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Judgment: approved by the Court for handing down | *Delivered:* **17/11/2014**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF THREE APPLICATIONS BY HUGH JORDAN FOR JUDICIAL REVIEW

JORDAN'S APPLICATIONS 13/002996/1; 13/002223/1; 13/037869/1

Before: Morgan LCJ, Girvan LJ and Gillen LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is the judgment of the court to which each member has contributed.

[2] On 25 November 1992 Patrick Pearse Jordan (the deceased) was shot and killed at Falls Road, Belfast by an officer of the Royal Ulster Constabulary (RUC) later identified as Sgt A, a member of the RUC's Headquarters Mobile Support Unit (HMSU). These are appeals and cross appeals in respect of judicial review applications by Hugh Jordan, the father of the deceased, concerning the investigation of his son's death and the conduct of an inquest which was heard before the Coroner, Mr Sherrard, with a jury between 24 September 2012 and 26 October 2012. Mr Macdonald QC and Ms Quinlivan QC appeared for Mr Jordan, Mr McGleenan QC and Mr Wolfe appeared for the PSNI and Mr Simpson QC and Mr Dornan appeared for the Coroner. We are grateful to all counsel for their helpful written and oral submissions.

Background

[3] Stephens J heard the judicial review touching on the inquest. He summarised the material evidence given in the hearing at paragraphs 33 to 42 of his judgment. He stated that the central issue in the inquest was whether the killing was justified. He then considered at paragraphs 46 to 48 the factual questions which had to be

determined in relation to the shooting of the deceased, the debrief of those involved and the planning and control of the operation. There was no criticism of those paragraphs in the course of the hearing of these appeals and we consider it appropriate to incorporate them in this judgment with some minor modifications.

Inquest evidence

[4] Detective Superintendent AB and Detective Inspector AA gave evidence that they were part of the Tasking and Co-ordinating Group (TCG) responsible for co-ordinating a joint police/Army surveillance operation mounted in West Belfast on 25 November 1992 to monitor activity at Arizona St., which was thought to be a location for IRA bomb-making for the city centre and throughout the province. On 22 November 1992, three days earlier, a bomb had been defused in the city centre in Chichester Street. TCG were in radio communication with HMSU officers who were at the scene. The arrangement was that HMSU officers would act in support of surveillance personnel and might be tasked to stop a vehicle or perform searches. That afternoon, both AA and AB were in the operations room at Castlereagh. At around 3.40 pm there was a report that a red Ford Orion, BDZ 7721, was being driven in the area of Whiterock Leisure Centre and appeared to be on IRA business. AB said that the information was that the car was delivering or collecting IRA munitions. The Orion had been hijacked outside a community centre at Monagh Road, Belfast between 3.15pm and 3.30pm by two men who told the driver that they were "Irish Republican Army". One of the men in the back seat gave the driver the impression that he had a gun. He was told to drive to Whiterock Leisure Centre and ordered to go to, and remain at, the swimming pool viewing gallery. One of the men sat behind him. At approximately 7pm he was told to wait 10 minutes then report the car to the police as being hijacked.

[5] At 4.30pm the Orion was observed leaving Arizona Street. It was seen to travel in the direction of Upper Springfield Road and then went unsighted for a period. At 5pm the Orion was observed returning to Arizona Street. At approximately 5.08 pm the Orion left Arizona Street. It headed towards Andersonstown. In view of the previous activity around Arizona Street AB instructed M, a HMSU officer in the operation room, to have the car stopped. The car had defective rear lights and that was to be used as a reason for checking the vehicle out. He said that because of the earlier reports they could not let the vehicle go without a check. At its height, it was a suspicious vehicle. He said that he did not know who was driving it at that time.

[6] AA said that once a decision had been made to have the vehicle stopped the task and tactics then passed to the HMSU officers on the ground. HMSU would not have been instructed on how to stop the car. AA said he could not recall if there had been any assessment of the risk of stopping. He said that the overriding concern was whether a car bomb was going to the City Centre. The priority was to ensure that a bomb did not go to the City Centre because the IRA was hell bent on a bombing

campaign. AA recalled that a few days after 25 November 1992 a bomb had exploded in Upper Queen Street, Belfast, in which 27 people were injured.

[7] At around 5.18 pm HMSU reported that they had rammed the car after it had failed to stop, that one person had run off and been shot by police. Following the fatal shooting, a statement was released which claimed that the deceased was a member of the IRA and that the car had been hijacked.

[8] Officer M's specific role on that day was to direct communications and to coordinate the HMSU units on the ground. He said that HMSU gave effect to TCG decisions and that the rear stop was the safest way to stop the vehicle. He said that he did not anticipate a high speed chase and if he had he would possibly then have put crews into a different location. He accepted that he could be seen as being at fault for not anticipating that particular eventuality.

[9] Sergeant A was the most senior HMSU officer on the ground. He was in the front passenger seat of Call Sign 8. C was the driver of Call Sign 8 and B was the rear seat passenger sitting behind Sergeant A. Call Sign 12 was working in support of Call Sign 8. E was its driver, D was the front seat passenger and F was the rear seat passenger.

[10] Sergeant A gave an account of the pursuit of the car on the Falls Road and that account broadly matched the accounts given by the other officers in Call Sign 8. Sergeant A directed the driver of his vehicle to drive alongside the Orion and he signalled for Mr Jordan to stop. He said that Mr Jordan slowed down and then accelerated city bound on Falls Road. He described ramming the Orion. He said they tried a soft stop, which then became a forcible stop when Mr Jordan's car failed to stop.

[11] Sergeant A's account of the shooting was that when the cars had stopped he burst out of his vehicle from the passenger door and then moved back towards the Orion. He said that he saw the driver of the Orion on the road. He stated in evidence that the driver had already got out of the Orion by the time he got out of his vehicle. He described him as running at an angle from left to right away from him. He said that the driver had turned his head to the right, looking in his direction. He said in his evidence that he could see the driver's upper body but could not see the bottom part of his arms. He described the man's arms as being straight down, but said he could not see his hands and claimed that he had shouted "Halt police" or "Police halt". He said that the driver of the Orion, Mr Jordan, turned towards him in a clockwise direction. In his account to the police, he used the word "spun". He said that at this moment he feared that his life, or the life of the driver of his car, was in danger. He fired a short burst from his firearm, a Heckler and Koch MP 5. Sergeant A said that when he released the safety catch on his weapon he erroneously pushed it too far as a result of which the weapon went onto automatic rather than single shot. He fired 5 shots on automatic and maintained that

when he fired, the deceased was facing him. He accepted that the RUC Code of Conduct governing the discharge of firearms applied to him and that he had not given the warning required by the Code.

[12] All the officers were debriefed after the incident but before they were interviewed by CID officers. The debrief was conducted by Officer M under the supervision of Officer V, who had come in from leave for the purpose. They denied that the purpose of the debrief was to fabricate an account of the incident that would protect Sergeant A from prosecution. Sergeant A said that he gave his account in the presence of the other officers and they then gave their accounts, which were noted by Officer M and Officer Q.

[13] The case on behalf of the applicant was that his son, who was unarmed, did not turn but rather was running away presenting no threat when he was shot in the back and killed by Sergeant A. Alternatively it was contended that if the deceased did turn in the manner indicated then subjectively Sergeant A did not believe that his life or the lives of others were in danger and/or in any event the use of lethal force was not an appropriate response in the circumstances.

The factual issues in dispute

[14] In relation to the shooting of the deceased those matters were as follows:

(a) why Sergeant A had a round in the breech before he got out of his car;
(b) whether Sergeant A shouted "police, halt" before he fired;
(c) whether Sergeant A issued any warning that he was going to fire;
(d) whether the deceased did anything that, as a matter of objective fact, posed a threat to Sergeant A or any other police officer;
(e) whether Sergeant A's view of the deceased's hands was obstructed;
(f) whether the deceased turned around to face towards Sergeant A;
(g) whether the deceased was facing Sergeant A when Sergeant A fired at him;
(h) whether Sergeant A honestly believed that the deceased did anything that posed a threat to him or any other police officer;
(i) whether Sergeant A selected automatic fire rather than single shot deliberately or accidentally;
(j) whether Sergeant A was justified in firing in breach of the RUC Code of Conduct governing the discharge of firearms;
(k) whether Sergeant A could have taken another course of action, such as using the protection of his armoured vehicle as an alternative to firing at the deceased.

[15] In relation to the debrief those factual issues were:-

(a) whether it was appropriate to conduct a debrief prior to the interviewing of witnesses by CID;

(b) whether the primary purpose of the debrief was to facilitate the exoneration of Sergeant A.

[16] In relation to planning and control those factual issues were:-

(a) whether there was a clear line of command within the operations room;
(b) whether the TCG exercised any or any adequate control and supervision over the conduct of officers on the ground;
(c) whether TCG officers or Officer M gave any advice, guidance or directions to the police officers on the ground in relation to stopping the car and the importance or otherwise of stopping the driver;
(d) whether the decision to stop the vehicle by way of a casual stop, as opposed to a vehicle check point, and the absence of any clear direction as to what should happen in the event that the driver ran away caused or contributed to the death of the deceased; and
(e) whether, therefore, the planning and control of the police operation was such as to minimise recourse to lethal force.

