Neutral Citation No: [2009] NIQB 76 | *Ref:* **HAR7581**

Judgment: approved by the Court for handing down | *Delivered:* **17/7/09**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION
(CROWN SIDE)

JORDAN'S (HUGH) APPLICATION [2009] NIQB 76

IN THE MATTER OF AN APPLICATION BY HUGH JORDAN FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION TAKEN BY THE SENIOR CORONER FOR NORTHERN IRELAND

HART J

[1] Pearse Jordan was shot dead by a police officer described as Sergeant A in Belfast on 25 November 1992. The inquest into his death has been fixed for 4 January 2010, and this is an application by Hugh Jordan, the father of Pearse Jordan, that the Senior Coroner be removed from hearing this inquest on the grounds of both apparent and substantive (that is actual) bias, and because it is alleged that the Senior Coroner has predetermined the outcome of applications for the granting of anonymity and/or screening of a number of witnesses.

[2] As Lord Bingham observed in Jordan v. Lord Chancellor [2007] NI 217 at [2]:

> "The inquest into the death of Pearse Jordan has been dogged by severe delay".

A number of causes have contributed to this, and there have been several applications for judicial review and a successful application by Mr Jordan in the European Court of Human Rights against the United Kingdom. The judgment of the European Court at (2003) 37 EHRR 52 sets out the earlier

procedural history at [11] to [54], and Lord Bingham has described the history of the proceedings that resulted in Mr Jordan's appeal to the House of Lords at [2], [3] and [32] of his speech in Jordan v. Lord Chancellor.

[3] As Mr McGleenan (who appears for the Chief Constable of the PSNI who is a notice party to this application) pointed out, in the last year there have been no fewer than six applications for judicial review relating to this inquest. Two were brought by the Chief Constable against the Senior Coroner, one by Mr Jordan against the Chief Constable, and two were brought by Mr Jordan against the Senior Coroner in February of this year. The present application is therefore the sixth application for judicial review in that time, and it will be necessary to refer to some of these applications later in the judgment.

[4] It is common ground that the test to be applied in determining whether the Senior Coroner has displayed bias is that laid down by the House of Lords in Porter v Magill [2002] 2 AC 357 by Lord Hope when he said that:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

As Lord Bingham pointed out in Davidson v. Scottish Ministers [2004] UKHL 34 when considering actual bias:

> "The expression is not a happy one since "bias" suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could distort the judge's judgment".

[5] The Senior Coroner does not accept that he has displayed bias. As Lord Hope observed in Porter v Magill at [104]:

> "…looking at the matter from the standpoint of the fair-minded and informed observer, protestations of that kind are unlikely to be helpful".

Referring to the decision of the European Court of Human Rights in Hauschildt v. Denmark (1989) 12 EHRR 266 he pointed out that the court emphasised "that what is decisive is whether any fears expressed by the complainer are objectively justified".

[6] It is in the light of these principles, which I shall simply refer to for the sake of brevity and to avoid needless repetition as the Porter v Magill test, that the court must consider the criticisms of the Senior Coroner made by the

applicant. Mr Barry Macdonald QC (who appears for the applicant with Miss Karen Quinlivan) relies upon eight separate matters as indicative of apparent or actual bias, and I shall consider those in turn. He also relies upon the cumulative effect of each of these matters and I shall return to this in due course. When dealing with the respective submissions of Mr Macdonald QC and Mr O'Donoghue QC (who appears for the Senior Coroner with Mr Ronan Daly) I do not propose to refer to every point made in their comprehensive and detailed written and oral submissions. Whilst it will be necessary on occasion to consider the evidence in some detail, I do not propose to refer to every detail in the voluminous documentation exhibited, which runs to over 600 pages of correspondence and other documents. I have carefully considered all of the evidence and the submissions made to me.

(1) The Senior Coroner's conduct in relation to notes of consultations between Emmerson Callendar and three police witnesses.

[7] In September 2007 the Senior Coroner directed Mr Callendar of Forensic Science Northern Ireland (FSNI) to prepare a computer simulation of the collision which occurred between police vehicles and the car driven by Pearse Jordan prior to his being shot by Sergeant A. The Senior Coroner facilitated a demonstration by Mr Callendar of his simulation at the FSNI laboratory on 17 December 2008. It became apparent to the applicant's counsel and solicitor who were present that Mr Callendar had made notes of conversations which he had with a number of police officers in the course of the preparation of his simulation, and at [68] of the affidavit of Fearghal Shiels of the applicant's solicitors it is stated that:

> "During that consultation Mr Callendar stated that he had prepared different simulations based on the instructions given by the drivers of the two police vehicles and one of the passengers. It was apparent that there was a difference in the accounts of the various officers. He also advised that he had had more than one consultation with each officer and that he had taken notes".

[8] A request was made by Mr Macdonald about access to the notes, and it is the Senior Coroner's attitude towards this request and events which followed it that is described by Mr Shiels at [68] of his affidavit as "a significant factor in the applicant's decision" to apply to the Senior Coroner that he recuse himself from hearing this inquest. The applicant argues that the Senior Coroner's attitude towards this request when compared with his attitude towards the actions of the police in relation to the same file demonstrate either double standards on the part of the Senior Coroner, or the appearance of double standards. In his closing submissions Mr Macdonald submitted that the Coroner's attitude implied a lack of trust in the applicant's representatives, and

said that the submissions on behalf of the Senior Coroner imputed virtually dishonest motives to the applicant's legal representatives and further reinforced concern about the Senior Coroner's attitude. These are serious allegations and clearly indicate that the applicant's legal advisers are considerably exercised about this matter. It is therefore necessary to consider the sequence of events relating to this matter in detail. Whilst Mr Callendar has not made an affidavit, there is a lengthy email containing his account of what occurred which is one of the exhibits to the affidavit of Jackie Moore. She is now a solicitor in the Crown Solicitor's office, but until March 2009 was a legal adviser employed by the PSNI and was acting in the latter capacity at the time when these events occurred. There is also an affidavit from Robert Trevor McFarland who is an assistant investigator with the PSNI Legacy Inquest Unit based at Seapark at Carrickfergus. I have also had regard to the transcript of a hearing before the Senior Coroner on 22 January, as well as various letters exhibited by Mr Shiels. From these accounts it appears that what happened was as follows.

[9] At this time there were applications for anonymity and screening for police officers who were listed as witnesses in the inquest before the Senior Coroner for him to determine, and when Mr Boyd of the Crown Solicitor's office contacted Jackie Moore on or about 18 or 19 December she realised that Mr Callendar's notes may contain information which would identify some or all or the officers involved, and that dissemination of these could compromise the anonymity and screening exercise.

[10] Mr Boyd communicated this concern to the Senior Coroner, who then wrote to him on 19 December 2008 in the following terms:

> "Following our conversation this morning I am writing to confirm that I have written to Mr Emmerson Callendar advising him that an officer from the PSNI will be making contact to view all the documentation he has in his possession relating to the computer simulation. I have said that access should be provided."

[11] On 19 December 2008 Jackie Moore asked John Middlemiss, Head of the Public Inquiry Liaison Unit (presumably of the PSNI) to access the notes made by Mr Callendar "to determine whether there was any such compromising material which could be subject to redaction prior to the disclosure of the notes to the Coroner, and, possibly the next of kin."

[12] On 7 January 2009 when Mr Callendar returned from a Christmas break he received a letter from the Senior Coroner sent on 19 December 2008 requesting a copy of his notes. On the same day he was contacted by Trevor McFarland of the PSNI asking if they could meet "to look at my file on the

case". Mr Callendar then sets out the sequence whereby the file was photocopied and a copy made available to Mr McFarland by the Historic Enquiry Team (HET).

[13] Mr Callendar asserted in the email that "I understood a copy would be sent to the Coroner's office so I did not reply to Mr Leckey's letter".

[14] The copy file was received by Jackie Moore on 8 January 2009. She states that she examined the documents but considered that they did not appear to be contentious. She did not return the file to Mr Callendar, or give it further consideration until she was contacted by the Senior Coroner's office on 21 January.

[15] This contact came about because the Senior Coroner's office emailed Mr Callendar on 20 January asking him to forward the notes to the Senior Coroner's office as soon as possible. Mr Callendar then explained to the Senior Coroner's office on 21 January "What had happened with HET having the file and making the photocopy, etc. I then called the PSNI Legacy Inquest Unit as I wanted to see if they had sent or were intending on sending a copy to the Coroner". He was directed to Jackie Moore and told her that the Senior Coroner was still looking for a copy of his notes.

[16] In her affidavit Jackie Moore states that:

> "I gave [Mr Callendar's copy file] no further consideration until I was contacted by the Senior Coroner's office on 21 January and asked if the materials could be released to the coroner. I examined the file again at that point and concluded that from the PSNI perspective there was no material in the notes which gave cause for concern."

[17] On 19 December the Senior Coroner wrote to the applicant's solicitors in the following terms:

> "I understand that recently your Mr Fearghal Shiels along with Mr Barry McDonald QC and Miss Karen Quinlivan BL visited the laboratory to meet with Mr Emmerson Callendar in respect of the computer simulation of the car chase. I am advised that whilst you were there you asked for access to Mr Callendar's notes.
>
> I find it most surprising that such a request should have been made without it having been directed to me first. As you are aware I directed that Mr

> Callendar prepare a computer simulation and any request in relation to that should be directed to me".

[18] On 23 December the applicant's solicitors replied saying:

> "Mr Macdonald did indeed ask Mr Callendar if he had retained any notes of his conversations with the police officers who had spoken to him for the purposes of preparing the simulation. When Mr Callendar confirmed that he did have such notes Mr McDonald indicated that we would like to see them and asked about the formalities involved. Mr Callendar agreed to supply us with the appropriate contact details for the purpose of making a formal request. He notified us subsequently by email that your permission "may be required", that he had therefore informed you of our request and that he expected to hear from you the following day.
>
> Mr Macdonald does not consider that there was anything inappropriate about the manner in which he raised this issue but he has directed us to indicate that no discourtesy to you is intended. We are happy to correspond with you directly about the matter".

The remainder of the letter contained a request for copies of the notes in question, explaining why they were considered relevant to the issues that which would arise in the inquest.

[19] The matter rested there until the preliminary hearing of 22 January convened by the Senior Coroner to deal with a number of issues arising from a judicial review which had been heard by Stephens J to which I will refer later in this judgment. Another matter was that the Senior Coroner had not received a copy of the Holmes Index which he had expected to receive by 31 December, and I will refer to that later in this judgment. After a discussion in relation to these matters and questions of the timing of PII issues, the Senior Coroner turned to the question of the requests by the applicant's legal representatives for Mr Emmerson Callendar's notes. He said that he had asked Mr Callendar for a copy of them, had not received them but was told the day before by Mr Callendar "that these had been taken by the Chief Constable's legal advisor". The Senior Coroner went on to say that he had been told that Miss Jackie Moore has them in her possession, that he would be able to have them in redacted form but that his view was that arguably the notes would fall to his ownership rather than those of the police, unless there was some argument that some parts might be the subject of public interest immunity. He explained that

he did not know because he had not seen them and requested that clarification be provided fairly quickly.

[20] He also continued

> "I am just looking at the email I received from Mr Callendar and he referred to it as the Historical Enquiry Team took the original file, which included not only his own personal notes, but the file of Mr Stephen Quinn. Now, you may know Mr Stephen Quinn was the forensic scientist who back in 1992 after the death of Mr Jordan did reports in relation to the vehicles involved".

[21] There then followed a lengthy exchange between the Senior Coroner and Mr Macdonald in relation to the question of service of a witness summons on Sergeant A. There were then further exchanges in relation to the provision of the Holmes Index in the course of which Mr Macdonald said:

> ". . . but you, sir, should not allow, if I can say so respectfully, the police or to be suggested on behalf of the police that they have complied with their section 8 duty in circumstances where they transparently have not".

[22] The transcript records that there then occurred the following exchange between the Senior Coroner and Mr Macdonald:

> **"Mr Leckey** : Well Mr Montague's answer is that that will be dealt with within a matter of days, and that to me does not seem unreasonable. If my letter to the Crown Solicitor was overlooked, well I am not going to come down like a ton of bricks on whoever should have dealt with it, and I would like to think we are all willing to allow some leeway to each other.
>
> **Mr McDonald** : Well that brings us to the next issue because you, sir, did come down like a ton of bricks on my instructing solicitors for having the audacity to ask Mr Callender about the procedure for obtaining copies of the notes made by him at your behest, at your request, in respect of the computer simulation of the so-called car chase.

Mr Leckey : Because I think I had every justification to do that because the approach should have been made to me.

Mr McDonald : Yes, and I had a letter written to you explaining what the situation was and the circumstances in which the request was made and now I find. I have to say I am flabbergasted to find that the Historical Enquiry Team of the PSNI has apparently gone into the premises of the Forensic Science Agency for Northern Ireland and lifted in their entirety all the original case notes prepared by Mr Callender in circumstances where you apparently were not even informed of that. You, apparently, have not made, therefore, any complaint about it, and even today when you were told that all of this material was removed in this way it appears that you are prepared to tolerate this state of affairs.

