNI could have reasonable confidence that an ICRIR investigation into the death of Sean Brown would be completed sooner, with less cost, and be less onerous for government departments and agencies and devolved authorities than a restored inquest or statutory inquiry. It said 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.

Under a subheading "Potential wider implications" the advice stated that a decision to establish an inquiry could have significant implications for other cases and ICRIR in the absence of any basis to draw such a significant distinction between them. NIO officials had discussed the Brown case with other government departments and agencies, and all had made clear their preference for an ICRIR investigation. Ministry of Defence and MI5 officials raised concerns about resourcing their

responses to an "additional separate process" if another Troubles-related inquiry were to be established, and that any focused terms of reference agreed across government could be expanded.

The recommendations to the SOSNI were that he:

- Agree not to establish a statutory inquiry;
- Agree to reiterate his commitment to restore inquests;
- Agree to encourage the Brown family to meet with ICRIR to hear how it would complete the investigation into Mr Brown's death;
- Agree to write to Mrs Brown and to Kinney J to communicate his 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; and
- Note the SOSNI may refer the case to ICRIR at a future point should the Brown family decide not to do so.

The SOSNI's decision letter dated 13 September 2024 stated that in his view the ICRIR 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 the Chief Commissioner.

***Ministerial advice dated 11 November 2024***

The SOSNI received further advice dated 11 November 2024 after the *Dillon* decision given that the Court of Appeal found that the ICRIR was incapable of holding article 2 compliant investigations. The advice stated that it was "highly likely" that a public inquiry under the 2005 Act would be able to deliver an article 2 complaint investigation, 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.

**CONCLUSIONS**

This case was 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 had been specifically asked to exercise his discretion to direct a public inquiry pursuant to section 1 of the 2005 Act. There was consensus among all parties as to the "disturbing" manner in which the inquest was terminated as a result of the withholding by the police of relevant materials. The court said it was apparent from the advice provided to the SOSNI that he declined to order a public inquiry on several fronts which it summarised as (i) a purported alternative route namely the ICRIR, (ii) cost and logistics and (iii) the setting of a precedent for other legacy cases.

***Whether the SOSNI unlawfully refused to exercise his power under the 2005 Act***

In determining this question, the court recognised that ministers have a broad discretion when deciding whether to order a public inquiry. However, this is not an unfettered discretion and is subject to the supervision of the courts in judicial review. The appellant contended that the discretion has been exercised lawfully and in compliance with article 2 relying upon the the

ministerial advice put to him by officials. The court, however, said that the interpretation of article 2 must be guided by the fact that the object and purpose of the ECHR 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. Article 2(1) imposes three duties on the state:

- The negative duty to refrain from taking life.
- The positive duty properly and openly to investigate deaths for which the state *might* be responsible.
- The positive duty of the state to take steps to safeguard and protect the lives of those within its jurisdiction.

The court said that 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. … 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].
>
> 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 why the material indicating the involvement of an unspecified number of state agents in the murder was not being addressed."

The court noted the inadequacy of the previous investigative means chosen by the state to investigate the murder of Sean Brown. In the light of this, the obvious question was simply what are the options available to allow the investigation into Sean Brown's murder to be completed?

***The binary choice: ICRIR or 2005 Act inquiry***

The ministerial advice of 19 August 2024 presented a binary choice to the SOSNI of whether he should refer the five Group A cases (including Brown) to the ICRIR *or* seek to establish public inquiries as requested. The court referenced the relevant documentation from the ICRIR which proposed that EIPs will be used in cases which have already undergone significant investigative procedures. However, it also noted that a proper statutory scheme is required if investigations which meet the requirements for a public inquiry are to be dealt with in this way. This is in line with the August 2024 ministerial advice, where the SOSNI indicated that placing the EIP process on a statutory footing may require legislation. The ICRIR, like inquests, is not currently equipped to deal with sensitive material, and is requesting comparable powers to CMPs. The court commented:

> "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 to be 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."

The court said that a 2005 Act inquiry is the sole remedy that currently exists on the statute book and is therefore, in principle, immediately available. The procedures for handling sensitive material under the 2005 Act offer a mechanism that enables them to be examined in a manner that is recognised by all as offering proper protection under the law.

Before the court reached the question of remedy, it considered the question as to whether the SOSNI's decision to refuse a public inquiry was lawful. The principal reasons put forward by officials and ultimately relied upon for not having a public inquiry were:

- Costs;
- The administrative burden that would be imposed on the state agencies that might be required to appear before an additional separate process; and
- The "floodgate" argument.