The issues in the appeals

[17] There were three broad areas of dispute between the parties in the appeals. First, there was an issue about the disclosure and deployment of material. Stephens J found that the Coroner had erred in refusing to disclose the Stalker Sampson reports, which concerned a number of shootings in mid-Ulster in 1982, to Mr Jordan on the basis that the report was not relevant or potentially relevant. He also determined that the report of the Police Ombudsman for Northern Ireland (PONI) into the shooting dead of Neil McConville on 29 April 2003 together with the underlying statements of Officers AA and M in respect of that incident were potentially relevant and that the Coroner had erred in holding that they were not. As a result of these failures of disclosure Stephens J concluded that the inquest was not compliant with the procedural obligation arising from Article 2 ECHR. There had been a previous judicial review heard by Deeny J prior to the start of the inquest in which he had declined to order disclosure of the Stalker Sampson reports and that decision was the subject of appeal by Mr Jordan. The final issue on the disclosure point was the contention on behalf of Mr Jordan that he had a legitimate expectation as a result of an averment by Mr Mercier of the Crown Solicitor's Office in an affidavit sworn on 11 October 2000 that all material provided to the Coroner would also be provided to the family, whether relevant or not, subject to PII. Stephens J accepted that submission and the Chief Constable appeals that decision.

[18] Secondly, the Coroner had prepared a series of questions designed to promote a narrative verdict as to the circumstances in which the deceased met his death. It was submitted on behalf of Mr Jordan that the questions failed entirely to direct the jury to the issues in contention thereby distracting the jury from the determination as to whether the force used was justified and whether the operation

was planned and controlled so as to minimise recourse to lethal force. It was further submitted that the questions actually tended to point the jury towards the conclusion that the force used by Sergeant A was justified. Related to that point was the issue of the directions given by the Coroner. It was accepted that in Bennett v UK (ECHR 10 December 2010) the ECHR had rejected a submission that a Coroner's direction to a jury in respect of the justified use of lethal force was flawed because it did not invite the jury to consider a test of absolute necessity. The Court held that the direction by the Coroner in that case advising the jury to consider the honest belief of the police officer who fired a shot killing a suspect and whether the force used was reasonable having regard to the circumstances which were believed to exist was sufficient. In this case those representing Mr Jordan submitted that the Coroner's direction fell short of the required standard and in particular that he misdirected the jury in suggesting that Sergeant A's training made him react in the way that he did on the day in question. Stephens J dismissed the application in respect of those matters. Mr Jordan appeals those decisions.

[19] Thirdly, this was an inquest which involved both security and terrorist issues. It was accepted by all parties that in Northern Ireland such issues give rise to a real risk of bias in the sense that jurors may not come to the evidence with an open mind. It was submitted on behalf of Mr Jordan, therefore, that where there was a real risk of bias it could never be desirable for the purposes of section 18(2) of the Coroners Act (Northern Ireland) 1959 to summon a jury. In submissions, it was accepted on behalf of the Coroner that there was a real risk of bias but contended that the Coroner had put in place sufficient safeguards to diminish that risk and to make it desirable to have participation by the public in this inquest by way of a jury. The learned trial judge found that the safeguards were insufficient and that a jury should not have been empanelled. The jury issue also impinged on whether the Coroner was correct to accept the jury's outcome as a verdict. Although the jury was able to reach agreement on the non-contentious matters it was not able to reach a unanimous verdict on any of the contentious matters. The Coroner accepted that outcome as a verdict. The learned trial judge found that such an outcome did not constitute a verdict for the purposes of Article 2. The Coroner appealed on both issues. We will now deal with each of these matters in turn.

Disclosure

The law

[20] In Jordan v UK (2003) 37 EHRR 2 the ECHR recognised that inquests had become the most popular legal forum in Northern Ireland in which to challenge the police and security forces on the use of lethal force. The scope of the investigation to be examined at an inquest was addressed at paragraphs 106 to 109.

> "106 For an investigation into alleged unlawful killing by State agents to be effective, it may generally

be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.

107 The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

108 A requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

109 For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

The importance of the timely disclosure of documentation to the next of kin was acknowledged at paragraph 134 of the judgment.

[21] The ECHR also examined the issue of disclosure in the particular context of the Stalker/Sampson reports in McKerr v UK (2002) 34 EHRR 20. That was a case in which the inquest concerned the circumstances surrounding the shooting dead of Mr McKerr by police. Although the Stalker/Sampson reports were directly concerned with that incident among others the RUC contended that it was not relevant and no part of it had to be disclosed to the next of kin. The ECHR addressed this at paragraph 151 of its judgment.

> "This Court is not in a position to assert whether the Stalker and Sampson Reports contained any material relevant to the issue of the existence of any shoot-to-kill policy. There are strong indications that the Stalker Interim Report did so—the RUC have criticised Mr Stalker's attempt to re-investigate the shootings in addition to the obstructions of justice. In his statement to Parliament, the Attorney-General referred to the DPP reviewing the Reports and the evidence concerning the shooting incidents also. The Reports in any event dealt with the evidence of obstruction of justice, which was relevant to the wider issues thrown up by the case. The Court finds that the inquest was prevented thereby from reviewing potentially relevant material and was therefore unable to fulfil any useful function in carrying out an effective investigation of matters arising since the criminal trial."

[22] The concept of potential relevance imports a broad ambit to the obligation of disclosure and that was adopted in this jurisdiction in Re Chief Constable PSNI's Application [2008] NIQB 100 and Re PSNI's Application [2010] NIQB 66. The test for relevance was helpfully addressed in the judgment of the majority in The Commissioner of Valuation for Northern Ireland v Debenhams plc [2014] NICA 49 at paragraph 13.

> "[13] Phipson proposes that the test of evidential relevancy is best expressed in the statutory formulation in section 55 of the Australian Evidence Act 1995:
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> > 'The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of

> the probability of the existence of a fact in issue in the proceedings.'

Rule 401 of the Federal Rules of Evidence (USA) defines relevant evidence as evidence having any tendency to make the existence of any fact more probable or less probable. The Evidence Act 2006 in New Zealand states that:

> 'Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceedings.'

It is not necessary that the relevance of a fact should appear at the time it is proved. The court will often admit evidence on counsel's undertaking to show its bearing or admissibility at a later stage, failing which it would be disregarded. In every case the question of relevance of a particular item of evidence can be decided only by looking at it in the context of the whole of the evidence in the case. Modern courts are less concerned with degrees of probative value, taken in the abstract, than with the possible disadvantages of admitting or excluding particular items in evidence. In Clarke v O'Keefe [1997] ATP and CR 126 at 133 Peter Gibson LJ in the Court of Appeal said:

> 'It was said, as long ago as 1969, by no less an authority than Megarry J in Neilson v Poole [1969] 20 P and CR 909 that the modern tendency was towards admitting evidence in boundary disputes and assessing the weight of the evidence rather than excluding it. That tendency has, in my experience not diminished in the intervening years.'

As pointed out in Phipson 18th Edition at paragraph 7.16, a similar tendency has been equally apparent in most other areas of the law."

[23] There are two House of Lords decisions that assist in identifying the relevant facts in issue in this inquest. The first is R (Middleton) v West Somerset Coroner and another [2004] 2 AC 182. That was an appeal concerning an inquest into the death of

a prisoner who hanged himself but at paragraph 16 of his judgment Lord Bingham examined the procedural obligation in a lethal force case.

> "It seems safe to infer that the state's procedural obligation to investigate is unlikely to be met if it is plausibly alleged that agents of the state have used lethal force without justification, if an effectively unchallengeable decision has been taken not to prosecute and if the fact-finding body cannot express its conclusion on whether unjustifiable force has been used or not, so as to prompt reconsideration of the decision not to prosecute. Where, in such a case, an inquest is the instrument by which the state seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's conclusion on the central issue is required."

[24] It was further submitted that additional guidance can be obtained from the decision in Jordan v Lord Chancellor [2007] UKHL 14. In that case the House of Lords held that the Human Rights Act 1998 did not apply to the Jordan inquest, a decision effectively overturned in Re Brigid McCaughey's Application [2011] UKSC 20, but still identified an extended purpose to the inquest at paragraph 37.

> "There was no issue between the parties concerning the purpose or scope of an inquest. Thus I take it to be common ground that the purpose of an inquest is to investigate fully and explore publicly the facts pertaining to a death occurring in suspicious, unnatural or violent circumstances, or where the deceased was in the custody of the state, with the help of a jury in some of the most serious classes of case. The coroner must decide how widely the inquiry should range to elicit the facts pertinent to the circumstances of the death and responsibility for it. This may be a very difficult decision, and the enquiry may (as pointed out above) range more widely than the verdict or findings."