Mr Leckey : Well you are putting it in terms that I would not agree with. I have stated the position that I was advised of yesterday. I have told Mr Montague that I expect to receive everything in unredacted form. There does not appear to be any opposition to that, and if this is something that can be resolved expeditiously, and I have had an indication that it will be, I am content with that.

Mr McDonald : Well I ask why exactly were the police allowed to come into the premises of the Forensic Science Agency and remove all the files that you said were effectively your files?

Mr Leckey : I am not saying that the files were my files. I –

Mr McDonald : You said that exactly, sir, because when you wrote to my instructing solicitors you complained about the fact that this was something that was done at your request and that there was - "

[23] Mr Macdonald continued to pursue the alleged disparity between the terms of the Senior Coroner's letter of 19 December to the applicant's solicitors and what he asserted was a failure to express equivalent or any displeasure with the approach of the police. There then occurred the following exchange which I consider it is necessary to set out in full:

"What we were looking for was the notes made by Mr Callender on your behalf as to what they were saying during their consultations with him. Now, we made our request for these recently when we responded to the complaint that you had made about the request, the very proper request that we had made to Mr Callender how we should go about getting copies of these documents, and we asked you whether we could now have copies of the notes in question on 23 December, last month, and we explained why they were relevant, because they are relevant to this issue of whether the police officers were involved in some kind of car chase or not, whether they had given consistent accounts of that incident. Now, you did not reply to that letter. You did not provide us with copies of those notes, but apparently Mr Callender felt able to just hand over everything to the police, who are effectively a party, an interested party at the very least, in this inquest, and then it is suggested today when this matter was raised that you might be able to have them in redacted form. Now, not only did you not come down like a ton of bricks on counsel for suggesting that, but you did not express any displeasure with that proposition. You did not express outrage that police officers had gone into the Forensic Science Agency's offices and removed without any legal authority whatsoever as far as we can determine—

Mr Leckey : You must think I was going to engage in some sort of display of histrionics in court about this matter. Well I am not going to.

Mr McDonald : You may think it is histrionics, sir. I am expressing outrage on behalf of the next of kin—

Mr Leckey : Mmm-hmm.

Mr McDonald : —that you have allowed this state of affairs to develop and that you should listen to the police suggesting to you that you may be entitled to get them in some sort of redacted form, and you listened to that without any question of criticism or objection.

Mr Leckey : Well all I said to Mr Montague was that I would expect to receive them in unredacted form and there was no opposition to that. There was no need for histrionics.

Mr McDonald : I object to the characterisation of my submissions as histrionics, sir.

Mr Leckey : No, you were suggesting that I should have come down like a ton of bricks on the police for what they were told and—

Mr McDonald : I am contrasting''

Mr Leckey —there was no need for any great censure on my part because of the approach of Mr Montague, which was that I would get the documents in unredacted form and that would be dealt with expeditiously.

Mr McDonald : So you think it is perfectly satisfactory for the police to go into the Forensic Science Agency, remove all these files, and then give you copies as they see fit after the event?

Mr Leckey : Well—

Mr McDonald : There are two separate issues here; whether you should get them back and whether they should have taken them in the first place.

Mr Leckey : Well—

Mr McDonald : When we asked for them, for copies of them in a proper form, you complained to us. Now, why, can I ask respectfully, do you not complain in at least the same terms as vociferously to the police when they go far beyond a formal request to know the procedure involved in asking for them, but actually lift them?

Mr Leckey : Well I will see what happens. Contact is going to be made with Miss Jackie Moore and I will see what the upshot of that is."

[24] I shall return to the nature and terms of this exchange later, but a matter to which Mr Macdonald attributed some importance is that it is apparent from the terms in Mr Callendar's email that his file must have been with the HET before Mr McFarland of the PSNI collected a copy of the file from the HET office on 7 January 2009, and that this had been explained to members of the Senior Coroner's staff on 21 January. I proceed on the assumption that the HET is part of the PSNI to judge by the terms of the logo at the foot of the letter of 29 January 2009, see page 273. This letter does not say whether the HET had the file or why, merely that it "had no involvement of the removal of any laboratory notes or statements from the Forensic Science Laboratory in relation to Pearse Jordan (Deceased)". Why the HET had the file remains unexplained.

[25] A further criticism of the Senior Coroner by Mr Macdonald is that the Senior Coroner did not disclose that he knew, or had the means of knowing, that the HET had the notes before access was given to the police. As can be seen from the passages quoted above the Senior Coroner did state on 22 January that Mr Callendar had told him that HET had taken the original file, but Mr Macdonald's complaint is not so much as to how HET came to have possession of the original file, but that the Senior Coroner's attitude demonstrates that he has, or appears to have, double standards towards the applicant's legal representatives when compared to his attitude to the actions of the police in relation to this matter. In essence the complaint is he rebukes the applicant's legal representatives for not applying to him for permission to have access to the notes, but makes no enquiry as to how the police came to have the notes.

[26] Mr O'Donoghue responded by stating that the Senior Coroner did receive copies of the unredacted notes and a redacted version on 28 January 2009. He said that it would have been not unreasonable for the Senior Coroner to have criticised the Chief Constable, but argued that it could not be said that no reasonable coroner would have reacted in the way which the Senior Coroner did.

[27] As the chronology of events outlined above makes clear the Senior Coroner had given the police access to the file to enable them to consider whether or not any PII issues in relation to screening anonymity were likely to arise. I consider that he was entitled to do this and it is hard to envisage how the police could have argued that PII might arise if they did not see the notes.

[28] I am satisfied that the Senior Coroner was entitled to state that the applicant's representatives should have applied to him, as it seems the Crown Solicitor's office did, for access to the documents. I consider that he did so in a temperate and limited way, both in correspondence and when the matter was again raised by Mr Macdonald on 22 January.

[29] Mr Macdonald, not unreasonably or surprisingly at that time, drew the conclusion from the limited information that was available to him that the HET had gone into the Forensic Science Laboratory and removed from Mr Callendar's files, whereas as is now apparent from the sequence of events I have described, they had the permission of the Senior Coroner to have access to the file. Whether that justified them in removing the file is another matter, but the Senior Coroner made clear he was expecting the file to be returned, it was returned to him, and he made it clear in the course of the public hearing on 22 January that that was what he expected to happen. Had the Senior Coroner stated that he had given the police permission to check the file and therefore that they had followed the correct procedure there could have been no criticism of his approach. It is regrettable that there was an evident rise in the temperature of the exchanges between Mr Macdonald and the Senior Coroner, and this should not have occurred, but I am satisfied that when the entirety of these exchanges are considered a fair-minded observer would conclude that the Senior Coroner was subjected to a barrage of criticism as to the way in which he had dealt with this matter, criticism to which he responded appropriately and temperately, with the exception of the unfortunate reference on his part to "histrionics". When all of the circumstances relating to the examination of Mr Callendar's notes by the police and the Senior Coroner's attitude towards the approach by the applicant's legal representatives to the question of examining the notes are considered, I am satisfied that they show that the Senior Coroner acted properly throughout.

[30] Following the hearing before the Senior Coroner of 22 January 2009 Madden and Finucane pursued the issue of how the HET came to have access to Mr Callendar's file in correspondence to the Senior Coroner of 27 January and 2 February 2009, in the course of which they again criticised him for the alleged disparity between his attitude towards the applicant's representatives and the PSNI over this matter. However, it is significant that no suggestion was made in those letters that the manner in which the Senior Coroner dealt with this issue amounted to, or demonstrated the appearance of, bias on his part. An unwillingness to allege bias can not be attributed to any reluctance to allege bias on the part of the Senior Coroner by the applicant's advisers, because in a letter of 20 February 2009 the applicant's solicitors asserted that the decision of the Senior Coroner in relation to the investigating officer's report (to which reference will be made later in this judgment) was tainted by bias, and the Senior Coroner was invited to recuse himself from hearing the inquest. That the applicant did not accuse the Senior Coroner of bias in relation to the attitude he had taken in relation to the Emmerson Callendar notes is an indication that the exchanges to which I have earlier referred were not regarded at that time by the applicant as being indicative of bias on the part of the Senior Coroner. Had the Senior Coroner stated on 22 January that he was merely ensuring that the applicant's advisers followed the same procedure as the PSNI had, namely that they should make requests for access to documents to the Coroner first, no possible criticism of his approach would have been

justified. I consider that a fair-minded observer who has considered all of the circumstances relating to the examination of these notes, and the exchanges of 22 January, would conclude that there is not a real possibility that the Senior Coroner was biased in the way that he responded to the request by the applicant's representatives for access to the notes, or in his subsequent references to these matters. I am satisfied that this episode has been invested in retrospect with quite disproportionate significance to that which it deserves, or had at the time. I am satisfied that the Senior Coroner was doing everything he could to ensure that the many complexities in the preparation of this inquest were addressed properly and fairly, and that the applicant has failed to make out his case under Porter v Magill in relation to this heading

(2) The Corner's conduct in relation to obtaining and disclosing the investigating officer's report.

[31] A number of grounds are advanced under this heading in the applicant's skeleton argument although only one of them relates to delay itself, the other submissions under this general head relate to the Senior Coroner's response to the judgment of McCloskey J in Hazel Siberry (2) [2008] NIQB 147 delivered on 4 December 2008. The applicant summarised these submissions in [29] of his written submissions in the following terms:

> "In summary, the Chief Constable is able to secure the adjournment of the Preliminary Hearing by means of what is in effect a private application in respect of which no notice is provided to the Applicant and which is acceded to, initially, without reference to the Applicant, and ultimately over the objection of the Applicant. The Chief Constable is then able to persuade the Coroner, to reach decisions according to their application of the relevant principles, without reference to the Applicant's submissions. The language of the Coroner's correspondence demonstrates a deference to the opinion of the Chief Constable, even when that opinion flies in the face of a decision of the High Court and House of Lords. Finally, this entire procedure relates to a document which the Coroner ought to have secured some 5 months previously and there is still no explanation for his failure to take the necessary steps to secure the document."

[32] I propose to deal first of all with the question of the alleged delay on the part of the Senior Coroner in obtaining copies of the investigating officer's report. This report consists of an initial report followed by a supplementary report. It appears that part of the initial report, and the entirety of the

supplementary report, were provided to the Senior Coroner some years ago and disclosed by him to the next of kin in 2002. However, the Chief Constable withheld a substantial portion of the initial report. In the conjoined appeals of Jordan and McCaughey (which are reported as Jordan v. Lord Chancellor) Mr McCaughey applied for judicial review of the Chief Constable's refusal to furnish to the Coroner certain documents obtained in the course of the police investigation into the death of his son Martin McCaughey in compliance with s. 8 of the Coroners Act (NI) 1959. The House of Lords declared that:

> ". . . s. 8 of the 1959 Act requires the Police Service of Northern Ireland to furnish to a coroner to whom notice under s. 8 is given such information as it then has or is thereafter able to obtain (subject to any relevant privilege or immunity) concerning the finding of the body or concerning the death".

See Lord Bingham at [45].

[33] Judgment was given by the House of Lords on 28 March 2007, but despite the ruling the Chief Constable argued that the withheld portions of the initial investigating officer's report should not be provided to the Senior Coroner. Since part of the initial report and the entirety of the supplementary report had been already provided to the Senior Coroner and disclosed by him to the next of kin some years before, it appears that the objection of the Chief Constable was primarily to any possible dissemination of the entirety of the initial report to interested parties such as the next of kin. This matter was the subject of detailed submissions made by counsel on behalf of the next of kin and of the Chief Constable, and following these the Senior Coroner gave a written ruling on 25 June 2008 directing that the Chief Constable was to provide him with a copy of the report (that is the entire report) by 4 July 2008. His ruling was in the following terms:

> "I now direct that the Chief Constable provide me with a copy of the police report into the death of Patrick Pearse Jordan before Friday 4th July. On receipt of this document I will consider it for the purpose of determining relevancy for inquest purposes and, in conjunction with the other documents I have, what the scope of the inquest should be. I see no reason in principle why I should not provide a copy of it to the legal representatives for the next of kin. If the Chief Constable is of the opinion that the contents of the police report raise matters of national or personal security or both, then whilst the usual applications may be made they should be made promptly. I would ask the Chief Constable to note

> both the timescale I have set for the production of the report and the fact that I intend to commence the inquest on the 12th January 2009."

[34] The Chief Constable challenged this order, but his application for leave to apply for judicial review was dismissed by Morgan J, see [2008] NIQB 100 delivered on 19 September 2008. There then followed a hearing before the Senior Coroner on 29 October 2008, in the course of which Miss Quinlivan conceded that certain observations by Morgan J about the extent of dissemination of the report were obiter and that the extent of dissemination had not been judicially determined. During that hearing the Senior Coroner again stated, as he had done in the portion of his ruling quoted above, that he would determine relevancy and would provide copies to the representatives of the next of kin, subject to questions of Public Interest Immunity (PII).

[35] During the hearing the Senior Coroner asked when he could review the investigating officer's report. In his affidavit Mr Boyd of the Chief Crown Solicitor's office says that the Senior Coroner examined the report at Seapark on 30 October, and on 3 November the Senior Coroner informed the applicant's solicitors that he had reviewed the papers and that the PSNI were considering whether PII issues arose.