The origins of the line about an additional separate process appeared when officials referenced the views of other government departments and agencies. The court said that, properly analysed, it was clear that these claims could be nothing other than speculative in relation to resourcing an additional process and the risk that focused terms of reference "could be expanded." There was then a reference to costs and the impact on public finances, all underpinned by an evidence-free assumption that an ICRIR process would cost less and be less demanding of input from these interested parties and agencies. The court said the ICRIR solution was itself a referral to an additional separate process. Moreover, this process is inchoate, not currently fit for purpose and is 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 IRCIR. It follows that the acceptance of the MOD/MI5 concerns does not add up."

The advice proceeded on the assumption that previous public inquiries have been costly. The court said this assumption does not withstand scrutiny given that the coroner had already undertaken the bulk of the work. All of the sensitive material has already been reviewed in detail by Kinney J and a global gist was furnished. All sides were already signed up to the scope of the inquest. 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:

> "The inquest was well advanced and significant public funds have already been expended to bring it to an advanced stage. … 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***

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. The court said there was 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. It added that there was nothing to prevent the inquiry from incorporating all the material that has already been collected via the inquest process and nothing to prevent Kinney J from being appointed as chairperson of such a public inquiry. Further, there was 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 needed to formulate appropriate findings: "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."

The court said this approach was never canvassed with the SOSNI:

> "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. 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."

The reasons for reaching this decision were:

- The SOSNI based his decision on the 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 exist 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.
- The SOSNI has failed to give proper weight to the current inadequacy of the ICRIR to carry out article 2 compliant investigations. At present, the ICRIR is inchoate, and has insufficient powers and independence. 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. In any event, 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."

The court held the 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 that are not evidence-based or well-founded, and the advice he received was incomplete and flawed for the reasons we have given." The court then considered the "floodgate" argument. The SOSNI argued that there will be an influx of cases seeking public inquiries on the same grounds as Sean Brown. The court disagreed and said there was one unique feature in this case which elevated it above the others namely the 'global gist', which was produced during the inquest hearing, agreed unequivocally and 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."

The court referred to the exceptional features of this case:

- The gist, now in the public domain, indicates an unspecified number of individuals linked through intelligence were agents of the state which requires an article 2 compliant investigation without further delay;
- The state's continued involvement in illegality at every stage of the investigations. The court referred to a letter written by the coroner to the SOSNI at the time which said that in light of what had been disclosed to him through the inquest process, serious questions arose 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;
- The Chief Constable, PONI and the judge who heard the case at first instance all confirmed their support for an inquiry. In addition, a previous Minister of State for NI offered implicit support.

The court said the argument that the article 2 rights of Mrs Brown in this case cannot be diluted simply because others might also claim article 2 rights is compelling. It said that whether those claims are realistic will depend on the facts of each case. The court said it would be wrong to make assumptions about the other four cases and that the concern of setting a precedent for other cases is exaggerated.

Drawing all together the court found that the decision to refuse a public inquiry cannot stand as it is unlawful and in breach of article 2 obligations.

***Remedy***

The appeal against the mandatory order made by the judge was based upon a submission that that he "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". The court disagreed. It said the primary function of the court is to adjudicate between all comers. That duty is acute when the dispute is between the state and the citizen particularly 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. Ministers have a broad discretion when deciding whether to order a public inquiry but the exercise of such a discretion is very context sensitive. In a case where the decision-maker has broad discretion, a mandatory order should only be granted in exceptional cases. The court said that 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, it did not find that the judge misapplied the recognised case low or wrongly used it to support a mandatory order.

The court said 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 <u>at the time</u> of its decision. The court said it could 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. The court acknowledged that the UK government is implementing a remedial order and considering further legislative changes "when parliamentary time allows." However, this commitment without 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." The ICRIR proposal also requires legislative change and so is currently not able to deliver. In addition, the Brown family are clearly opposed to the ICRIR, and it was not suggested during the hearing 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.

In terms of relief, certiorari was not sought or argued by any party before the judge as an alternative form of relief which would require the SOSNI to reconsider the matter himself. The choice presented by all parties was effectively one between an immediate declaratory or mandatory order. The court said this was not 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. Mindful of constitutional boundaries, and the trust on the Government to comply with declaratory orders

which underpins the relationship between the Government and the courts, the court said it would adopt a more staged approach than the judge and would not contemplate a mandatory order without first allowing the SOSNI to reflect upon the judgment of the court. It made a declaration to reflect the judgment of the court 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."

The court adjourned the case for four weeks to give the SOSNI time to consider the judgment and the terms of the declaration made. It stressed that there cannot be any further delay and trusted that the SOSNI will confirm the mechanism which he proposes to comply with the declaratory order within the time provided for. This disposal reflects the court's view of what should happen in this case whilst respecting the role of the SOSNI. On the resumption of the case on 2 May 2025, the court said that it would consider whether any further remedy by way of mandamus or otherwise is required.

**NOTES TO EDITORS**

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

**ENDS**

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