The disputed disclosure

[25] In November and December 1982 there were three separate incidents in County Armagh in which police shot dead six alleged terrorists in disputed circumstances. In 1984 John Stalker was appointed to carry out an investigation into allegations of a cover-up by police of their role in the shootings. He prepared an interim report. The investigation was concluded by Colin Sampson. The outcome

was the Stalker/Sampson reports. A redacted copy of the reports was made available to those directly involved in the inquests arising from those deaths subject to an undertaking to use the reports solely in connection with those inquests. Since some of the lawyers involved in this case were also involved in the inquests into those deaths it was agreed that the reports should be made available to all of the lawyers representing Mr Jordan on their undertaking not to disclose the report to the family but to use it solely for the purposes of the Jordan inquest if material. It followed, therefore, that the representatives of Mr Jordan were in a position to make submissions on the potential relevance of the report. If potentially relevant a redacted copy of the report would normally then have been made available to the next of kin.

[26] M and V were involved in a number of the 1982 incidents. M was the sergeant of a Special Branch (SB) unit involved in an incident at Ballynerry Road North, Lurgan on 14 November 1982 in which Michael Tighe was killed and Martin McCauley was seriously injured. M fired 33 shots in the incident. M and V attended a debrief after the incident where a cover story was formulated that M had seen a gunman approaching a shed. M made an initial statement to CID giving that false account of the incident purportedly to protect the life of a source. There was a listening device in the shed and M had been directed to go to the shed because of noises heard through the listening device.

[27] M and V also attended a debrief in respect of an incident on 12 December 1982 when 2 people were shot dead by a SB unit at Mullacreevie Park, Armagh. A cover story about the vehicle breaking through a fictitious check point and injuring an officer was given to the CID investigators to conceal SB involvement. V was also the head of a unit that was involved in the shooting dead of three alleged terrorists on 11 November 1982. He was present at a debrief where he alleged senior officers instructed those involved to make false statements to CID to conceal SB involvement in the incident.

[28] The Coroner made available to the next of kin the statements made by M and V to CID and the Stalker Sampson team together with all relevant interview transcriptions. That was plainly because the credibility of M and V was crucial to the issue of whether the purpose of the debrief in this case was to facilitate the exoneration of A. The next of kin wanted to deploy some further material from the report in cross examination. M contended that he had been instructed by a named senior police officer who is now deceased to give an account referring to the gunman in the field in respect of the incident on 24 November 1982 in order to protect the life of a source. The Stalker/Sampson reports indicate that the senior officer denied that M had told him that he had not seen anyone with a rifle.

[29] Both M and V had participated in debriefs after the 1982 incidents after which false accounts were then provided to the investigating CID officers. In the interim Stalker report dated 10 April 1987 it was stated that where shooting incidents occur

there should be no debriefing of officers before interview with the CID unless on the explicit instruction of a senior officer. That approach was not followed in this case.

[30] In respect of the incident on 12 December 1982 the report alleged that V had instructed an officer to make up the story that he had been struck by the car in which the deceased were travelling as it tried to break through a non-existent check point. It was further alleged that V instructed the officer to attend at the scene of the shooting and impregnate his clothes with dirt from the scene to add credence to the account. It was reported that another officer alleged that he had accompanied the first officer to the scene to enable this to occur.

[31] There were further matters concerning the credibility of V in respect of the circumstances in which he corrected his false statements, the extent to which he had been responsible for fabricating statements and manipulating officers and his preparedness to encourage an officer to give a false account and stand over it at a Coroner's Court.

The Coroner's ruling

[32] Prior to the commencement of the inquest the Coroner ruled by letter dated 17 August 2012 that he did not consider that the Stalker/Sampson reports were relevant to the issues in the inquest. In his affidavit sworn on 17 September 2012 in the proceedings before Deeny J the Coroner indicated that he asked himself whether the material was probative or potentially probative of the issues arising in this inquest. He concluded that it was not. That decision was the subject of a challenge by Mr Jordan which was dismissed by Deeny J, partly on the basis that the Coroner would keep the matter open for review in the course of the hearing.

[33] M and V gave evidence on 4, 5 and 8 October 2012. Submissions were made on 7, 8 and 11 October inviting the Coroner to revisit his earlier decision on relevance in light of the matters at paragraphs 28 to 31 above. The Coroner rejected the submission that he should allow the deployment of any sections of the report on 19 October 2012 and gave his reasons in writing on 6 November 2012 after the conclusion of the inquest. We set out below the relevant parts of the decision.

> "**Relevance of the Stalker Sampson Reports**
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> 2… Following a request by the next of kin for disclosure of the Stalker Samson reports, I read the reports at Seapark in the summer. I formed the view that the reports were not relevant to the issues to be determined in the Jordan inquest and I informed the solicitors for the next of kin of my decision by correspondence of 17 August 2012…

> 4… I provided a further explanation of my decision not to order disclosure of the reports in an affidavit dated 17 September 2012.
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> 7. The submissions advanced on behalf of the next of kin invited me to reconsider my decision on the relevance of the reports; it was contended again that the contents of the reports themselves were relevant or potentially relevant to the question of how Pearse Jordan died and should be available for deployment in the examination of witnesses.
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> 8. Having given careful consideration to the various submissions and mindful of the evidence given by M and V… I was not persuaded to depart from my original decision that the reports were not relevant (or potentially relevant) to the issues to be determined in Jordan. I therefore confirmed the decision originally communicated to the parties on 17 August.
>
> 9. The submissions on behalf of the next of kin also directed me to specific passages within the reports on the basis that the evidence given by M and V at the inquest had clearly demonstrated the relevance of those passages. I reviewed those passages with particular care in the light of the evidence given by the officers, but I was not persuaded on that basis to depart from my decision on relevance… I remained of the view that the underlying material provided to the next of kin and deployed by counsel for the next of kin represented the totality of Stalker Sampson material that was properly subject to the duty of disclosure in the context of Jordan."

The trial judge's decision

[34] Stephens J recognised that before considering the question of deployment the Coroner first had to consider whether the materials were potentially relevant. If they were potentially relevant they should have been made available to the next of kin, suitably redacted if necessary. The Coroner could then have entertained submissions on the question of relevance. Even if the Coroner considered that the materials were relevant he would still have to consider whether within the context of the inquest it was appropriate to permit the material to be introduced. In carrying out that task the

Coroner can take into consideration the extent to which the evidence may distort the trial or distract the attention of the jury, whether the probative value of the evidence would outweigh any unfair prejudice, the impact in time, cost and personnel resources in extending the trial and the potential prejudice to witnesses recalling matters long closed where documentation has been lost and recollections have faded. These were factors suggested by Lord Bingham at paragraph 6 of O'Brien v Chief Constable of South Wales [2005] UKHL 26 in the closely analogous field of civil litigation. Clearly in the absence of a jury the balance may come down differently and more emphasis should be given to the principle that all relevant evidence is prima facie admissible and the judge should give it the weight it deserves.

[35] The judge concluded that the Coroner's written decision of 6 November 2012 was solely about relevance. He accepted the submissions of the next of kin that the matters set out at paragraphs 28 to 31 above could affect the credibility of M and V and that they were, therefore, both potentially relevant and relevant. The judge accepted that the Coroner may not necessarily have permitted deployment of all of the material but he concluded that the Coroner erred in determining that the material was not relevant and consequently had failed to consider whether it could be deployed.

The submissions of the parties on Stalker Sampson

[36] Mr McGleenan essentially made two points on behalf of the appellants. The first was that the learned trial judge had been wrong to conclude that the Coroner had determined not to allow the deployment of the material on relevance grounds only. He submitted that the analysis of the Coroner's ruling had to take into account the submissions made on behalf of the parties which were largely directed to whether the admission of the materials would disrupt the progress of the inquest. He further pointed out that in relation to the challenge before Deeny J the Coroner swore an affidavit on 17 September 2012 in which he said at paragraph 14 that even if he had determined that the reports were potentially relevant and should be disclosed he was not persuaded that any further application to deploy the reports of the hearing of the inquest would have been successful. That was clearly a reference to what was described as the control test in O'Brien v Chief Constable of South Wales. In his affidavit in respect of these proceedings the coroner stated at paragraph 22 that in relation to the disputed matters he remained of the view that appropriate disclosure had been made and that it was not necessary or desirable for the relevant witnesses to be recalled. Mr McGleenan submitted that this was a further reference to the control test.

[37] The second point made on behalf of the appellants was that in any event the application to deploy the materials would have been refused because of the disruptive effect it would have had upon the conduct of the inquest. The issues touching upon the involvement of M and V in the debriefing which occurred

subsequent to the 1982 incidents was disputed and was inevitably going to form part of the inquest into those deaths. To allow material from the Stalker Sampson reports to be introduced at this stage would almost inevitably have resulted in the interruption of the inquest and led to extensive delay while further materials were subject to PII redaction and made available to the witnesses. The next of kin submitted that the trial judge had approached the matter correctly.

McConville

[38] Similar disclosure issues arose from the death of Neil McConville at Ballinderry on 29 April 2003. The deceased was the driver of a motor vehicle which was under surveillance by a HMSU unit on the basis of intelligence suggesting that the vehicle was to be used to collect a gun. AA was the silver commander in the control room responsible for planning and control of the operation. M was the most senior HMSU officer in the control room. AA Directed EE to instruct the surveillance vehicles to stop the deceased's vehicle. The officers were told to stop the vehicle from behind. A collision took place before the vehicle was brought to a stop. As officers approached the vehicle the deceased reversed the car at speed and spun round. One officer discharged his weapon killing the deceased because he feared that the deceased was about to strike other officers in his path with his vehicle.