[36] In the course of the hearing of 29 October Miss Quinlivan submitted that the Senior Coroner was wrong not to permit representations as to relevancy of any documents to be made on behalf of the next of kin prior to the Senior Coroner deciding what documents were relevant to the inquest, and on 18 November the Senior Coroner was informed by the applicant's solicitors that judicial review might be taken against him if he did not permit such representations to be made.

[37] In the event, on 19 November the Senior Coroner wrote to the applicant's solicitors at length, stating that he had reconsidered his position, and had done so in the light of information which he had received about the approach adopted by Lord Hutton in the Kelly inquiry and by Scott Baker LJ in the Princess Diana/Dodi Fayed inquest, and he was now prepared to permit the parties to make submissions on relevance before determining what documents were relevant.

[38] On 26 November 2008 the Senior Coroner wrote to the Crown Solicitor's office in relation to a number of matters connected with this inquest, and in the course of that letter referred to his "considerable concern" that he had not yet received documents including both the original and supplemental reports of the investigating officer and required these documents, subject to PII, to be provided by Friday 12 December. As may be seen from the following extract from that letter, faced with further delay by the police, the Senior Coroner made it clear that he expected speedy action of the part of the police.

> "It is a matter of considerable concern to me that I have heard nothing in relation to the documentation (both "sensitive" and "non-sensitive") I identified some weeks ago as being relevant for inquest purposes. That documentation included both the original and supplemental reports of the investigating officer. I have not been advised if it is the intention of the Chief Constable to seek a PII Certificate in relation to any of this documentation. Subject to PII, I am requiring you to provide me with copy of this documentation no later than Friday l2 December. In default of receiving it I will take whatever action I consider appropriate."

[39] The applicants then rely upon the fact that the Senior Coroner did not receive the investigating officer's report until 11 February, but this is to ignore other matters which entered into the chronology of this inquest between 26 November 2008 and 11 February 2009. The first of these was the decision by McCloskey J in Siberry's case, and I shall deal with this later in the judgment. The second was that on 15 December 2009 Stephens J delivered his judgment, [2008] NIQB 148, upon the application for judicial review brought by the next of kin against the Chief Constable. As can be seen from that judgment, the dispute in those proceedings turned on whether previous representations by the Chief Constable gave rise to a legitimate expectation that all the documents relating to the police inquiry would be released to the next of kin, even though they were irrelevant to issues which could be expected to emerge upon the hearing of the inquest. See Stephens J at [19]. As Stephens J acknowledged at [25], the representations of the parties in the course of that judicial review did not extent to the investigating officer's report.

[40] The significance of that judicial review is that there have been a number of subsequent hearings in relation to PII issues before Stephens J as stated below and which did not conclude on 21 May 2009, and these have affected the timetable for the start of the inquest.

[41] A further development was that on 11 December 2008 the Chief Constable initiated judicial review proceedings against the Senior Coroner in respect of the decision he made on 19 November 2008 to receive submissions from the parties before deciding the relevance of any documents for the purposes of the inquest. This judicial review was withdrawn by the Chief Constable on 6 January 2009.

[42] I am entirely satisfied that the applicant's submission that the Senior Coroner did not take sufficient steps to obtain the full investigating officer's report is unsustainable and ignores the sequence of events described above.

These establish that following his ruling of 25 June 2008 directing the Chief Constable to provide the reports the Senior Coroner had to wait the outcome of the judicial review proceedings which were dismissed by Morgan J on 19 September 2008. He then convened a preliminary hearing to deal with this and other matters which was fixed for 29 October. In the course of that he made it clear that subject to PII issues he would provide copies of documents which he determined were relevant to the parties and expressly asked when he could review the report. He reviewed the entire report the next day and informed the applicant's solicitors of that on 3 November. On that date he also indicated that the PSNI were considering PII issues. This was hardly a surprise in view of the course which the proceedings had taken and the references to PII by the Senior Coroner in his order of 25 June 2008. On 26 November 2008 the Senior Coroner made very clear to the Chief Crown Solicitor's office that if he did not receive the investigating officer's report by Friday 12 December he would take whatever action he considered appropriate and expressed his "considerable concern" that he had not received this report.

[43] Thereafter the outworking of the PII aspects of the judgment of Stephens J has resulted in a number of hearings before Stephens J which did not conclude until May 2009, and as a result it was clearly impossible for the inquest which had been fixed for 14 January 2009 to proceed. From 26 November 2008 onwards the Senior Coroner was faced with the prospect of the Chief Constable taking judicial review proceedings against him which were not abandoned until 6 January 2009. To assert that "The Coroner appears to have taken no steps to ensure that he received that Report as per his entitlement" is not in accordance with the facts, and ignores that he had been pressing for the remaining parts of the investigating officer's report, and had inspected the entirety of the report on 30 October. Given that other issues had arisen between 26 November and the date when the Senior Coroner took the decision to adjourn the inquest, there is no basis for asserting that he did not take proper steps to obtain this report more rapidly. In any event, whether he received it or not, the inquest hearing in January inevitably had to be delayed for reasons beyond the Senior Coroner's control.

[44] However, as is apparent from the submissions quoted above the applicant does not rest this part of his argument solely upon the delay in obtaining the investigating officer's report. Although the facts in Siberry's case related to matters far removed from those in dispute in the present inquest, in the course of a lengthy examination of the relevant authorities including the decision of the House of Lords in Jordan v. Lord Chancellor, McCloskey J concluded that it would be unlawful for the former Prisoner Ombudsman to give evidence at the forthcoming inquest of matters of medical opinion expressed in a number of reports which had been provided to him, and which were reflected in certain passages and recommendations in the Prisoner Ombudsman's report. See [70].

[45] The first complaint in relation to the Senior Coroner's approach to the Siberry case may be said to be that he should not have taken it into account at all. I consider this criticism is quite unjustified. It appears from the correspondence which I set out below that the Chief Constable has made it clear that he intends to argue that Siberry is relevant. Not only would the Senior Coroner have been foolhardy to have proceeded without considering an issue of this nature in an area of the law which has been intensely argued on every possible occasion by the Chief Constable and the next of kin, but it would have been wrong to decide whether Siberry is relevant without receiving submissions from the parties. The implications, if any, for the disclosure of any parts of the investigating officer's report that have not yet been disclosed because it may be said that they contain statements of opinion is a matter which will have to be determined by the Senior Coroner if it is pursued by the Chief Constable and I express no opinion on that question.

[46] A second complaint is that the Chief Constable obtained an adjournment of the preliminary hearing fixed for 14 February 2009 without giving the applicant an opportunity to object. This requires the sequence of events to be considered. It appears that a preliminary hearing had been fixed for 12 February in order to deal with the Siberry issue, and on 10 February the Senior Coroner wrote to each of the parties stating "In view of the fact that the SIO's report [that is the investigator's report] is to be made available to me in unredacted form and to the next of kin in redacted form I will not proceed with the Preliminary Hearing."

[47] The applicant's solicitors sent a letter of 10 February arguing that the provision of the investigating officer's report had no bearing on the need for a Siberry hearing. In the course of the afternoon of 10 February at 1551 the Senior Coroner sent the following email to the applicant's solicitor:

> "This is to confirm that the Preliminary Hearing scheduled for Thursday will not take place for the reasons set out in my letter. I expect to receive the IO's report today in both unredacted and redacted form. Once I have perused both I will then consider if the need for a Preliminary Hearing remains. I will of course send you the redacted report as soon as I receive it".

The next morning the Senior Coroner confirmed by email that the redacted report was now available for collection at his office, and then in an email to the applicant's solicitors at 0851 he stated:

> "I have been advised this morning by Mr Ken Boyd that I am being asked on behalf of the Chief Constable to determine relevance prior to forwarding the file, or

> any part of it to you. Therefore I will now have to examine the contents which I have not had an opportunity to do as the file arrived with me only last evening. The Preliminary Hearing remains cancelled".

[48] At 0924 the Senior Coroner sent a further email saying:

> "I am writing to you to confirm this email and to inform you that the Chief Constable has asked me to reach a decision on relevance based on Siberry".

[49] On the same day he sent a letter in the following terms:

> "First of all I confirm that the Preliminary Hearing scheduled for tomorrow morning will not take place.
>
> Last evening I received the Investigating Officer's Report. I have this morning been advised by the Crown Solicitor that I am to consider the contents in order to determine relevance for inquest purposes based on the principles set out by McCloskey J in *Siberry*.
>
> Once I have completed that task I will advise you of the outcome.
>
> Therefore, the position of the Crown Solicitor appears to me to be that the Chief Constable does not accept you are entitled to disclosure of the Investigating Officer's Report but only those sections of it (if there are any) which are relevant pursuant to *Siberry* principles."

[50] On the same day the Senior Coroner sent a second letter to the applicant's solicitors in which he referred, inter alia, to his decision to adjourn the Preliminary Hearing in the following terms:

> "In relation to the Preliminary Hearing that had been scheduled for tomorrow morning, the decision to adjourn was mine following discussion with my counsel.
>
> I have asked the Crown Solicitor to confirm that once I have considered the report for relevance for inquest purposes applying *Siberry* principles I may provide to

> you either the entirety of the report or sections of it that I consider relevant.
>
> As I mentioned in my previous letter the Crown Solicitor has advised me that the Chief Constable does not accept that this report is "information" for the purposes of section 8 of the 1959 Coroners Act and that I must determine relevance prior to the full report or sections of it being made available to you. If you are making the case that the report is in fact "information" or that I would be in error in applying *Siberry* principles then those are matters which can be addressed following my determination on relevance."

[51] The applicant's solicitors protested by letter of the same date, criticising the reason for, and the method by which the adjournment of the preliminary hearing was taken, as well as other issues. The Senior Coroner replied by letter dated 12 February 2009, the material parts of which are as follows.

> "In relation to your complaint about the adjournment of the Preliminary Hearing scheduled for this morning I thought my explanation was clear. I received the Report of the Investigating Officer on the evening of 10th February. As it contains some minor redactions I was unsure whether it was the intention of the Chief Constable that I should forward it to you. No covering letter accompanied the Report. On the morning of 11 February I spoke by telephone to Mr Ken Boyd of the Crown Solicitor's Office and he informed me that the Report had been sent on the basis that I would consider relevance based on the *Siberry* principles. My letter of 11 February to you sets out the position of the Chief Constable in greater detail and you will note that I have left open the issue of the *Siberry* principles for a future Preliminary Hearing. Therefore, it is quite wrong for you to state that Mr Boyd made oral representations which I accepted. Rather he provided clarification of the basis on which the Investigating Officer's Report was provided to me."

[52] In the course of correspondence and the written and oral submissions of counsel the applicant places great emphasis on the wording of the letter set out at [47] above as indicating that the Senior Coroner was, in effect, acting at the bidding of the Chief Constable. I am satisfied that when these exchanges are read in their entirety there can be no doubt that the Senior Coroner was making

clear that the Chief Constable wished to argue relevance based on Siberry principles, that he was obliged to consider that, and that he was adjourning the preliminary hearing because he had just received the investigating officer's report. In his replying affidavit the Senior Coroner points out that:

> "The issue of the impact, if any, of the decision in Siberry's application remains to be determined by me. Subject to further legal challenge, this process should be completed by me by 30 October 2009."

I accept the Senior Coroner's statement that he has not predetermined the issue of the relevance, if any, of the decision in Siberry and I am satisfied that when the entire correspondence to which I have referred is considered it is abundantly clear that that is the position. No doubt in the letter at [47] above the Senior Coroner may have expressed in somewhat conventional lawyer's language how the Chief Constable's position was conveyed to him, but the final paragraph of that letter, coupled in particular with the earlier email of 0851, leaves me in no doubt that any fair-minded observer reading the correspondence as a whole would be satisfied that it does not justify the construction placed upon it by the applicant.

[53] For these reasons I am satisfied that the applicant has failed to establish that the Senior Coroner has either displayed apparent bias, or predetermined the matter, and has failed to establish bias in accordance with Porter v Magill.

(3) Anonymity/screening protocol.

[54] This part of the application asserts that the Senior Coroner has displayed both apparent and substantive (in other words actual) bias in his ruling on screening and anonymity of 9 February 2009. In the course of a very detailed and careful ruling the Senior Coroner dealt with a number of issues of law and deduced from them the tests he had to apply. He then considered the circumstances of a number of police officers who had sought both anonymity and screening and reached a decision in relation to each of them. Following this ruling the next of kin sought judicial review of the Senior Coroner's ruling by an Order 53 statement dated 23 February 2009 seeking certiorari to quash his decision on the grounds, inter alia, that he had refused to provide redacted copies of the applications and submissions made on behalf of the police officers, and did not provide the next of kin with the opportunity to make representations after the ruling, although they had been permitted to make representations beforehand. I understand from counsel that the Senior Coroner conceded that his approach was in error on 13 March 2009 when he agreed to pay the costs of the next of kin. As appears from the Senior Coroner's affidavit, he subsequently instructed senior counsel to the Senior Coroner to draw up a fresh protocol to deal with these applications and that was in the course of preparation. At the commencement of the hearing before me on 15 June I was

told that it had been intended that it would be available by Friday 12 June, although in the event it seems that date was not achieved.

[55] The argument on behalf of the next of kin is that the Senior Coroner's approach to the various issues connected with the screening and anonymity applications has displayed apparent or actual bias for a number of reasons.

(1) Because the original procedure put in place by the Senior Coroner did not provide for representations to be made by the next of kin if the applications were successful and it was therefore unfair. The Senior Coroner has conceded this by his agreeing to revisit the procedure in accordance with the new protocol being prepared.

(2) That the procedure adopted by the Senior Coroner resulted in the hearing of the inquest fixed for January 2009 having to be adjourned and thereby has caused further delay. The next of kin point out that in their objections to the proposed procedure before the Senior Coroner heard the applications they made the point that the procedure which the Senior Coroner did in the event adopt was bound to cause delay because of the protracted process that was being adopted.

[56] I consider that by submitting to the judicial review application of the 23 February 2009 the Senior Coroner conceded that he was in error in not permitting representations to be made as requested by the next of kin, and that has therefore been a contributory factor to the postponement of the inquest until January 2010. However, it does not therefore follow that such an error is indicative of apparent or actual bias. An error of law or a wrong decision on the facts without more is not indicative of either apparent or substantive bias. The law presumes that coroners, like other judicial officers, will apply the law in a fair and even-handed way. However, the law does not presume that every judicial officer of whatever rank is incapable of falling into error, and appellate courts frequently make orders reversing procedural or substantive decisions made by lower courts or tribunals, and then remitting the case to that court or tribunal to proceed with the matter in accordance with the ruling of the appellate court. In doing so the law presumes that the judge or judicial officer concerned can be relied upon to proceed in accordance with the direction of the superior court. For a judicial officer of any rank to be held to have shown apparent or substantive bias merely because they have fallen into error on a point of law is a remarkable and novel proposition. It is entirely unsupported by authority, and I am satisfied that in respect of this argument the applicant has failed to satisfy the Porter v. Magill test.

[57] A further allegation is that the Senior Coroner has displayed substantive, that is actual bias, on the basis that he is predisposed to grant these applications. One of the grounds supporting this submission may be seen from the terms of [43] of the written submissions on behalf of the next of kin.

> "It should also be noted that the "controversial" inquests in which the Coroner has been involved, and in respect of which he has concluded that neither anonymity nor screening have had an adverse impact, have consistently been unable to ascertain facts about the circumstances of the death because of the curtailments on the Inquest process which existed in the past: non-compellability; absence of pre-inquest disclosure; and limitations on verdict. Whilst anonymity may be meaningless when the only thing a jury could do was to give a "brief, neutral statement" providing less information than would be obtained from an autopsy report, it is clearly of significance where an inquest is required to "investigate fully and explore publicly the facts pertaining to a death occurring in suspicious, unnatural or violent circumstances." *Jordan v Lord Chancellor* [37]."

If the substantive law and procedural rules relating to inquests are, or have been perceived to be, inadequate it is the responsibility of Parliament to change the law. The Senior Coroner, like every other coroner, is constrained by the statutory framework provided for inquests and has to operate within those constraints and within the parameters of the coronial law as it is declared by the superior courts.

[58] In the course of his ruling at paragraph 1-04 the Senior Coroner stated:

> "1-04 I concur with the views expressed by Lord Woolf based on my own previous experience in holding inquests occurring in controversial circumstances where members of the security forces were responsible for the deaths. The impact of the granting of anonymity and/or screening on the inquisitorial process and the ascertainment of the facts has been minimal."

[59] The applicant contends at [42] of his skeleton argument:

> ". . . that the Coroner's statement at 1-04 demonstrates a mind set biased in favour of the grant of anonymity to members of the security forces and a complete failure to appreciate the impact of anonymity and screening applications on the principle of open justice and on families' ability to undermine the credibility of security force witnesses."

The very experienced Senior Coroner is, in my opinion, perfectly entitled to bear in mind his experience of the way in which other inquests have proceeded where witnesses have been granted anonymity and/or screening. It is apparent from the comprehensive and thorough review of the law in this field contained in his ruling that the Senior Coroner has conscientiously sought to apply the law, and the assertion that his ruling in this case demonstrates a mindset of the type that is alleged is without foundation. Indeed, as the ruling and preliminary ruling on screening and anonymity indicate, the Senior Coroner initially refused several of the applications, and only granted them when further and more detailed information was provided by the applicant's legal representatives. That plainly contradicts the assertion that the Senior Coroner has a mindset in favour of granting anonymity and/or screening applications by members of the security forces.

[60] So far as the adoption of the protocol is concerned, the Senior Coroner has stated in his affidavit that he acted on the basis of advice given to him by senior counsel. The relating to anonymity and screening is one of very considerable complexity which has developed rapidly in recent years, not only in the area of inquests but in relation to the criminal courts. As the outcome of Officer L [2007] NI 277 demonstrates, there have been substantial differences of opinion between the various judicial tiers in relation to aspects of screening. I consider that the Senior Coroner was entitled to act upon the advice of senior counsel. That he subsequently conceded that the approach he adopted on advice was wrong is very far from evidence of bias.

[61] In this context Mr O'Donoghue pointed out that when the applicant's solicitors made their initial response to the ruling in a letter of 19 January 2009 bias was not alleged. In the context of bias generally Mr O'Donoghue has, in my view correctly, conceded that if bias, whether apparent or substantive, is established then it would not be proper for the court to refuse relief on the grounds of delay. However, he also argued, I believe correctly, that when considering whether or not bias has been established it is relevant to take into account whether it has been alleged in relation to the same matter at an earlier stage. I am satisfied that this is the proper approach to adopt, and that it is a relevant consideration, but not determinative of the issue, whether bias was alleged at the earliest reasonable opportunity when the person alleging bias on the part of a decision maker has had a reasonable opportunity to make a considered and fully reasoned response to the impugned decision. Where such a response is made and does not allege bias, but bias is subsequently alleged in relation to the same matter, the earlier failure to allege bias must be a relevant consideration when deciding whether there is an appearance of or actual bias by the decision maker.

[62] A related ground upon which the Senior Coroner's approach to screening and anonymity is criticised relates to matters which he took into

account when granting two of the applications, namely those of Sergeant A and Officer AA. In relation to Sergeant A, the Senior Coroner granted anonymity and screening in the interests of fairness even though Sergeant A no longer lives and works in Northern Ireland and says that he will not attend. However, a summons has been issued, and Sergeant A has applied for anonymity. As the Senior Coroner pointed out:

> "His role and actions are likely to be referred to by his former colleagues who are to give evidence as well as civilian witnesses. Also, as he might have a change of mind and decide that he will attend the inquest I have decided that it is appropriate that I should also make a decision on his application for screening."

I am satisfied that this is the correct approach to adopt.

[63] Mr Macdonald focused his submissions on a particular aspect of the ruling in relation to Sergeant A, namely that the Senior Coroner took into account two matters in respect of which there was no evidence justifying him in doing so. The first is that, as the Senior Coroner acknowledged in his ruling, no personal statement had been lodged on behalf of Sergeant A. This needs to be considered in the context of the Senior Coroner's reasoning on this issue as contained in the following extract from his ruling to be found at pp 381 and 382 of the exhibits.

> "I then have gone on to consider whether the common law test has been satisfied for either screening or anonymity or both. I have noted the concerns expressed on his behalf by his solicitor in a letter to me dated 22 January 2009 in relation both to fears for his own personal safety should he return to Northern Ireland and the effect that would have on his wife who is seriously ill. Whilst there is no personal statement as such from Sergeant A I attach considerable weight to the pivotal role he played in the events that culminated in the death of Patrick Pearse Jordan, the publicity generated by a lengthy series of legal challenges, the frequent references in the media to him being responsible for the death, the publicity the inquest is likely to attract and the fact that sometime in the future he may wish to return to Northern Ireland to live or to visit. The latter consideration was not put forward in support of his application

> but I consider it is reasonable that I do consider it as many persons who reside abroad wish to retire to their homeland when their working life has ended. I have carefully considered also all the documentation submitted in support of his application including the security assessments and I have taken account of the fact that he has not submitted a personal statement. My decision is that in relation to Sergeant A the common law test is satisfied and that I will grant his application for both screening and anonymity."

As can be seen from the entirety of this passage, the Senior Coroner considered other material as well as taking into account the absence of a personal statement. However, although a personal statement was not lodged on behalf of Sergeant A, his solicitor had written to the Senior Coroner setting out fears for his personal safety should Sergeant A return to Northern Ireland and the effect that that would have on his wife. The Senior Coroner expressly stated that in considering all of the relevant issues he had taken account of the fact that Sergeant A had not submitted a personal statement. I consider that he was entitled to take into account that matters he did, and the concerns expressed through his solicitor were relevant and were proper matters to take into account.

[64] A further criticism of the Senior Coroner's reasoning in this respect is that he took into account that Sergeant A might wish to return to Northern Ireland even though Sergeant A had not put forward this suggestion. I am satisfied that it cannot be regarded as irrational or wrong in principle for the Senior Coroner to take this matter into account, indeed the possibility that Sgt A might return to Northern Ireland at some point was advanced on 22 January 2009 by Mr Macdonald in his submission that a witness summons be issued against Sgt A. See p. 576 of the exhibits and [71] below. Some coroners might have chosen not to take this point into account, but I consider that this was a matter within the Senior Coroner's proper discretion to consider and take into account.

[65] The criticism in relation to Officer AA is based upon the fact that the Senior Coroner has taken into account the subjective fears of other officers even though Officer AA has not expressed such fears. The relevant passage from his ruling is set out below:

> "I have carefully considered what factor or factors should guide me in reaching my Final Decision. Whilst the absence of any personal statement or

> submissions makes my task much more difficult in reaching a decision as to whether the common law test has been satisfied, I have concluded it would be unreasonable for me to assume that he has no subjective fears. In determining what subjective fears I could reasonably take account of in reaching my Final Decision, I have considered all the subjective fears expressed by the other officers and all the submissions made on their behalf and I have assumed he would share at least some of them, bearing in mind that he was a colleague. I do not believe this approach is unreasonable and I believe I must attach great weight to the principle of fairness and that factor must be the overriding one I should bear in mind in reaching my Final Decision. Having adopted that approach I have decided that fairness dictates that, as have granted the applications of all the other officers for both anonymity and screening, I should also grant Officer AA's application for both on the basis that he too was directly involved in the events leading to the death of Patrick Pearse Jordan and almost certainly would share at least some of the subjective fears of his former colleagues."

[66] In this context Mr O'Donoghue pointed out that the Order 53 statement did not present a challenge to the Senior Coroner's reasoning in relation to Officer AA, or alleged bias or irrationality. Whilst I take that consideration into account, I have come to the conclusion that the Senior Coroner was wrong to take into account the subjective fears of others where Officer AA did not advance them, and had not submitted a personal statement. The decision in relation to each officer has to be made upon the basis of matters that can be properly taken into account in relation to the individual officer concerned. That does not mean that the Senior Coroner is prevented from taking into account general considerations even if they have not been expressly relied upon by the officer concerned. For example, had Officer AA expressed such fears then the fears of others in similar terms could legitimately be taken into account when testing the objective credibility of the assertions by Officer AA. However, I do not consider that the Senior Coroner can legitimately take into account subjective fears which have been specifically advanced by other officers when considering the application in respect of an officer who has not expressed such subjective fears. Although Mr Macdonald did not take the point, I consider that it is an error of law to elevate "fairness" to the status of the overriding factor to be considered when considering applications of this nature. Whilst it may be a relevant factor, others, particularly the need for open justice are of great weight. I therefore consider that the Senior Coroner was in error in taking into account when evaluating the application of Officer

AA the subjective fears of other officers. I do not consider that it would be appropriate to express any opinion as to whether the remaining matters could or would justify the Senior Coroner in arriving at the same or a different decision, because his ruling understandably does not disclose each and every detail of the applications made to him. As he has undertaken to reconsider the applications it will be a matter for him to approach any renewed application by Officer AA in the light of this court's ruling on this point.

[67] I am satisfied that these errors fall far short of indicating apparent or substantive bias. While the Senior Coroner has made an error of law in the dealing with AA's application, I do not consider that this amounts to his having predetermined any renewed application that might be made.

[68] Having considered each of the grounds advanced by the applicant under the general heading of screening and anonymity as demonstrating apparent or actual bias I am satisfied that the applicant has failed to demonstrate that the Senior Coroner has displayed either apparent or actual bias in the way he has approached the question of anonymity and screening. Whilst the errors he made in relation to Officer AA would have rendered that decision void had that decision been superseded by the Senior Coroner's decision to have a fresh hearing on these matters, they could not be regarded as such by an objective and fair-minded observer. The applicant has failed to establish that the Porter v. Magill test has been met under this heading.

(5) The Senior Coroner's decision in relation to issuing a witness summons for Sergeant A.

[69] The applicant relies upon the Senior Coroner's refusal to issue a witness summons to ensure the attendance of Sergeant A at the inquest as indicated by the Senior Coroner in the course of the submissions on behalf of the applicant that he should issue such a summons made in the course of the preliminary hearing on 22 January 2009. Sergeant A is the officer who shot Pearse Jordan and as the applicant states at [51] of the amended written submissions:

> "There can be no more important witness in the Inquest as it is fundamentally Sergeant A's explanation as to why he shot Pearse Jordan which will determine the central issue in the Inquest, the lawfulness of the shooting of Pearse Jordan."