[39] The Police Ombudsman for Northern Ireland investigated the death and her report was published in 2007. The report was a public document. The police also provided to the Coroner a transcript of interviews between the Police Ombudsman investigators and AA. The report was critical in particular of the decision to stop McConville's vehicle from behind describing it as a high risk tactic. The same tactic was used in Jordan. In his evidence at the Jordan inquest AA denied that stopping a vehicle from behind was high risk. The next of kin sought access to the interview material in respect of AA and leave to put the conclusion of the Ombudsman to the witness. The Coroner decided that the material was not relevant and refused to allow the question on the basis that the Ombudsman's conclusion was a matter of opinion.

[40] Stephens J recorded that counsel for the Coroner initially accepted that the materials were relevant and then changed his mind. He found that the underlying interview material was potentially relevant particularly in relation to the question of the scope of the inquest. It was suggested by Mr McGleenan that the issue of scope should have been determined first and the question of disclosure dealt with thereafter.

Conclusion

[41] We are satisfied that the decision of the Coroner in relation to the Stalker Sampson reports set out in his ruling dated 6 November 2012 was a determination based on relevance. That is clear from the heading of the ruling itself, the indication

in paragraph 2 that his earlier decision of 17 August 2012 was based on relevance, his indication at paragraph 8 that he was not persuaded to depart from his original decision that the reports were not relevant or potentially relevant and his determination to confirm the decision originally communicated to the parties on 17 August 2012.

[42] The credibility of M and V was accepted by the Coroner as in issue at the inquest at paragraph 3 of his ruling given on 6 November 2012. At paragraph 44 of his judgment Stephens J identified the central issue as being whether the killing was justified but recognised that there were issues about the debriefing which went to the credibility of the accounts given about the shooting and were therefore relevant to the central issue as to whether the killing was justified. The matters set out at paragraph 28 to 31 above touched on the credibility of M and V and in our view were plainly potentially relevant in determining the scope of the inquest.

[43] It was submitted by Mr McGleenan that it was for the Coroner to determine the scope of the inquest before considering the question of disclosure of documents. We reject that submission. The starting point is to identify all potentially relevant information. Such information, suitably redacted if necessary, should be made available to all of the parties concerned in the inquest in order to assist in establishing relevance and thereafter determining scope. Because he did not recognise the relevance or potential relevance of the documents in question the Coroner did not get to the next stage of determining the scope of the inquest which, the parties agreed, remained undefined.

[44] The Coroner had sworn an affidavit in the application before Deeny J in which he said at paragraph 14 that even if he had determined that the reports were potentially relevant and therefore should have been disclosed, he was not persuaded that any further application to deploy the reports at the hearing of the inquest would have been successful. He did not give any reasons for that conclusion. It was submitted that the inquest would have been delayed because of the need to carry out PII redactions of Stalker Sampson documents which might fairly have to be made available to the witnesses being cross-examined. Those are documents which the ECHR concluded should have been made available in the McKerr case in 2002. Any argument based upon delay in redacting the documents would have had to be very carefully scrutinised. The next of kin indicated that they were content for protective redaction to occur.

[45] This observation of the Coroner must also be seen in the context of his conclusion about the potential relevance of the material. The next of kin successfully argued before the learned trial judge that the material was relevant because it touched upon the credibility of crucial witnesses in relation to the debrief of Sergeant A. The learned trial judge rightly regarded that as an important aspect of the investigation. In those circumstances compelling reasons would have been required

to exclude an avenue of enquiry which sought to undermine the police evidence on the debrief.

[46] Similarly we agree that the learned trial judge was correct to conclude that the underlying material generated by the Police Ombudsman in McConville was potentially relevant in relation to AA and should have been disclosed. We note that the learned trial judge considered that this alone would not have justified a decision to direct a fresh inquest. We were satisfied, however, that the failures of disclosure in relation to the Stalker Sampson reports were sufficient to justify that course. We directed that the verdict be quashed and the matter remitted to a different Coroner at the end of the first day of the oral hearing.

Legitimate expectation

[47] This issue arose out of previous judicial review proceedings in 2000 by Mr Jordan in which he sought disclosure of documents which had been forwarded by police to the Coroner but which had not been provided to the next of kin. The applicant relied upon Force Order 61/2000 which provided that all material provided to the Coroner should normally be made available to those whom the Coroner considered were interested parties and also on the Human Rights Act 1998 which had come into force on 2 October 2000. An affidavit in reply was sworn by David Mercier on 11 October 2000 setting out the view of the Chief Constable that the documents were not relevant and that there was accordingly no duty of disclosure. At paragraph 14 of that affidavit he stated:

> "In the particular circumstances of this case, which he considers unique in many ways, the Chief Constable has now determined that the materials which are the subject matter of this application for judicial review will, subject to issues of public interest immunity, be disclosed to the applicant."

That disclosure, including the material which the Chief Constable considered irrelevant, was sufficient to dispose of the judicial review application.

[48] In 2008 Mr Jordan launched a further judicial review in anticipation of the inquest starting on 14 January 2009 in respect of documents disclosed to the Coroner but not the next of kin. Although the Coroner agreed to make available all relevant documents to the next of kin, the applicant sought access to the entirety of the documentation provided by police to the Coroner. He relied upon the affidavit of Mr Mercier as the basis for a legitimate expectation that such documents would be provided. Ms Quinlivan also relied upon a letter of 9 May 2008 from the Crown Solicitor's Office to Mr Jordan's solicitor. It was sent in the context of ongoing issues around disclosure and the preparation by the police of inquest bundles. The particular passage upon which reliance is placed was as follows:

> "I can confirm that the new PSNI inquest hearing bundles of non-sensitive materials are virtually complete and will be available by 16 May 2008.
>
> These bundles will be fully indexed, comprehensible with fewer redactions and reader friendly.
>
> For the record I wish to make it clear that the new PSNI inquest bundles contain substantial quantities of what we consider to be irrelevant documents. If this inquest were being prepared today then the bundles would have a different composition. However, as previously acknowledged in view of the fragmented history of these proceedings, my client is prepared to treat this as a unique case and make the additional material available."

It was accepted before Stephens J in 2008 that this letter created an expectation that the documents in question would be provided.

[49] In his judgment on the 2008 application Stephens J concluded that both the affidavit of 11 October 2000 and the letter of 9 May 2008 gave rise to a legitimate expectation that included the disclosure by police to the next of kin in the future of all documents subsequently provided to the Coroner subject to PII redaction. Although that decision was not appealed the matter was reargued in respect of future documents in these proceedings and Stephens J confirmed his previous view.

[50] The Chief Constable now appeals against that part of the judgment. In a case such as this a claim to legitimate expectation can be based only upon a promise which is "clear, unambiguous and devoid of relevant qualification": see Bingham LJ in R v Inland Revenue Commissioners, Ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545 or a course of conduct which has the same effect. In his affidavit of 11 October 2000 the disclosure promise was made in respect of "the materials which are the subject of this judicial review application". The materials the subject of the judicial review application were those then in existence which had been given to the Coroner and not provided to the next of kin. The promise did not contain any clear and unambiguous statement that it applied to any documents that would be generated in the course of preparation for the inquest. At paragraph 10 of his judgment in 2008 Stephens J transposed the promise into one made in respect of the inquest rather than the judicial review that he was hearing. In our view he was plainly wrong to do so. That led him to the conclusion that the promise was prospective as well as retrospective.

[51] The judge then turned to the letter of 9 May 2008. Six lever arch files of documents were disclosed in accordance with that undertaking. In light of the view

that he had formed of the undertaking in the affidavit of 11 October 2000 the judge concluded that the letter of 9 May 2008 was also prospective. For the reasons set out above we do not accept that premise and in our view the letter of 9 May 2008 relates to the documents disclosed at that time. We do not accept, therefore, that there was any clear, unambiguous, unqualified promise which could give rise to a legitimate expectation in respect of future conduct.

[52] We recognise that there was no appeal from the 2008 judgment but that is not altogether surprising as in practical terms there was little to be pursued in any appeal since the documents in dispute were provided and the police were no longer seeking to prevent their disclosure. The Order of Stephens J in the 2008 proceedings related only to documents then in existence. He did not make any declaration about future documents. His reasoning as to future documents was not, therefore, critical to his decision. That explains why he entertained the issue de novo in his judgment in these proceedings. We do not consider, therefore, that the failure to appeal the reasoning in the 2008 judgment should prevent us allowing the appeal by the PSNI on this point.

Deeny J

[53] The final point on disclosure is the appeal from the decision of Deeny J made on 26 September 2012 where he refused to quash the decision of the Coroner to disclose the Stalker Sampson report. At an earlier hearing the appellant recognised that this appeal was potentially academic in light of the fact that matters had progressed in the course of the inquest. The appeal was maintained in existence at the suggestion of the court in case any suggestion was made that the parties were fixed with any of the judge's conclusions. In light of the findings that we have made this appeal is now academic and there is no purpose to be served by pursuing it.