[70] The applicant's contention in relation to the Senior Coroner's decision on 22 January 2009 is encapsulated in [58] of the written submissions:

> "58. It is submitted that the Coroner's decision-making in relation to issuing a witness summons for Sergeant A demonstrated an unwillingness to have

> regard to submissions made on the Applicant's behalf. The comparison with how he dealt with Sergeant A's application for anonymity would also lead the fair-minded observer to conclude that there was a "real possibility" that he was biased. The decision is symptomatic of an approach which accords undue deference to the interests of the security forces and insufficient weight to the countervailing rights of the Applicant."

[71] It is therefore necessary to refer to the submissions made by Mr Macdonald to the Senior Coroner on this issue during the hearing of 22 January 2009. These exchanges are lengthy and are to be found in the transcript at pp 570 to 584 of the exhibits. During the course of the exchanges between Mr Macdonald and the Senior Coroner on this issue, the Senior Coroner made it clear that he considered that because he had been informed that Sergeant A was permanently resident outside the United Kingdom and did not intend to return to Northern Ireland for the inquest, and since the Senior Coroner therefore had no power to issue a witness summons to be served on Sergeant A outside the jurisdiction there was no purpose in issuing a witness summons under the provisions of s. 17 of the Coroners Act (Northern Ireland) 1959. Mr Macdonald sought to persuade the Senior Coroner that notwithstanding this, it was justifiable to issue a summons so that in the event that Sergeant A may return to this jurisdiction at some stage the summons could then be served upon him to secure his attendance at the inquest. The practicality of such a suggestion was debated, and Mr Macdonald's submissions can be summarised in the following extract from the transcript to be found at page 582 of the exhibits.

> "**Mr McDonald** : So this is not a person who has disappeared from the face of the earth or who may not maintain any contact with people in this jurisdiction, so it is by no means far fetched to-suggest that he may return to this jurisdiction at some stage so that he can be served by police with the summons in circumstances where it is the obligation of the police under the Act to serve a summons that is issued by you, but if you do not set that in train, if you do not issue a summons in the first place that possibility is not available to the police, so they are denied the opportunity to ensure the attendance at this inquest of this single most important witness. It is for that reason that we pursue this matter."

In the course of the exchanges at page 583 the limitations on the Coroner's power to ensure the attendance of Sergeant A were explained by Mr Devlin, junior counsel to the Senior Coroner. Mr McDonald then asked the Senior Coroner to confirm his ruling

> "That you do not have a power to issue a summons under section 17 in respect of someone who lives outside the jurisdiction?"

To which the Senior Coroner replied at p. 584:

> "Where a person is and I am told is outside the jurisdiction they are not within the Coroner's district for Northern Ireland and the issuing and service of a summons would have no purpose at all. So I hope that is clear."

[72] The applicant did not accept the Senior Coroner's ruling and on 23 February 2009 issued proceedings for judicial review and I had been told by counsel that on 13 March 2009 the Senior Coroner conceded that he would issue such a summons.

[73] Although the Senior Coroner has conceded that he would issue a summons, whether such a summons will serve any useful purpose remains to be seen. Throughout the exchanges between the Senior Coroner and Mr McDonald on 22 January the Senior Coroner was pointing out that he had been informed by the solicitors for Sergeant A that Sergeant A was living and working outside the United Kingdom and did not intend to return to Northern Ireland to participate in the inquest. Therefore unless at some stage in the future before or during the inquest Sergeant A returns to Northern Ireland or some other part of the United Kingdom the summons will not be capable of being served upon him. Although the Senior Coroner changed his position after he gave his ruling on 22 January and conceded in the judicial review proceedings that were taken against him that he would issue a summons, that does not mean that the position which he held prior to the judicial proceedings can be characterised as one which was irrational or which no reasonable Coroner could have adopted.

[74] In addition to the Senior Coroner reversing his position, Mr Macdonald also relied upon a number of matters which he submitted demonstrated apparent bias on the part of the Senior Coroner and, as indicated in the extract from his written submissions above, that his decision

> ". . . is symptomatic of an approach which accords undue deference to the interests of the security forces

> and insufficient weight to the countervailing rights of the Applicant.

The first of these is that the Senior Coroner "demonstrated a disregard for submissions advanced on behalf of the Applicant's legal representatives". I consider that to say that Mr Macdonald's submissions were disregarded is to misconstrue the Senior Coroner's attitude. Mr Macdonald, with his usual careful use of language, is asserting that the Senior Coroner did not take the submissions into account, whereas the real complaint is that the Senior Coroner did not accept them. The Senior Coroner plainly took a different view to Mr Macdonald, but that cannot be characterised as "disregarding" the submissions that were being made to him. On the contrary, it is evident that throughout the Senior Coroner was engaging with the practical realities underlying the submission made by Mr Macdonald. Whether the summons will ever be served must be open to question. If it is then of course the summons will compel the attendance of Sergeant A at the inquest and as already stated Sergeant A is a central witness. If the summons if not served on Sergeant A it will have served no purpose. That will not be the fault of the Senior Coroner, it will be a consequence of the absence of any power vested in the Senior Coroner to issue a summons which in some way can be enforced outside the jurisdiction of the United Kingdom. That the Senior Coroner conceded that he was wrong after judicial review proceedings were taken against him does not mean that his refusal to accept the submissions made to him can be regarded as demonstrating apparent or substantive bias.

[75] A further matter to which Mr Macdonald attached some significance was the observation of the Senior Coroner in the course of the exchanges on two occasions, namely at pp 571 and 599, that the applicant was free to seek judicial review to test his ruling. Thus at page 599 the Senior Coroner observed:

> "If you want to test that you are free to do so".

I can see no possible basis upon which it can be properly asserted that to refer to the ability of the applicant to challenge the Senior Coroner's ruling is evidence of bias on his part. Any judge or judicial officer is entitled to say in respect of any submission made to him which is not accepted, particularly where it is being pressed in a determined and vigorous fashion, that the party concerned has a remedy elsewhere if that is the case. The Senior Coroner's observations were proper and, so far as can be ascertained from the transcript, expressed in a temperate fashion. In any event, for the Senior Coroner to make such an observation can hardly be regarded as surprising or unjustified in the context of the history of this inquest because there had been numerous applications for judicial review either by the applicant, or by the Chief Constable, and the applicant had indicated on recent occasions that judicial review would be sought of decisions made by the Senior Coroner if they were

not made in favour of the applicant. For example, on 18 November 2008 the applicant's solicitors stated their intention to issue judicial review proceedings, see their letter of 18 November 2008 to the Senior Coroner at pp 216 to 218 of the exhibits, a letter I shall have occasion to refer to later in this judgment. I consider that there is no substance to Mr Macdonald's complaint under this heading.

[76] So far as the refusal of the Senior Coroner to issue the summons against Sergeant A is concerned, I consider that it is noteworthy that when the Order 53 statement was filed on 23 February 2009 challenging the refusal of the Senior Coroner to issue the witness summons against Sergeant A it made no allegation of bias against the Senior Coroner in respect of his decision. Earlier in this judgment I have referred to the possible significance of a failure to allege bias at an appropriate early stage and I do not need to repeat those remarks. When I raised with Mr Macdonald why bias had not been alleged in the judicial review proceedings of 23 February, and why the applicant did not seek the recusal of the Senior from the inquest in that judicial review, Mr McDonald's response was that the outcome of this judicial review and the parallel judicial review launched at the same time regarding the anonymity protocol was such that, as he put it, the applicant had reached a "tipping point". He continued by saying that the applicant was reluctant to rush to court and felt driven to make these applications. He later amplified that by saying that once the Senior Coroner had conceded in March that he needed to revise the anonymity protocol it was obvious that the date of the inquest would have to be vacated. That was because, amongst other considerations, new threat assessments would have to be prepared and then considered by the Senior Coroner. Because the June date would have to be vacated there was accordingly less urgency in proceeding with this matter. The Order 53 statement seeking recusal of the Senior Coroner on the grounds of bias was not filed until 11 May 2009.

[77] It is evident that a great deal of effort has been put into the preparation of this application by the applicant's advisers. I have already referred to the very large volume of material which has been exhibited and Mr Macdonald made the fair point that it took a good deal of time to assemble and prepare this material. As he put it, when asked to explain why it had taken three months to lodge the proceedings, he responded that "it had been a long time in the works".

[78] However, when the sequence of events relating to the Senior Coroner's refusal to issue the witness summons in respect of Sergeant A is examined, I consider that the explanation advanced by Mr Macdonald does not bear scrutiny. As Mr O'Donoghue pointed out on behalf of the Senior Coroner, an express allegation of bias was made on behalf of the applicant against the Senior Coroner on 20 February 2009. In that letter, the applicant's solicitors took issue with the Senior Coroner's intention to determine the question of relevance in relation to the Siberry judgment to which reference has been made

earlier, and as can be seen from the penultimate paragraph of that letter invited the Senior Coroner to recuse himself from hearing the inquest into the death of Pearse Jordan.

> "As we have set out previously, it is not our desire to engage in litigation. However, given your decision to the effect that you will, in the first instance, determine relevance in light of the *Siberry* judgment, without being prepared to consider, or hear our submissions on the we consider that, this matter, particularly when considered against the background of your treatment of our client vis-à-vis the PSNI, gives rise to the reasonable perception of bias. In those circumstances we would invite you to recuse yourself from hearing the Inquest into the death of Pearse Jordan."

[79] This letter had been preceded by an earlier letter of 13 February 2009 stating that if the Senior Coroner did not give certain assurances as to his approach to dealing with the Siberry issue then he would be asked to recuse himself. See page 450d of the exhibits. At that time, the inquest had been adjourned and was listed to start in June 2009. It was only at one of the PII hearings before Stephens J on 3 April 2009 that counsel for the Senior Coroner informed the court that the inquest would have to be adjourned because of the new procedure that was to be adopted in relation to applications for screening and anonymity. On 28 April 2009 the Senior Coroner confirmed that the inquest could not proceed and identified the new screening and anonymity procedure as one of the reasons why the inquest had to be adjourned.

[80] It is apparent from the matters to which I have referred that the applicant's advisers were prepared to take judicial review proceedings against the Senior Coroner in both November 2008 and February 2009, notwithstanding that on both of those occasions the threatened proceedings, if they had been instituted, would have been heard very shortly before the proposed inquest dates. As Mr Macdonald pointed out at the beginning of his submissions in the present case, one of the reasons for seeking a hearing before the end of last term was so that if the applications succeeded a new coroner would have sufficient time to read himself or herself into what is clearly a very complicated case. These considerations apply with equal force to the effect that would, or at least very probably could, have been brought about had the applicants in fact launched their judicial reviews in November and February. In other words, the applicants were clearly prepared to seek the recusal of the Senior Coroner at a point on each occasion that was very close indeed to the hearing date. In addition, these were not the only occasions when the applicant alleged that the Senior Coroner had displayed bias. As Mr Sheils' grounding affidavit recounts at [4], after the original inquest was adjourned in 1995 "the

applicant also challenged aspects of the Coroner's decision-making on grounds of alleged bias. The bias aspect of the application was not pursued when the application proceeded to hearing."

[81] I do not accept that the absence of allegations of bias against the Senior Coroner in the immediate aftermath of his decision to refuse to issue the summons in relation to Sergeant A can be explained on the basis advanced by Mr Macdonald. It is at variance with the willingness of the applicants to take judicial review proceedings and to seek, if necessary, the recusal of the Senior Coroner in the past.

[82] I have considered all of the evidence and submissions in relation to this issue, and have concluded that it is an example of circumstances where a decision taken by the Senior Coroner has been retrospectively characterised as evidence of bias against the applicant where this was not raised in any shape or form by the applicant at the time or within a reasonable period thereafter. I am satisfied that the applicants have failed to show that the Senior Coroner's ruling on this issue, and his approach to it, could be considered as indicative of bias, and I consider that the applicant has failed to establish that the Porter v. Magill test has been satisfied in respect of this matter.

(6) Delay.

[83] The Order 53 statement at 3(vi) alleges that the Senior Coroner has "demonstrably failed to attach the requisite degree of importance to a prompt holding of the inquest", and there then follow seven headings particularising the allegations.

> "a) Repeatedly, usually on his own initiative, and sometimes at the initiative of the PSNI, adjourned Preliminary Hearings and the substantive Inquest, over the Applicant's objection to repeated delays in the holding of the Inquest.
> b) Permitted the PSNI/MOD to engage in persistent delay in relation to the disclosure process;
> c) Failed to take steps to ensure the expeditious determination of the disclosure process;
> d) Changed his mind in relation to the Applicant's entitlement to disclosure and effectively encouraged the PSNI in their tardy handling of the disclosure process;
> e) Permitted the PSNI/MOD to engage in persistent delay in relation to the anonymity process;

f) Failed to take steps to expedite this process; and

g) Demonstrably, despite the fact that these issues are not unique to the Jordan Inquest, failed to put in place systems which ensure that Inquest proceedings proceed promptly and efficiently, without compromising the need for fairness as between the Interested Parties."

It is submitted that the Coroner has demonstrated so little weight to the need to take responsibility for ensuring that there is no further unnecessary delay of the hearing of this Inquest that he should recuse himself."

[84] Although the question of delay was touched upon by Mr McDonald in his written submissions, he passed over this matter relatively briefly in the course of his oral submissions. Nevertheless, given the exceptionally protracted history of this inquest I consider it appropriate to deal with some of the more important aspects of the history of the matter since 1995 in view of the generalised assertions contained in the seven headings set out above, assertions which are not limited in time. The grounding affidavit of Mr Shiels sets out much of the procedural history since the adjournment of the first inquest in January 1995, and I will have occasion to refer to some parts of his affidavit in due course.

[85] The following are pertinent to any consideration of the extent of and the responsibility for the delay which occurred between 1995 and 2007 when the House of Lords gave its judgment in Jordan v. Lord Chancellor:

(1) The applicant did not pursue allegations of bias in the course of judicial review proceedings which were taken by the applicant in 1995. It appears from the description of these matters in Jordan v. UK at [42] to [46] that the applications were for certiorari to quash inter alia –

(a) the Coroner's refusal to give the next of kin access to statements of witnesses before they gave evidence, and

(b) his decision to grant anonymity to RUC witnesses.

These are described in Mr Shiels' affidavit as proceedings which concluded "in or around 1996", however the description of these proceedings given in Jordan v. UK discloses that the application was dismissed by Carswell LJ in December 1995, and the applicant's appeal was dismissed by the Court of Appeal in June 1996. Leave to appeal to the House of Lords was refused by the Court of Appeal in 1996 and by the House of Lords in March 1997. As

Jordan v. UK records at [41] it had been the Coroner's intention that the inquest would resume on June 12th 1995, but these judicial review proceedings were taken by the applicant on 26 May 1995.

(2) The inquest was again listed "in and about 1997", but was adjourned pending the outcome of judicial review proceedings taken in a different inquest regarding the unavailability of legal aid.

(3) The inquest was again listed for hearing on 1 November 1999, but was adjourned when judicial review proceedings were taken by the applicant, I presume (although this is not stated in the affidavit) against the Chief Constable in respect of the Chief Constable's refusal to make disclosure.

(4) On 9 October 2000 the Senior Coroner indicated that he wished to hold a preliminary hearing to deal with various matters. A subsequent preliminary hearing was adjourned on 31 January 2001, the inquest had been listed for April 2001, but the decision to adjourn was quashed by Kerr J on 26 August 2001.

(5) In the interim the European Court of Human Rights had delivered its judgment in the case of Jordan v. United Kingdom on 4 May 2001 and determined that the government of the United Kingdom had breached the applicant's Article 2 rights by failing to hold "an effective official investigation". Although the judgment of the European Court makes clear that there were a significant number of factors involved in its decision which could not be attributed to the Senior Coroner, the court did observe at [139] –

> "Nor has the inquest progressed with diligence in the periods outwith the adjournments. The Court refers to the delay in commencing the inquest and the delay (on two occasions of more than 8 months), in scheduling the resumption of the inquest after the adjournments."

(6) Following the European Court's decision, the Senior Coroner held various preliminary hearings in September, October and November 2001. The inquest had been listed for November 2001 but was adjourned to February 2002 because the Lord Chancellor was considering amending the inquest rules on compellability of witnesses, but no time table had been given for this which was of course something over which the Senior Coroner had no control.

(7) At the preliminary hearing of 9 October 2001 the Senior Coroner determined that, inter alia, unless the rule changes were in place when the inquest was held Sergeant A would not be compelled to attend.

(8) That decision in turn was the subject of judicial review proceedings, and a judicial review was brought against the Lord Chancellor in respect of his failure to put in place Article 2 compliant rules. At this point I would observe that the judicial review taken against the Senior Coroner demonstrates the difficulties he faces in dealing with this inquest. Although it would seem that the Senior Coroner was making a further effort to hold the inquest, a judicial review was taken against him by the applicant, who, it would seem, did not want the inquest to proceed until the Coroners' Rules were changed to ensure that Sergeant A could be compelled to attend.

(9) The judicial review proceedings themselves were significantly protracted as they proceeded through the High Court, the Court of Appeal and ultimately the House of Lords where judgment was given in March 2007.

(10) At [20] of Mr Shiels' affidavit the reference is made to an application by the Senior Coroner to seek an adjournment of the judicial review proceedings in the Court of Appeal, and it is stated that the proceedings were adjourned over the applicant's objection. At [60] in the written submissions on behalf of the applicant the court was invited to have regard to the Senior Coroner's application to adjourn the Court of Appeal hearing pending the outcome of a case in England referred to as Middleton, that is R (Middleton) v. West Somerset Coroner [2004] 2 AC 182, because it was asserted that part of the delay should be attributed to the Senior Coroner's application for an adjournment before the Court of Appeal. However, this was not pursued in the course of the oral submissions. Given that the Court of Appeal acceded to the Senior Coroner's application to adjourn I cannot see how it could now be suggested that a lower court can, in effect, be invited to investigate a decision to permit an adjournment made by the Court of Appeal several years ago. Not only would it be improper for this court to do so, but given the passage of time since the death of Pearse Jordan by that time and the previous history of this matter, I would be extremely surprised if the Court of Appeal was not alert to the implications for the holding of the inquest of any adjournment it might permit, whether that was expressly pressed upon it or not. Be that as it may, although this allegation has been made, it has not been pursued, and no basis upon which it could be supported has been placed before the court. I therefore propose to leave it out of account when considering the allegation of delay against the Senior Coroner.

[86] This necessarily abridged review of the history of the progress of the inquest, and the litigation associated with it, between the adjournment of the inquest in January 1995 and the House of Lords giving its judgment in 2007 demonstrates that, apart from the adjournments prior to the hearing in the European Court to which the European Court referred in the passage quoted above, none of the delay can properly be attributed to the Senor Coroner

between those dates. In general terms it can be stated that virtually all of the delay which occurred during that period was occasioned by –

(1) deficiencies in the Coroners Rules;
(2) inaction on the part of the government in making changes in the Rules;
(3) the non-availability at the early stages of legal aid for inquests;
(4) the steadfast resistance of the Chief Constable to making available to the applicant various categories of documents which the applicant sought; and
(5) frequent, complex and protracted litigation over many issues arising out of (1) to (4).

None of the matters at (1) to (4) can properly be considered to be the responsibility of the Senior Coroner, and whilst some of his decisions were subject to successful judicial review challenges during that time, it is also the case that the applicant's account itself acknowledges that the Senior Coroner held many preliminary hearings, and fixed a number of dates for the resumption of the inquest. That suggests that the Senior Coroner was attempting to have the inquest heard, but dates for the hearing of the inquest had to be vacated because of the litigation to which I have already referred.

[87] I have dealt with this matter in some detail because of the generalised allegations made in the Order 53 statement which did not specifically assert that the delay for which the Senior Coroner was said to be responsible was limited to the period of time after the House of Lords delivering its judgment in Jordan v. Lord Chancellor on 28 March 2007. It is nevertheless clear that the extended period of time that has elapsed since the death of Pearse Jordan places a heavy responsibility upon the Senior Coroner as the judicial officer ultimately responsible for the conduct of the inquest to ensure that every possible effort be made to ensure that the inquest be held after the ruling of the House of Lords in March 2007, and I therefore consider the conduct of these proceedings since then against that background.

[88] In the applicant's written submissions at [59] eleven headings are set out relating to events since the House of Lords gave its judgment in Jordan v. Lord Chancellor, and it is upon this period of time that the applicant's submissions have focused. Some of these, such as the allegation that the Senior Coroner failed to provide the investigating officer's report promptly have already been considered earlier in this judgment and it is unnecessary to refer to them again. Others – such as the failure to require the PSNI to provide the Holmes Index – are also relied upon by the applicant under the final and general heading relating to the Senior Coroner's role in relation to disclosure, and these matters are more appropriately dealt with at that point.

[89] Following the judgment of the House of Lords in March 2007, it appears from the material placed before me that the next step was that on 4 May 2007 the applicant's solicitors wrote to the Senior Coroner asking him to confirm that he had sought "all documentation and/or information held by [the PSNI] relating to the death of Pearse Jordan, such documentation to include the Investigating Officer's Report". The letter continued with a request for an indication as to when a preliminary hearing would be held in relation to any outstanding issues and when an inquest would be listed for hearing. On 5 September 2007 a preliminary hearing held by the Senior Coroner addressed several issues, some of which have proved exceptionally contentious.

- The issue of anonymity sought by police and military witnesses.
- Public interest immunity, which it emerged had not yet been considered by Ministers.
- The need to conduct risk assessment in order to comply with the test and procedure considered by the House of Lords in Officer L, when it emerged that this procedure would take some three months.
- Issues relating to the attendance of Sergeant A.
- The availability of witnesses who had to be located in view of possible changes of address over the years since the previous inquest.
- Disclosure.

[90] In the course of the proceedings it can be seen from the transcript at page 472 of the exhibits that Miss Quinlivan for the applicant recognised that the suggested date in February 2008 for the resumption of the inquest was a realistic one in the light of the steps that remained to be taken. The Senior Coroner then pencilled in 4 February 2008 as the date for the inquest and set aside four weeks for it. It is noteworthy that, despite the assertions that are now being made, there was no suggestion at the time, either in correspondence or in the course of the proceedings at the preliminary hearing on 5 September 2007, that the Senior Coroner had been dilatory or was not doing everything he could to fix a realistic date. No complaint was made that there had been unjustified delay since the House of Lords had given its judgment, and I have no doubt given the history of the case that had it been felt at that time that there had been unjustifiable delay on the part of the Senior Coroner in resuming the inquest that that would have been fully and vigorously ventilated by the applicant's representatives, either in correspondence or in the course of the hearing, or both. I am satisfied that there was no unjustifiable delay on the part of the Senior Coroner in convening a preliminary hearing after the House of Lords gave its judgment, and that there is no substance in the assertion that the Senior Coroner was at fault in this respect.

[91] The next significant date appears to be the preliminary hearing of 4 December 2007. Mr Shiels refers to this at [27] of his affidavit, and says that there were difficulties regarding disclosure. There appears to be no transcript of this preliminary hearing amongst the exhibits before me, however notes

made by Messrs Madden and Finucane which had been exhibited record the Senior Coroner as saying "This must happen first week in January". As is apparent from the remainder of the notes there were continuing difficulties with the PSNI producing documents and in ensuring that PII claims were made. The inquest was therefore adjourned from February to a target date of 7 April. The emphasis conveyed by the underling of "must" in the note leads me to infer that the Senior Coroner was emphasising that he was imposing a deadline upon the PSNI in this matter.

[92] There was then a further preliminary hearing on 11 March 2008 relating to the relevance of a decision by the European Court in Ramsahai v Netherlands and I will refer to this again under the Private Representations heading. It appears that the inquest was then adjourned from the projected date of 7 April. The papers before me do not disclose why it was adjourned, and no complaint has been made by the applicant about this adjournment. A letter exhibited of 9 April 2008 from Messrs Madden and Finucane indicates that a serious disagreement had arisen between the next of kin and the PSNI about the outstanding disclosure, and it would seem that it was this dispute which the Senior Coroner resolved by his ruling of 25 June 2008 which has been referred to earlier.

[93] This then led to the unsuccessful judicial review by the Chief Constable, and following Morgan J's judgment in September 2008 there were continuing disputes about disclosure of the investigating officers report throughout the remainder of 2008. I have already considered how these disputes led to the adjournment of the inquest which at that stage had been fixed for January 2009, resulting further adjournments to April and then June 2009 and it is unnecessary to refer to those matters again.

[94] Having considered the chronology of events during that period, the transcripts of the preliminary hearings and the voluminous correspondence between the parties which interspersed these hearings, I am satisfied that it is apparent that the repeated delays in commencing the inquest during that period were entirely due to the continuing efforts of the PSNI to avoid providing to the next of kin documents that they sought, (a) in respect of the withheld portions of the investigating officer's report, and (b) the "irrelevant" documents (as they will be later described) promised by the Chief Constable to the next of kin as far back as 2000, together with claims for PII brought by the Chief Constable and the judicial review that generated. Throughout the entire period not only was the Senior Coroner making every effort to fix dates, but he had to deal with voluminous and detailed correspondence from the parties in relation to this matter. He rapidly responded to the matters raised therein and, where necessary, as I have already pointed, out fixed deadlines for the production of documents.

[95] In the applicant's written submissions at [61] and [62] it is asserted that the Senior Coroner has failed to realise the importance of a prompt hearing of the inquest and that there is no evidence that he has accorded it any sense of priority. I am satisfied that the sequence of events that I have described in this part of the judgment establishes that these assertions are unfounded, and that the Senior Coroner has made very effort to ensure, so far as lies within his power, that the inquest is heard. I am satisfied that the applicant has failed to satisfy the Porter v Magill test under this hearing.

(7) Private Representations.

[96] The applicant makes the case under this heading that the Senior Coroner permits a practice whereby the Crown Solicitor's Office make applications to him to which he accedes without permitting the applicant to participate in the process. In response Mr O'Donoghue pointed to the obligations of the police to provide information to the Coroner under s. 8 of the Coroner's Act, and submitted that it was therefore unsurprising that from time to time there was contact between the Senior Coroner and the Crown Solicitor's Office who were representing the PSNI.