[54] We wish, however, to make two observations on the judgment. First, counsel detected some measure of criticism of their conduct in paragraph 35 of the judgment where the judge referred to a number of passages from the Code of Conduct for the Bar of Northern Ireland. We do not understand the judge to be making any such criticism but for the avoidance of doubt are happy to acknowledge that counsel have acted entirely properly in this and other related hearings.

[55] Secondly, at paragraph 30 of the judgment the judge appeared to assert that it was fair for documents to be provided to legal representatives but not to the next of kin. We recognise that there may be some limited circumstances where such a course may be appropriate if information is sensitive but wish to make it clear that the next of kin ought to be involved to the extent necessary to safeguard their legitimate interests.

The jury questions

[56] In paragraph 271 to 285 of his judgment the judge dealt with the questions which the coroner invited the jury to consider and with his directions to the jury. On 16 October 2012 the coroner produced draft questions for consideration by the parties. Counsel and solicitors for the next of kin submitted proposed questions which according to counsel set out in a clear and logical sequence the issues which fell to be addressed by the jury in producing a verdict determining the outcome of the inquest. On 23 October 2012 the coroner produced a final draft of the questions which he proposed to ask the jury to consider. These kept closely to his original draft and in effect the coroner rejected the alternative formulation of questions as put forward on behalf of the next of kin.

[57] The six questions posed by the jury were as follows:

> "1. Summarise the scenario in which the death occurred, so that if I were a newcomer to the case with no knowledge of it, I could understand the broad background and circumstances.
> 2. What role, if any, did the Royal Ulster Constabulary have in the death of Mr Jordan? In particular:
>
> (a) What was the nature and purpose of the operation in which the RUC was involved on 25 November 1992?
>
> (b) If you find that the death occurred as the result of a shot or shots fired by a police officer, describe as precisely as possible how the shooting took place. Consider in particular any actions, if there were any, by Mr Jordan before and at the time the shot or shots were fired, his position and orientation, and the actions and position of the officer who fired the fatal shot or shots.
>
> (c) If you find that the death occurred as the result of a shot or shots fired by a police officer then when the officer fired what was the officer's state of belief concerning the actions of Mr Jordan?
>
> (d) If you conclude that Mr Jordan died as the result of a shot or shots fired by a police officer

then, having regard to your answer above regarding the officer's state of belief, was the force used by the officer reasonable in the circumstances?

(e) Having regard to your answers above, particularly in relation to the officer's state of belief was there another reasonable course of action (or other reasonable courses of action) open to the officer as an alternative to firing?

(f) Having regard to the above, was the operation conducted by the officers at the scene in such a way to minimise to the greatest extent possible any recourse to lethal force?

(g) Was there any aspect of the training of, or planning by, any RUC officer at the scene that could account for the death?

3. Please specify the wound or wounds sustained by Mr Jordan. Please specify, if you consider it possible to do so, what wound or wounds caused Mr Jordan's death? Is it possible to say in what order any wounds sustained by Mr Jordan occurred? If so, in what order was the fatal wound or were the fatal wounds sustained?

4. Was the operation planned, controlled and supervised in such a way by the RUC as to minimise to the greatest extent possible any recourse to lethal force? Consider in particular:

(a) The purpose of the operation.

(b) The roles and responsibility of the various personnel involved.

(c) Whether there were other reasonable steps that might have been taken in the course of the planning or control – supervision of the operation.

5. What part if any did Mr Jordan have in his death?

> 6. Beyond any findings you have made in consideration of the above questions, is there any other factor that you would wish to record as having in some (more than minimal) way caused to contribute to Mr Jordan?"

[58] Ms Quinlivan argued that the questions so formulated compromised the jury's ability to effectively scrutinise the planning and control of the operation and the action of Sergeant A in having recourse to lethal force. She contended that they had a tendency to steer the jury towards the conclusion that the force used was lawful. They failed to direct the jury to the issue in such a way as to ensure that the jury reached a meaningful verdict capable of determining whether the force used was justified and whether the operation was planned and controlled in such a way as to minimise the chance of recourse to lethal force.

[59] As the judge correctly pointed out, the choice of questions must be that of the Coroner and his decision as to the formulation of the questions should not be disturbed by the court unless strong grounds are shown (see the comments of Lord Bingham in R (Middleton) v Coroner for the Western District of Somerset [2004] 2 AC 1182.) In the context of the inquest into the deaths of Mr McGaughey and Mr Grew the Coroner had adopted broadly similar questions. In Re Gribben [2012] NIQB 81 Weatherup J refused leave to apply for judicial review in relation to the questions left for the jury. The applicant in that case was unsuccessful on appeal in challenging Weatherup J's refusal to grant leave. Doubtless the Coroner concluded that since the questions formulated in that inquest had withstood legal scrutiny there was no compelling reason not to use similar questions in the Jordan inquest.

[60] Bearing in mind Lord Bingham's approach in Middleton and bearing in mind the absence of any successful challenge to the questions in the McGaughey and Grew inquest we conclude that the trial judge was correct to reject the challenge to the Coroner's questions. Had the jury been able to answer the questions raised a full and meaningful verdict would have been provided. We do not consider that read fairly the questions pointed the jury in a particular direction.

[61] As we make clear elsewhere in this judgment for other reasons we have concluded that a fresh inquest will be necessary in this matter. The Coroner conducting that fresh inquest must of course formulate appropriate issues to be decided in the light of the evidence emerging in that inquest and if the inquest is conducted without a jury there will be no question of formulating jury questions as such. If he is sitting without a jury the coroner will have to address the question of the best way to formulate the overall verdict in light of all the issues raised on the evidence adduced.

[62] For our own part we consider that in the context of the inquest as conducted the format and sequencing of the questions proposed by counsel for the next of kin

had advantages as compared to the open ended and looser questions set out in the Coroner's questions to the jury. The next of kin proposed 28 questions put forward as straightforward, separate and sequential questions addressed to all the issues raised by the course of the evidence adduced at the inquest. These started with what the nature and purpose of the operation on 25 November 1992 was; whether Sergeant A shouted a warning: "police, halt" or "halt police"; whether he issued any warning before firing; whether the deceased was doing anything which in fact amounted to a threat; whether the deceased was presenting his front or back to Sergeant A; whether the police officer who shot the deceased selected automatic mode deliberately or inadvertently and whether the police officer's view was obstructed in any way. The questions then proceeded to be focussed on the issue of the necessity to fire, the necessity to fire to kill rather to disable and the necessity of using a weapon on automatic. The questions then proceeded to ask whether the police officer actually believed it was necessary to defend himself or his driver, whether that belief was reasonably held and whether the use of the force used was necessary in the circumstances. The remaining questions raised were specifically and sequentially related to the planning and control of the operation. The posing to the jury of short and focussed questions specifically addressed to the issues raised in the course of the inquest might well have assisted the jury in its task of addressing in a logical sequence each of the issues raised in the course of the evidence. The questions to the jury if so formulated might have reduced the risk of the jury being unable to reach agreement on particular matters because the use of broad open-ended questions widened the scope for jurors to fail to reach a consensus on how to formulate and express the answer sought.

The Coroner's directions to the jury

[63] Ms Quinlivan criticised the coroner's directions to the jury for failing to properly direct the jury to consider Sergeant A's actions against the standard of absolute necessity. In the course of the inquest in the case of Bennett v UK No 5527/08 there had been lengthy reference by the Coroner to the Association of Chief Police Officers manual which featured heavily in the evidence in that case. Counsel contended that that was to be contrasted sharply with the manner in which the Coroner directed the jury in the present case in respect of Sergeant A's training and the question of the RUC Code of Practice in relation to use of the lethal force. In Bennett the European Court of Human Rights said that:

> "It is evident … that the application of the test of self-defence imposes in principle a higher standard of care on firearms trained police officers than, for example, untrained civilians. The coroner devoted some days of the inquest to the taking of evidence on the question of Officer A's training and she referred in her summing up, at some length to his training and the ACPO manual which guidance had been revised

> to limit the use of firearms to when absolutely necessary."

The court concluded that while it might be preferable for an inquest jury to be directed explicitly using the terms "absolute necessity" any difference between the convention standard on the one hand and the domestic law standard and its application to that case on the other could not be considered sufficiently great as to undermine the fact-finding in the course of the inquest or give rise to a violation of Article 2 of the Convention.

[64] The next of kin raised two central complaints about the Coroner's directions to the jury which it was argued was not compliant with the requirements of Article 2. Firstly, it was argued that the Coroner's directions to the jury about Sergeant A's training and experience in firearms and how that should inform their assessment of his evidence given that he shot an unarmed man were inadequate. Secondly, it was contended that the Coroner's directions to the jury as to the inferences they were entitled to draw from his non-compliance with the relevant RUC code of conduct relating to the use of lethal force were inadequate and misleading. Counsel took particular issue with the following passages in the coroner's directions.

> "So, members of the jury, you can see that on the one hand it is being suggested that the shooting was incapable of being justified in the circumstances in which Mr Jordan was unarmed and not positively identified by Sergeant A as being armed having regard to the wealth of experience that Sergeant A had. On the other hand it is being suggested that his training and experience led him to act in the way that he did having regard to the threat that he believed he was confronted with. It is a matter for you members of the jury as to which interpretation of the facts, if either is the more probable".

> "You will recall that whenever A was giving his evidence it was put to him that he did not in fact comply with the instructions on the day in question and that he agreed he did not. It is, of course, quite proper ladies and gentlemen that you should have regard to the instructions whenever you are considering the reasonableness or otherwise of Sergeant A's actions … but you must be aware that even if you find that Sergeant A acted in breach of those instructions it does not necessarily follow that he was not justified in law in resorting to force. In other words an officer might be in breach of his

> instructions yet still be acting within the law when opening fire."

[65] The RUC code in Clause 2(2) states that the use of force by an officer is subject to all the following conditions:

(a) it is necessary i.e. the objective cannot be achieved in any other way;

(b) the amount of force used will be reasonable in the circumstances;

(c) only the minimum amount of force necessary to achieve the objective will be used, and

(d) the amount of force used will be in proportion to the seriousness of the case.

These conditions clearly point to a test of absolute necessity. Amongst the specific examples of occasions where a firearm could be used after due warning is Clause 3(5):

> "(e) If there is no other way to protect yourself or others from the danger of being killed or seriously injured."

Again this is consistent with a test of absolute necessity. Clause 4 provides that in general the warning must be given before firing and should be as loud as possible. If necessary or practical it should be repeated. It must make clear that it is a police officer speaking, give clear unambiguous instructions and make it clear that fire would be opened if the instructions are not obeyed. These ingredients may be contained in a very brief warning e.g. "Police stop or I will fire."

[66] Since we are dismissing the appeal against the judge's decision to quash the verdict thus necessitating a fresh inquest, it is not necessary to reach a final conclusion on the question whether the Coroner's directions to the jury failed to adequately explain the law and failed to properly direct the jury on the importance of the RUC code and its terms and conditions. Any new Coroner coming fresh to the inquest will have to determine the outcome of the inquest in the light of the evidence in that inquest. Nevertheless we accept the next of kin's contention that the directions failed to remind the jury sufficiently and clearly about the meaning and significance of the RUC code on the use of the lethal force. In particular we agree that the Coroner should have reminded the jury more fully and more clearly of the requirements imposed by the code and the ways in which the actions of Sergeant A disregarded or may have disregarded the requirements and demands of the code. In particular, the jury needed to understand and appreciate the significance of the requirements of the code. The manner in which the Coroner directed the jury had the potential to mislead the jury into believing that it was open to the jury to accept

that his training and experience may have led to his acting in the way in which he did in the light of the threats he believed he confronted. However, the true issue was whether, in light of the higher standard of care demanded of a trained and experienced police officer and in light of the requirements demanded by the code before a decision to use lethal force was made, Officer A was acting properly in self-defence when he shot dead the deceased. The code in effect requires that the use of lethal force is unavoidably necessary. This accords with the concept of absolute necessity under Article 2 as explained in Bennett and the other Strasbourg case-law. The Coroner's directions to the jury may not have brought these matters sufficiently to the attention of the jury.

The jury and the verdict

[67] This part of the judgment concerns the appeal by the Coroner on the grounds that the learned judge was wrong:

to conclude that in the so called legacy inquests which are controversial and involve security and terrorist issues there is inevitably a real risk of a perverse verdict (ground 5)

to grant a declaration that the inquest should have been conducted with a jury and to quash the verdict on this ground (ground 6)

to conclude that the Coroner's decision to accept the verdict was irrational and to quash the verdict of the jury on that basis (ground 8a)

to conclude that the Coroner's decision to accept the verdict, in light of his original decision to sit with a jury, was irrational and to quash the verdict on the basis of this matter (ground 8b and 8c).

[68] A ground of appeal was also raised touching on the decision of the learned trial judge that the Coroner ought to have discharged a particular juror. In light of our decision to order a fresh inquest this matter became of only academic importance and being fact sensitive to this case would offer no assistance to Coroners in future instances. Hence we have not addressed it.

Grounds 5, 6, 8a and 8c - the jury issue

The Statutory Context

[69] The Coroner's Act (Northern Ireland) 1959("the 1959 Act") provides, where relevant, as follows:

> "18(2) If in any case other than those referred to in sub-section (1) (*not relevant to the instant case*) it appears to the coroner, either before or in the course

> of an inquest begun without a jury, that it is desirable to summon a jury, he may proceed to cause a jury to be summoned in accordance with the said sub-section."

The factual background and the decision of the Coroner

[70] Having heard the submissions of counsel for the next of kin, the Coroner ruled at the outset of the inquest that it appeared to him that it was desirable to summon a jury. He made it clear that in doing so the arguments of the next of kin about the controversial nature of the inquest, the involvement of an alleged IRA member being shot by a member of the RUC, the widely recognised and continuing problem of perverse verdicts related to sectarianism in our divided society, the requirement for unanimous verdicts, the statutory anonymity of jurors and the suggested absence of effective safeguards against the perverse verdict had all been taken into account by him.

[71] His reasons for concluding that a jury was desirable included the following:

Unanimous inquest juries have been a feature of "controversial troubles related cases".

The will of the legislature had been enacted in legislation with full appreciation of the position regarding inquests.

The present case concerning the death of Mr Jordan was almost 20 years old with an exceptionally high profile over that period. Any single judicial officer, albeit a professional judge, would not be in as favourable a position as a jury who would bring the very clear advantage of an entirely fresh, open set of ears listening to the difficult evidence.

It was possible to take proactive steps to guard against perverse verdicts. Accordingly the jury panel, having been told what the case was about, were asked to identify if they had any links to the police or army or any strong community views or engagement that would have prevented them dealing with the matter fairly and impartially. Moreover the Coroner said that if a potential juror identified himself as falling within such a category he would speak to that person and if correct to do so excuse him from jury service.

This was a much more extensive thorough check on potential jurors than had ever existed in the criminal courts in Northern Ireland.

The Coroner felt that the nature of a protracted and detailed verdict as would occur in this case where the jury would be expected to formulate a full and reasoned

narrative verdict would provide ample opportunity for detailed scrutiny of the verdict lest it was reached against the weight of the evidence.

The facts of the inquest were relatively brief, straightforward and confined i.e. not too unwieldy, complicated or lengthy so as to justify a non-jury.

It was desirable that citizens in whose name this death was effectively occasioned should be placed in charge of judging the factual basis of Mr Jordan's death.

[72] The Coroner had also prepared questions asking the catchment area from which the Panel had been drawn, confirmation that the jurors had been selected randomly by computer, checks that had been made to ensure each juror was qualified to serve on a jury and a recitation of grounds on which the Coroner would excuse anyone who e.g. had been a member of the police, convicted of a terrorist offence, member of a sectarian organisation or had reservations about finding that the actions of the RUC in shooting a member of the IRA believed to be involved in IRA activity were unreasonable and unjustified.

[73] In addition a letter dated 17 August 2012 sent to the solicitors for the next of kin set out instructions that the Coroner intended to give to the jury panel including an exhortation to recognise the necessity to commit to dealing with this matter solely on the evidence in an entirely dispassionate and unbiased manner indicating that if anyone felt because of "life experiences, connections or beliefs, that they could not deal with the matter in an unbiased, open-minded, dispassionate manner then they should let the Coroner know".

[74] During the course of the inquest the Coroner on various occasions, including his summing up, reminded the jury of the need to remain open-minded on these matters, to clear their mind of all empathy and the need to hear the case objectively and impartially.

The Judge's decision

[75] Stephens J, whilst recognising that the decision of the Coroner on this matter was an exercise of discretion in which the Coroner would carry out a balancing exercise to decide positively that "it was desirable to summon a jury", concluded that there could not be an effective investigation where there is a real risk of a perverse verdict or bias.

[76] The learned judge went on to find that in circumstances where unanimity was required, if there is a real risk of a perverse conclusion or of bias on behalf of a single juror, then there can be no other outcome to the balancing exercise but that the inquest should be conducted without a jury. In such circumstances all the many advantages of a jury trial have to give way.

[77] Rehearsing the well trammelled test of apparent bias set out in Porter v Magill [2002] 2 AC 257 at [103] the question was "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

[78] Notwithstanding the steps taken by the Coroner Stephens J determined that since this inquest involved both security and terrorist issues of a controversial nature, there remained a real risk of perverse verdicts. He concluded at paragraph 245:

> "The essential purpose of an investigation is 'to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility'. That cannot be achieved if there is a real risk of a perverse verdict. For this legacy inquest to be article 2 compliant it should not allow of that real risk of a perverse verdict. I emphasise that this is a prospective decision … I consider that such a risk was clearly established."

[79] Accordingly the learned trial judge granted a declaration that this inquest ought not to have been conducted with a jury.