[97] In support of the criticism of the Senior Coroner the applicant points to three occasions where it is asserted that the Senior Coroner demonstrated apparent bias by adjourning preliminary hearings after what the applicant contends are "private representations" made to him by the Crown Solicitor's Office. The first occurred in February 2008 when the Senior Coroner adjourned a preliminary hearing fixed for 22 February 2008 because he stated that he had become aware of the implications of the judgment of the European Court of Human Rights in Ramsahai v Netherlands in which judgment was given on 15 May 2007. The second occurred earlier this year when the Senior Coroner adjourned a preliminary hearing fixed for 14 February 2009 because of the implications of the judgment of McCloskey J in Siberry. The third relates to the Senior Coroner's approach to the examination of material described as "sensitive" without giving the applicant the opportunity to make representations. I shall refer to these as the Ramsahai and Siberry issues respectively.

[98] From the exhibits the relevant sequence of events relating to the Ramsahai issue commences with the decision of the Senior Coroner to fix a preliminary hearing for 22 February 2008. On 20 February 2008 he wrote to Madden and Finucane stating that on the previous Friday he had become aware of the relatively recent judgment of the European Court in Ramsahai, and he referred to specific portions of the judgment. He went on to identify three issues about the extent of documentation that the next of kin were entitled to that appeared to arise as a result of the Ramsahai judgment. He stated that he proposed to arrange a new date for a preliminary hearing in order to consider the issues which he had identified, and requested that he be

provided with the applicant's skeleton arguments on these matters by 7 March 2008, and requested that it be copied to the Crown Solicitor's Office.

[99] Correspondence then took place between Madden and Finucane and the Senior Coroner about this, as well as other unrelated issues concerning disclosure. Skeleton arguments by both the applicant and the Chief Constable were submitted and the preliminary hearing took place on 10 March 2008. The transcript reveals that a number of different issues were considered at length during the preliminary inquiry as well as whether there were implications for the inquest stemming from the Ramsahai judgment.

[100] The transcript of the hearing appears at pp 509-556 of the exhibits and shows that the hearing commenced with a lengthy opening statement by the Senior Coroner, at the beginning of which he explained how he came to be aware of the Ramsahai judgment.

> "Until recently, my consistent position has been that the bereaved family were entitled to have access to the same documentation as the coroner, subject to any public interest immunity considerations. About a month ago, [Ms Majella Meehan], Assistant Crown Solicitor and solicitor acting on behalf of the PSNI and the Ministry of Defence advised me that my views as to the legal position were at variance with coronial practice in England and Wales and, in particular, that of the Oxfordshrie coroner who is currently holding inquests into the deaths of service personnel in Iraq and Afghanistan.
>
> As a result of inquiries I made I established that this appeared to be correct, although I could not ascertain if this was the position of every coroner in England and Wales."

[101] The applicant was represented at the preliminary hearing by Ms Quinlivan, and in the course of her submissions she raised concern on the part of the applicant about representations being made to the Senior Coroner in this fashion as can be seen from the following extract from the transcript.

> Mr Leckey…."But of course, the only reason we are here today is because, if you like, I was told my approach was wrong in law and that is why I thought it important to make the opening statement to explain why we are here.

> Ms Quinlivan: I am grateful to that and I have to say, sir, that it is matter of some concern to us that the police would effectively make representations through the backdoor without openly disclosing the nature of those representations to us. Until this morning, sir, I was unaware that representations had been made on behalf of the PSNI which seem inconsistent with their policy and would suggest to you a different course than that which you have adopted.
>
> Mr Leckey: What happened, the practice in England was drawn to my attention, it did not relate to the PSNI's position. What is happening in Oxfordshire was drawn to my attention, can I put it like that? That was the catalyst for further inquiries by myself.
>
> Ms Quinlivan: But, sir, you will I think contrast the approach that we have taken in terms of our dealings with you and that any correspondence we send to you we also copy to the Crown Solicitors' office to ensure that they are not taken by surprise by submissions we made and, of course, the reverse is not the case and it does not come as a surprise that the police are effectively making representations which can influence the course of a decision and point you in a different direction. I am making no criticism of you but I do think in the interests of transparency and openness it would be appropriate if they seek to make representations that they would so in an open fashion."

[102] As is apparent from this extract the Senior Coroner expressly stated that what had occurred was that the practice of the Oxfordshire coroner had been drawn to his attention, and Ms Quinlivan then stated that she was "making no criticism of [the Senior Coroner] but I do think that in the interests of transparency and openness it would be appropriate if [the Crown Solicitor's Office] seek to make representations that they do so in an open fashion". The hearing then proceeded to consider other issues.

[103] In his affidavit in the present proceedings the Senior Coroner has stated that:

> "… the decision in Ramsahai was in fact brought to my attention by Professor Paul Matthews [author of

Jervis on Coroners] and HM Coroner for the City of London."

[104] The assertion in the applicant's skeleton argument at [68] that the transcript of the hearing of 11 March 2008 "now demonstrates that Majella Meehan did make representations to the Coroner which, whatever their objective, resulted in his re-visiting his entire approach to the disclosure process agreed except for /Oct 2007" is at variance with the contents of the transcript.

[105] As the transcript shows, and the passages I have quoted confirm, the Senior Coroner explained how he came to raise this issue, and Ms Quinlivan did not impugn his explanation at the time. I have no doubt that had it occurred to her then, or subsequently, that the Senior Coroner's explanation warranted further explanation or criticism she would have criticised him or sought such further explanation as appeared necessary to explain how he had come to pursue this matter. She did not, nor was such a suggestion made in the correspondence between the applicant's solicitors and the Senior Coroner which followed in succeeding weeks. In addition the Senior Coroner has stated in his affidavit that Ramsahai came to his attention because he was told about it by a fellow coroner who is the author of the leading textbook on coronial law. Judges and judicial officers keep abreast of developments and the law relevant to their particular field in many ways, one of which is by discussion with colleagues. It is therefore not in the least surprising, nor in way indicative of apparent or actual bias on the part of the Senior Coroner, that he learnt of Ramsahai in this fashion.

[106] Having considered all of the evidence I accept the Senior Coroner's explanation as to how he learnt of the Ramsahai judgment. It is consistent with what he said to the parties when he gave an explanation of a full and detailed nature which was not challenged or pursued by counsel for the next of kin at the time. Not only did he explain how this matter had come to his attention, but the Senior Coroner gave both parties the opportunity to make representations by lodging skeleton arguments and then conducted a full hearing on the matter. This course was justified and was conducted throughout in an open and transparent fashion. The applicant's criticisms of him in this respect are unjustified.

[107] The second matter relied upon by the applicant in a similar vein relates to the Senior Coroner's approach to the Siberry issue. I have already considered this in detail earlier in this judgment and it is unnecessary to revisit the sequence of events. I content myself with saying that when they are fully and objectively considered they too fail to support the applicant's assertions under this head.

[108] Finally, the applicant asserts that the Senior Coroner was wrong to consider material suggested to be "sensitive" without giving the applicant the opportunity to make representations. However, as the skeleton argument itself acknowledges, the Senior Coroner heard arguments on that issue in March 2008, and again in September 2008. Whilst he initially ruled against the applicant, he subsequent reversed that position in November 2008, see [72] of the applicant's written submissions. It is therefore the position that, contrary to the implication contained in the applicant's submissions, the Senior Coroner heard submissions from the applicant on two separate occasions on this issue, and subsequently changed his mind and accepted the applicant's submissions. That the Senior Coroner was prepared to change his position is evidence of his willingness to reconsider his decisions, and, if appropriate, to change his mind in the applicant's favour. Far from being evidence of bias on his part, I consider that it demonstrates that the Senior Coroner was not biased against the applicant and was at all times prepared to entertain submissions made on behalf of the applicant on this issue and, where he considered it appropriate to do so, ultimately give a decision in favour of the applicant.

[109] Having considered each of the matters relied upon by the applicant under this heading I am satisfied that the applicant has failed to satisfy the Porter v Magill test in relation to the private representations issue.

(8) The Senior Coroner's Oversight Role in relation to Disclosure.

[110] The applicant's submissions under this heading relate to the Senior Coroner's approach to the suggestion that in order to enable the applicant's advisors to collate and cross-reference the papers disclosed to them by the PSNI, whether directly received by them from the PSNI or received through the Senior Coroner, it was necessary that the applicant's be provided with Holmes Index listing all documents held by the PSNI in respect of the investigation into the death of Pearse Jordan. At [39] in his affidavit Mr Shiels as explained that the purpose of the request was that the indices to the Holmes database be provided to ensure:

> "(i) That the applicant was being provided with all of the documentation to which it was conceded they were entitled, in effect all documents subject only to PII;
>
> (ii) That the PSNI were in compliance with their disclosure to the Coroner."
>
> (emphasis added)

[111] In the applicant's written submissions at [76] the applicant's case on this is expressed in the following terms.

> "76. It is submitted that the coroner does have a duty to:
>
> i) Ensure that the PSNI comply with their statutory obligation to him to provide disclosure of all material relating to the death. The importance of this obligation was recognised in the Court of Appeal in PSNI v McCaughey despite their finding against the Applicant, with the Court concluding that: 'It appears to us that if the coroner is to carry out his statutory function effectively he must have the power to require the production of relevant information from those who have it' and absent such a power the Court was of the opinion that there was 'a real danger that, if the coroner is unable to require the police to supply relevant information, the efficacy of the inquest system will be imperilled.'
>
> ii) Ensure that the PSNI provide such disclosure to the Next of Kin as is directed by the Coroner, in the instant case disclosure of all documents subject only to PII."
>
> (emphasis added)

[112] These submissions are a response to the Senior Coroner's position as explained at (11) and (12) of his affidavit.

> "11. In response to Paragraph 40 of the Affidavit of Fearghal Shiels, the problem here stems from a procedural inadequacy. I have always understood the Applicants complaint to be that I, as Coroner, have an obligation not only to receive from the Police Service of Northern Ireland all relevant documents and to inspect them, but also to take positive steps to ensure that the Police Service of Northern Ireland has, in fact, made full disclosure and not retained documents from me. The Applicant has sought to argue that I should compel the Police Service of Northern Ireland to provide a List of Documents that are or have been in their possession custody or power (akin to the

procedure in relation to Civil Proceedings in the High Court). In this case, there is a list of documents in the form of what is known as the "Holmes Index" which refers, apparently, to all documents held on the police computer records. I understand, however, that it may not be an exhaustive list of all of the police documents.

12. However, it must be remembered that (a) an Inquest is not an inter partes hearing; (b) I have no statutory power to compel the PSNI to provide a List of Documents and; (c) there is no procedure for specific discovery in the Coroner's Court. Consequently, I have taken the view that it is not within my statutory power to investigate positively the adequacy of the disclosure made to me by the police. Given that I function as Coroner without any dedicated investigative resources and that I have a full caseload to manage and administer, it is inconceivable that I could carry out such an investigation. On occasions, such as in this case, it is readily apparent to me that documents held by the PSNI do exist and ought to be provided, such as the senior investigating officers report, and I have certainly required that document to be handed over to me by the PSNI on the basis that this is a section 8 obligation on the part of the PSNI. Beyond that, however, I have no power to compel the sort of inter partes discovery process suggested by the Applicant.

13. What I can say is that if, during the inquest proceedings, it comes to light in the course of the examination of a witness, by me or by any properly interested person, or otherwise that other relevant documents exist and which ought to be disclosed to me pursuant to the obligation of the police under section 8 principles, I will require those documents to be produced to me and, if relevant, those documents will be provided to other interested persons subject to PII considerations. This procedure will provide a safety net to ensure that there is fairness to properly interested persons and proper disclosure."

[113] The applicant's contentions, and the response of the Senior Coroner, therefore reveal that what at first sight appears to be a dispute about whether a useful but undeniably secondary document (as opposed to a primary

document such as a witness statement or an expert's report), which takes the form of an index, should be made available to the applicant, and if so, whether it was the responsibility of the Senior Coroner to ensure that it was, conceals a fundamental question as to the nature of the Senior Coroner's responsibility to make available to the next of kin documents held by the police, and his powers to ensure that a document which the next of kin may seek is made available to them so that they can identify documents held by the police which they say they require in order to make effective representations as to what documents may be relevant.

[114] In the course of his submissions no issue was taken by Mr Macdonald with the correctness of the propositions advanced by the Senior Coroner that (a) an inquest is not an inter-partes hearing, (b) that a coroner has no statutory power to compel the PSNI to provide a list of documents, and (c) that there is no procedure for specific discovery in a coroners' court comparable to that of *inter partes* litigation in the civil courts. I therefore proceed on the basis that these propositions are correct. It has to be remembered that an inquest is an inquisitorial proceeding, as can be seen from Lord Bingham's observations in Jordan v Lord Chancellor at [37] if authority is need for this proposition.

[115] The decision of the House of Lords in Jordan v Lord Chancellor was that s. 8 of the Coroner's Act (Northern Ireland) 1959 requires the police in Lord Bingham's words at [45].

> "… to furnish to a Coroner to whom notice under s. 8 is given such information as it then has or is thereafter able to obtain (subject to any relevant privilege or immunity) concerning the finding of the body or concerning the death."