The submissions of the parties

The Coroner's submissions

[80] Mr Simpson contended that:

This decision was within the wide range of decisions open to the Coroner under the discretion vested in him pursuant to Article 18(2) of the 1959 Act.

The Coroner had sat with a jury previously and was very experienced in such matters. He was entitled to come to the view that the inquest with a jury was capable of providing an effective means of investigating the issues of the use of lethal force and the planning of the operation.

The Coroner had identified the risk of bias and had taken steps to remove the risk. Whilst he had not expressly stated that the risk was now gone in light of the steps he had taken, by implication he had come to that conclusion.

The learned trial judge's conclusion was logically flawed in that if he was correct in asserting that all controversial security and terrorist cases should not be subject to

the discretion of the Coroner, that would apply even if all the parties wished the inquest to proceed with a jury. Such matters should be looked at on a case by case basis.

The reliance by the next of kin on the consultation paper produced by the Northern Ireland Office in August 2006 "Replacement Arrangements for the Diplock Court System", which adverted to the continuing risk of intimidation of jurors and the risk of partisan juries made no reference to coronial juries. Moreover no step had been taken by the legislature to amend the 1959 legislation to provide for majority verdicts. Thus when the Juries (Northern Ireland) Order 1996 was amended by Section 10 of the Justice and Security Act (Northern Ireland) 2007 to restrict the disclosure of juror information, it would have been open to the legislature, if it was aware of any concerns posed by the combination of the necessity for unanimity and the introduction of anonymity, to have made any appropriate legislative change to amend the 1959 Act.

The submissions of the next of kin

[81] Mr Macdonald contended that:

The Coroner had acknowledged that there was a real risk of a perverse verdict in this matter. He had introduced proactive steps to guard against it. However he had not explained how those factors had operated on his mind and he had not declared that they had removed the real risk.

Once there is a real risk of a verdict being tainted by bias, it cannot be desirable to summon a jury. There is no question of carrying out a balancing exercise once the real possibility of such a risk exists.

The normal safeguards against corrupt and biased jurors would be insufficient in terrorist and security cases. Even a full reasoned narrative would not be sufficient. The presence of the need for unanimous verdicts ensures that there is a real risk of a hung jury which removed from the next of kin their entitlement to a timely verdict in compliance with Article 2 of the Convention.

The Northern Ireland Office Consultation Paper "Replacement Arrangements for the Diplock Court System" makes a number of references to the continuing danger of perverse verdicts in Northern Ireland because of juror intimidation and, particularly relevant to this case, partisan jurors. It refers to the continuing legacy of terrorism that Government has to take into account which includes the continuing risk of perverse verdicts because of paramilitary and community based pressures on a jury. Lord Carlile, the independent reviewer of terrorism legislation, in correspondence to the Secretary of State for Northern Ireland in April 2006 had adverted to the history and sectarian background in Northern Ireland leaving distinctive and particular

concerns of this nature still in existence albeit such risk factors have reduced significantly since 2000.

In August 2007 the Attorney General promulgated guidelines on the use of jury checks and a power to stand by jurors. In particular those guidelines referred to "both security and terrorist cases (*where*) the danger that a juror's political beliefs are so biased as to go beyond the broad spectrum of views and interests in the community to reflect the extreme views of a sectarian interest or pressure group to a degree which might interfere with his fair assessment of the facts of the case or lead him to exert improper pressure on his fellow jurors may make it desirable to seek extra precautions in such cases".

Conclusions

[82] Section 18(2) of the 1959 Act confers on the Coroner a wide discretion to summon a jury if it appears to him that it is desirable to do so. The Oxford English Dictionary defines desirable as "worth having … advisable". This captures the polycentric character of the Coroner's decision-making in such matters which will include considerations of public interest, the value of the public participating in the administration of justice particularly in the vexed historical context of Northern Ireland, the complexity of the issues, the probable length of the hearing, the amount of documentation involved and the nature of the investigation to be determined. By implication it recognises also the wide experience of coroners in dealing with juries, such experience often being much wider than other members of the judiciary.

[83] The participation of the public in trials by jury constitutes a long recognised asset in the administration of justice. In McParland's Application (2008) NIQB 1 Kerr LCJ said at paragraph 46:

> "In the United Kingdom we have not adopted the practice of in-depth inquiry into the views and attitudes of potential jurors that has been deemed in other jurisdictions to be an essential concomitant of a fair trial procedure. But it is not suggested that the absence of such inquiry has produced an unfair system of trial. Ultimately, a measure of trust must be reposed in the conscientiousness and sense of civic duty of those who serve on juries in this jurisdiction. Happily in the vast majority of cases, that trust has not been betrayed."

[84] On the other hand, it would be idle to ignore the problems both of jury intimidation and perverse verdicts in Northern Ireland. Mr Macdonald correctly adverted to this strain coursing through the presence of scheduled criminal cases in Northern Ireland following the Diplock report of 1972, the consultation paper of

August 2006, the Justice and Security (Northern Ireland) Act 2007 and the Attorney General's guidelines on jury checks. As the court in McParland indicated at [37]:

> "The existence of the risks identified by the juries' sub-group of juror intimidation, of partisan juries and of perverse jury verdicts has not been seriously disputed by most commentators, although there has been acute disagreement about the measures needed to deal with those risks".

That risk, albeit reduced, exists to the present time.

[85] It is a risk which all coroners must address in the context of Section 18(2). The test of apparent bias to be applied is that set out by Lord Hope in Porter v Magill at (103):

> "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".

[86] Hence a Coroner, in exercising his discretion under Section 18(2) must, having considered the facts of the case, ask himself if there is a real possibility that a jury will be biased. It is only by carrying out such a two stage exercise that he can be assured that the inquest process will be capable of conducting an objective and impartial investigation into the death as required by Article 2 of the Convention. In the instant case, the Coroner clearly recognised that there was a real risk of a perverse verdict. Moreover he did take steps to address that risk as outlined in paragraphs [72] to [74] above.

[87] However having taken those steps, it is imperative that the Coroner then stand back and ask himself whether or not he considers that those steps have removed such a risk to a fanciful or remote level. Reduction of the risk per se is insufficient unless it achieves this level of reduction. Absent this exercise, it cannot be desirable to summon a jury in circumstances where a real risk of jury bias remains.

[88] We are not persuaded that in this inquest the Coroner did direct his mind to the risk of jury bias which might lead for example to a disagreement or a hung jury notwithstanding the steps he had taken. The need for such an approach was particularly compelling in this inquest where there already has been lengthy delay in the 22 years since the death occurred and in circumstances which now cry out for a speedy but fairly conducted investigation. It is in these circumstances of prolonged delay that the possibility of the safety net of a rehearing in the event of a hung jury is inadequate and will not afford the timely resolution that this investigation demands.

[89] Ultimately a court on judicial review or on appeal will determine for itself whether a fair procedure has been followed. Its function is not merely to review the reasonableness of the decision-maker's judgment of what fairness required. (See Osborn v The Parole Board [2013] UKSC 61). However we do not intend to fetter the discretion of a Coroner in the fresh inquest which is to take place or indeed any of the future legacy inquests. Decisions under Section 18(2) must be made independently by a Coroner on a fact sensitive basis in each instance.

[90] However in deciding whether it is likely to be beyond the reach of a jury to decide such matters impartially doubtless Coroners may wish to take into account such factors as:

There are formidable difficulties in being satisfied that the insidious nature of bias has been removed in security and terrorist type cases.

It is necessary to confront directly the need to ensure that jury verdicts emerge unconstrained by tribal loyalties. A Coroner must be satisfied that there will be a sensitively constructed distance between prejudice and justice.

The existence of a real risk of a biased juror or jury will outweigh any other factor.

Mere reduction of the risk is insufficient. The Coroner must be satisfied that the steps taken have reduced that risk to a remote or fanciful possibility.

Does the requirement for a unanimous jury verdict increase the risk of a hung jury in the particular security and terrorist cases?

Does the nature of protracted and detailed questions the jury may be required to answer increase the risk of a perverse verdict in the case under consideration?

[91] Had we not already determined that it was necessary to conduct a fresh inquest for the reasons earlier set out in this judgment, we would have concluded that it was necessary to return this matter to the coroner to carry out this exercise.

[92] In the circumstances therefore we consider that it is unnecessary to:

conclude in the so called legacy inquests which are controversial and involve security and terrorist issues there is inevitably a real risk of a perverse verdict (ground 5). Each inquest must be dealt with on a case by case basis;

grant a declaration that the inquest should have been conducted with a jury and quash the verdict on this ground (ground 6);

conclude that the Coroner's decision to accept the verdict was irrational and to quash the verdict of the jury on that basis (ground 8a); and

conclude that the Coroner's decision to accept the verdict, in light of his original decision to sit with a jury, was irrational and to quash the verdict on the basis of this matter (ground 8b and 8c).