[116] In many straightforward and/or uncontroversial cases the documentation provided to the Coroner by the police may not require much in the way of an index or pagination, but I can see no reason why the obligation of the police to provide documents to the Coroner should not be regarded as encompassing an obligation to provide the documents in an indexed and paginated form if this is not in fact the practice. Where a case is more complex and/or controversial, and where it may therefore be reasonably anticipated that disputes may arise as to whether documents are relevant to the inquest or not, or whether they have in fact been disclosed at all to the Coroner, then it is all the more important that documents be presented to the Coroner in an indexed and paginated form. If this is not being done, I consider it should be, such an obligation cannot be regarded as an onerous one or in any way unreasonable.

[117] As the history of the present case demonstrates, in some circumstances there may be acute controversy over whether particular documents exist and their possible relevance to an inquest. It is clear that it is for the police to furnish documents in their possession to the Coroner, and then it is for him to determine whether documents are relevant to the inquest, and if so whether they should be disclosed to the next of kin. See Stephens J in Jordan's Application [2008] NIQB 148 at [25]. Therefore, contrary to what Mr Macdonald asserts in the written submissions in the passages emphasised above, and what the applicant's solicitors repeatedly asserted throughout 2008, the next of kin are not entitled to receive from the Coroner all the documents which are in the possession of the police concerning the death of Pearse Jordan insofar as any such obligation arises under s. 8 of the Coroner's Act. They are, as Stephens J ruled in Jordan's Application entitled to receive all of the documentation held by the police in relation to the death of Pearse Jordan because an undertaking that such documentation would be produced was given on behalf of the police in October 2000. In the particular circumstances of this case that means that there are two distinct, but substantially overlapping, routes by which documents held by the police have to be transmitted to the next of kin. The first and more restricted route is that the Senior Coroner will make available to the next of kin documents which the Senior Coroner considers are relevant to the inquest. The second and broader route is that created by the undertaking of the police in October 2000 to provide all documentation to the next of kin.

[118] It is abundantly clear that in this case, as Stephens J observed in Jordan's Application

> "… confusion has been created by the fragmented production of documents over the years. There has been duplication of some documents and a failure to produce certain documents on some occasions and there [has been] production on other occasions. It has been acknowledged that the level of redactions have on occasions been excessive."

[119] I consider that in order to ensure that the Senior Coroner has actually received all the relevant documents in circumstances where there be confusion as to whether particular documents have been received, then it is essential that in such cases the PSNI provide documents to a coroner in indexed and paginated form. It cannot be for a coroner to devote time and resources indexing and paginating documents received from the police before deciding which are relevant to the inquest, and so have to be disclosed to the next of kin, and which are not. I am satisfied that a coroner is entitled to require the police to provide documents to him in indexed and paginated form in order to discharge their Section 8 obligations. Indeed, as will subsequently appear, the police undertook to do that in this case in May 2008.

[120] There may be some cases where it may become apparent to a coroner that there may be further documents in the possession of the police which he may consider relevant to the inquest. If there were to occur in a case where the papers were voluminous and/or complex, then the provision of documents in index and paginated form becomes even more important. In the present case, there are two particular complications. The first is that the applicant has sought from the PSNI not only those documents which the Senior Coroner has determined, or may determine, to be relevant to the inquest (which I shall call "relevant papers"), but all the documents held by the PSNI in relation to the death of Pearse Jordan (subject to PII) (which I shall call the "irrelevant papers"). That the applicant is entitled in this particular case to not only the relevant documents but to the irrelevant documents because of the 2000 undertaking was decided by Stephens J in Jordan's Application to which I have already referred, and in which he gave judgment on 15 December 2008. The second complication is that there has been a dispute as to what documents have actually been, or have not been, received by the Senior Coroner and the next of kin from the police. No doubt this is part at least because of the piecemeal manner in which disclosure has been made from time to time.

[121] It is against the background of these general observations that I now turn to consider the submissions made by Mr Macdonald regarding the provision of the Holmes Index to the applicant. He submits that the Senior Coroner did not take effective steps to achieve the production of the Holmes Index and that that failure on his part is indicative of what Mr Macdonald described as systemic bias. He engaged in a meticulous analysis of the various letters and transcripts of the preliminary hearings at which this matter was touched upon, but I do not consider it necessary to refer to every detail of these matters. The following appear to be the salient considerations under this heading.

[122] The question of a satisfactory means of identifying documents which had or had not been provided was first raised by the applicant's solicitors in a letter of 12 February 2008 in which they asked the Senior Coroner to confirm that he had received all of the documentation to be found on the Holmes database. On 20 February 2008 the Senior Coroner responded, pointing out that the next of kin were only entitled to those documents which were "relevant to inquest purposes". On 22 and 25 February 2008 the applicant's solicitors again reiterated that they were entitled to all documents held by the police (subject to PII). On 3 March 2008 the Senior Coroner replied stating that it was not for him to interrogate the Holmes Index.

> "You have enquired whether I have been given access to the HOLMES database in this case. The answer is that I have not. I have neither the technical skills, nor

> the time and resources available to me to interrogate or investigate this, or any other database held by the police relating to this, or any other death which the police may have investigated. While I can, of course, query any apparent discrepancies and/or omissions, I am necessarily reliant upon the police in ensuring [sic] that they have fully discharged their obligation under section 8. This is something that is necessarily inherent in any discovery/disclosure process."

[123] The question of the provision of some form of index was ventilated in the course of a preliminary hearing held on 11 March 2008. In the course of length exchanges between counsel for the next of kin, for the Chief Constable and for the Senior Coroner, Mr Hanna QC, senior counsel for the Senior Coroner, suggested that a form of list should be prepared by the police, and it is clear that the Senior Coroner supported this suggestion and encouraged the police to provide such a list.

[124] It is also clear that the applicant's solicitors recognised that the obligation had been placed upon the shoulders of the police to provide such an index, because on 9 April 2008 they wrote a lengthy letter to the Crown Solicitor in relation to a great many individual documents, and categories of documents, that they said they were entitled to, and, inter alia asked for proper index and paginated bundles to be provided when disclosure was being made, because as they quite understandably pointed out:

> "It has proven an extremely difficult and time-consuming exercise for us to review the documentation provided and the manner in which disclosure has been provided to date as operated so as to mask the deficiencies in the process."

Specifically the request was made that:

> "In addition the Coroner and the Next of Kin should be provided with print-outs from the Holmes database detailing all Statements, Documents, Actions, Messages, Reports, Exhibits, Interviews and any documents separately categorised. The print-out provides a simple mechanism for enabling the Coroner and the Next of Kin to cross-check the documents received."

[125] On 9 May 2008 Ms Meegan of the Crown Solicitor's Office responded to earlier correspondence from the applicant's solicitors about what documents had or had not been provided, and in the course of that she stated:

> "The new inquest bundles have been indexed using the Holmes database as a basis for same. My client is prepared to make same available to the Senior Coroner so that he can cross-check and satisfy himself that all documents have been made available to him."

[126] The question of the provision of the Holmes Index appears to have lain dormant whilst other matters were being debated, but it was raised again by the applicant's solicitors in a letter to the Senior Coroner on 13 October 2008, in the course of which they ask:

> "2. You direct the PSNI to provide you with a full Index of the Holmes database. This Index is clearly a document falling within the meaning of s. 8 of the Coroner's Act (NI) 1959 and should have been disclosed by you in compliance with the PSNI's obligations in any event.
>
> 3. Subject to any redactions you disclose to us the full Index of the Holmes database."

[127] In the course of a preliminary hearing on 29 October 2008 Mr McGleenan, counsel on behalf of the Chief Constable, said:

> " We give you the material, you perform that exercise. There is no need for other parties to be given a description of the documents in whatever form."

[128] On 18 November 2008 the applicant's solicitors made it clear that if the Senior Coroner did not provide them with the information they were seeking about the documents that he had determined were relevant they were considering instituting judicial review proceedings. See page 217 of the exhibits.

[129] It appears that the Senior Coroner was led to believe that the police would provide him with the Holmes Index by 31 December according to remarks he made at a preliminary hearing on 22 January 2009. The Senior Coroner queried why he had not received the Holmes Index and the transcript records that Mr McGleenan said:

> "I do not think we have given a positive indication that we were supplying the Holmes Index in its entirety."

To which the Senior Coroner replied:

> "Well there is no reason why clarification and the Index perhaps could not be provided within a matter of days."

The Senior Coroner went on to indicate that a speedy response was required.

[130] It is surprising that in the face of the undertaking given on behalf of the police in May 2008 that the Holmes Index would be provided Mr McGleenan's comments were not queried, particularly by counsel for the applicant as it was the applicant that sought the Holmes Index and the applicant's solicitors had been told that it would be provided. I draw attention to this because the Senior Coroner is criticised for not ensuring that the Holmes Index had been provided more expeditiously, yet when a statement is made on behalf of the police which was clearly contradictory of the undertaking given to provide the Index in May 2008, counsel for the applicant did not avert to that either. One can well understand that in the course of a lengthy and complex inquest where there have been many exchanges of correspondence, preliminary hearings and debates as to the production of various documents, it is easy to overlook that a statement is being made which contradicts an earlier undertaking. The significance of this is, however, that the alleged failure of the Senior Coroner to ensure that this Index was provided more expeditiously is said to be indicative of bias on his part, yet if this Index is as central to the preparation of the applicant's case as is now being asserted one would have expected Mr McGleenan's statement to have been contradicted, if not in the course of the preliminary hearing itself certainly in correspondence very soon afterwards.

[131] I have come to the conclusion that the applicant's submissions on this part of the application are based upon a false premise, namely that the Coroner was obliged to obtain the Holmes Index to comply with the applicant's request that <u>he</u> then check whether he had received documents which he considered relevant, based not upon what the police had supplied to him, but on the basis of an independent evaluation by him of that material when compared with indications given by the Holmes Index. A coroner is obliged to seek relevant documents from the police, but it is evident that the Senior Coroner did not attribute to the Holmes Index the importance which from time to time the applicant's advisors have sought to attribute to it. Following the exchanges at the preliminary hearing of 11 March 2008 the applicant's solicitors then directed their request for the provision of the Holmes Index to the Crown Solicitor's Office and were expressly informed that it was being provided to the Senior Coroner. Thereafter the matter does not appear to have been pursued by either the applicant's advisers or the Senior Coroner, no doubt because the emphasis in the proceedings had turned to the efforts of the applicant's solicitors to obtain the investigating

officer's report from the police, a matter in respect of which the Senior Coroner gave a ruling favourable to the applicants on 25 June 2008.

[132] The applicant's advisers knew from the preliminary hearing of 11 March 2008 that the Senior Coroner supported the suggestion that the police provide some form of comprehensive index of the documents provided to the Senior Coroner and the next of kin in redacted and unredacted form. The applicant's advisers were aware that the PSNI had undertaken to provide the index to the Senior Coroner, yet in June and again in December 2008 they did not, so far as I can ascertain from the material before me, pursue their claim that the Chief Constable produce a copy of the Holmes Index either to the Senior Coroner or to themselves. Whatever the position was in the June 2008 judicial review proceedings, I can see no reason why the applicant's advisers did not seek the Holmes Index from the Chief Constable in the course of the judicial review proceedings that were heard by Stephens J in December 2008.

[133] In any event, the Senior Coroner did seek the Holmes Index, and, as already stated, declared that he had expected it by 31 December. When it was not produced he raised this publicly, and made it clear that he expected to receive it very soon, and I was informed by Mr Macdonald that it appears to have been delivered on or about 4 February 2009. Whilst it is correct that the Crown Solicitor's office had undertaken to provide the Holmes Index to the Senior Coroner in May 2008, and did not do so for several months, the importance of the Holmes Index was much greater for the applicants that it was for the Senior Coroner. The applicant pursued the matter with the Chief Constable in April but did not subsequently pursue the matter against the Chief Constable for reasons which do not appear. Despite that it is now sought to erect upon the Senior Coroner's failure to obtain the Holmes Index an edifice which it is suggested indicates that he was guilty of apparent or substantive bias.

[134] I do not believe that the facts as I have outlined them support the contention that the Senior Coroner's attitude towards obtaining the Holmes Index was indicative of bias. If this was as important to the applicants as is now inferred, they could have and should have pursued the matter themselves under the obvious heading of the s. 8 obligation of the police to produce all documentation to the Coroner, and/or their legitimate expectation argument that they were entitled to all of the documents on the basis of the 2000 undertaking. I am not persuaded that any failure on the part of the Senior Coroner to press the Chief Constable more vigorously for production of the Holmes Index, not to facilitate the discharge of his duties but to facilitate the preparation of the applicant's case, can be construed as evidence of bias in any form. I consider that the applicant has failed to establish his case under this heading under the Porter v. Magill test.

Conclusion.

[135] In the course of his submissions Mr Macdonald suggested that bias could be established by the cumulative effect of the actions of the Senior Coroner which have been considered under each of the specific headings. Whilst I do not rule out that in some circumstances the cumulative effect of a judicial officer's actions, even if each individually is not established as displaying bias, may be capable of amounting to bias when looked at in their entirety, in the present case I am satisfied that the applicant has failed to establish that the actions of the Senior Coroner have been indicative of apparent or actual bias on his part, or that he has in any respect predetermined matters which are to be considered before him. The application is accordingly dismissed.