Ground 8a—the verdict issue

Statutory and Regulatory Context

[93] Where relevant the 1959 Act at section 31 provides as follows:

> "**Verdict**
>
> 31-(1) Where all members of the jury at an inquest are agreed they shall give, in the form prescribed by rules under Section 36, their verdict setting forth, so far as such particulars have been proved to them, who the deceased person was and how, when and where he came to his death.
>
> (2) Where all members of the jury at an inquest fail, within such reasonable time as a coroner may determine, to agree upon a verdict as a foresaid, the coroner may discharge the jury and instruct the Juries Officer for the County Court Division where the inquest is held to summon another jury in accordance with the Juries (Northern Ireland) Order 1996, and thereupon the inquest shall proceed in all respects as if the proceedings which terminated in the disagreement had not taken place (save that none of the former jurors shall be eligible to serve on it)."

[94] Where relevant, the Coroner's Practice and Procedure Rules (Northern Ireland) 1963("the 1963 rules ") provide as follows:

> "22(1) After hearing the evidence the coroner or where the inquest is held by a coroner with a jury, the jury, after hearing the summing up of the coroner, shall give a verdict in writing, which verdict shall, so far as such particulars had been proved, be confined to a statement of the matters specified in Rule 15."

The Factual Background and the role of the Coroner

[95] At the conclusion of the evidence, and after hearing submissions from counsel, the Coroner posed the six questions for the jury set out at paragraph 57 above. After the jury had been sent out to consider its verdict the jury returned and made a number of points to the Coroner indicating that "there is a mindset there that we are not going to get by" in relation to question 2. The Coroner concluded that "given the logic of what you have told me concerning question (2)" he should take questions 4, 5 and 6 away from the jury in terms of their deliberations. He then asked the jury to provide answers to question numbers 1 and 3 and with regard to question number 2 he asked him to formally record that they had gone through the questions and that that was the conclusion they had reached.

[96] At this point Mr Macdonald submitted that there could no longer be any meaningful verdict. We observe that Mr Doran, who appeared on behalf of the Coroner at the inquest, conceded at that time that "I don't think any of us would say that it is going to be ideally what one would want to achieve in this context". The Coroner however concluded that the jury still had a verdict to give. The jury thereafter returned indicating that they were able to come to a conclusion concerning question 1, 2(a) and 3. The jury confirmed there was no majority amongst the members for questions 2(b)-(g).

[97] The jury thus answered only questions 1, 2(a) and 3. In relation to questions 2(b)-(g) they recorded "findings not unanimous". The answers to questions 1, 2(a) and 3 were as follows:

> "(1) On 25 November 1992 based on intelligence (surveillance) of a Ford Orion being present at a site of a possible munitions movement, the RUC were to stop this car. After a forcible/controlled stop of the red Orion on the Falls Road, the driver exited the car, and was shot by an RUC officer resulting in the death of the driver, Mr Jordan, who died at 5:25pm in RVH. A post mortem examination confirmed Mr Jordan died of a bullet wound to the chest.
>
> (2a) The nature and purpose of the RUC in the death of Mr Jordan was based on ongoing military surveillance of 2-4 Arizona Street and intelligence on 25/11/1992 of a possible movement of munitions in West Belfast by PIRA. TCG directed HMSU to deploy personnel to the area to monitor movements of vehicles observed in the Arizona Street area.
>
> (3) Mr Jordan sustained three wounds, a bullet wound to the back of this left arm, a wound to the left shoulder and the fatal wound to the chest. It is not

possible to determine the order in which the wounds were sustained."

The Judge's Decision

[98] Stephens J concluded at paragraph [126] of his judgment that:

the jury had not reached a unanimous verdict as to "how" the deceased came to his death,

the question in relation to planning and control had been withdrawn from the jury as they could not agree,

the jury was unable to agree any fact in relation to whether the force used was or was not justified

" a result "would include findings that tended to point to the killing being lawful or unlawful or alternatively that it was not possible to make a finding on the evidence in relation to some or all of the issues. In circumstances where the jury verdict had not arrived at a result as to how the deceased died and where it was possible for an inquest to arrive at such a result, he considered that it was irrational for the Coroner to accept the verdict,

on that basis he quashed the decision of the Coroner to accept the jury verdict.

The Submissions of the Parties

The Coroner's Submissions

[99] Mr Simpson contended that:

the verdict of the jury complied with the requirements set forth in Section 31(1) of the 1959 Act and Rule 15 of the 1963 Rules,

article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act 1998) ("the Convention")—the obligation to protect the right to life-- does not identify any requirement in relation to the verdict. The inquest procedure in Northern Ireland is capable of fulfilling the article 2 requirements of an effective investigation. The proceedings in this inquest provided the jury with the *means* of answering all the questions which had been formulated and
the emphasis on the obligation of means, does not render the failure of the jury to agree on issues of justification non-compliant with Article 2. Accordingly the decision by the Coroner not to discharge the jury but to accept the verdict amounted to a proper exercise of his discretion.

The Submissions of the Next of Kin

[100] Ms Quinlivan contended that:

the jury did not make a determination on a central issue in this case namely "Was the use of lethal force justified?",

it also failed to make a determination on the planning and control of the operation which was also a core central issue. Accordingly whether one adopts a broad or a narrow definition of the issue of "how" the deceased met his death, the jury has failed to make a determination,

in those circumstances the Coroner has to exercise his discretion under Section 31(2) of the 1959 Act to discharge the jury and

if it is open to the Coroner to accept a verdict of the kind accepted in the instant case, the inquest system in Northern Ireland will have become a vehicle for subverting rather than achieving the purported aims of the inquest process.

Principles governing this application

[101] It is possible to state a number of principles applicable to the instant case which were not the subject of plausible challenge during this hearing.

[102] First, the obligation to protect the right to life under article 2 of the Convention read in conjunction with the State's general duty under article 1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms found in the Convention, also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.

[103] The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.

[104] The form of investigation that will achieve those purposes may vary in different circumstances. However, that investigation must be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and where appropriate, an autopsy which provides a complete and

accurate record of injury and the objective analysis of clinical findings, including the cause of death.

[105] In Jordan v United Kingdom 37 EHRR 52 Mr Jordan complained that his son Pearse had been unjustifiably killed by Sergeant A of the RUC and that there had been no effective investigation into the circumstances of his death. He complained of breaches both of the substantive obligation in Article 2 of the Convention and also of the procedural investigative obligation. As previously indicated the court said at paragraph [107]:

> "The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances …. This is not an obligation of result, but of means …. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard."

[106] In R (Middleton) v West Somerset Coroner [2004] UKHL 10, (2004) 2 AC 182 the deceased, having been in prison for nearly 17 years, took his own life. The verdict reached at a first inquest had been quashed because of insufficient enquiry and it was accepted that a second inquest had fully explored the issues surrounding the death. The mother of the deceased sought judicial review asking that the jury's finding at the second inquest, attributing the death of the deceased to the failure of the prison authorities to take adequate steps to prevent it, be publicly recorded. The Appellate Committee considered what, if anything, the convention required (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving or possibly involving, a violation of article 2 of the Convention. The court concluded that where an inquest is the instrument by which the state seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's conclusion on the central issue is required.

[107] Lord Bingham of Cornhill said at paragraphs 18 and 20:

> "18. … First a verdict of an inquest jury (other than an open verdict, sometimes unavoidable) which does not express the jury's conclusion on a major issue canvassed in the evidence at the inquest cannot satisfy or meet the expectations of the deceased family or next of kin. Yet they, like the deceased may be victims. They have been held to have legitimate interests in the conduct of the investigation … which is why they must be accorded an appropriate level of

> participation. … An uninformative jury verdict will be unlikely to meet … one of the purposes of an Article 2 investigation "that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others".
>
> 20. The European Court has repeatedly recognised that there are many different ways in which a state may discharge its procedural obligation to investigate under Article 2. In England and Wales an inquest is the means by which the state ordinarily discharges that obligation, save for where a criminal prosecution intervenes or a public inquiry is ordered into a major accident, usually involving multiple fatalities. To meet the procedural requirement of article 2 an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusions on the disputed factual issues at the heart of the case"(*hereinafter called "the Middleton principles*").

[108] In some cases short verdicts in the traditional form will enable the jury to express their conclusion on the central issue canvassed at the inquest. Thus in McCann 21 EHRR 97, after a lengthy and detailed inquest into the fatal shooting by soldiers of three people believed to be terrorists in Gibraltar, the Coroner simply left the jury with three verdicts which were regarded as reasonably open to them – unlawful killing, lawful killing or an open verdict. The jury could thus indicate by returning an open verdict their ability to decide or, by choosing one or other of the remaining verdicts, express their judgment on the central and very important issue.

[109] But in other cases such a short form will not be satisfactory and it is for the Coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury's conclusion on the central issue or issues. In such cases, as in the instant case, it is open to the parties appearing or represented at the inquest to make submissions to the Coroner on the means of eliciting the jury's factual conclusions and any questions to be put albeit the choice is that of the Coroner at the end of the day (see Middleton at [36]).

Conclusions

[110] We are satisfied that a Coroner must interpret the meaning of Section 31(2) of the 1959 in a manner consistent with the principles set out in by Lord Bingham in Middleton's case. In considering whether or not a jury has failed to agree upon a verdict the Coroner, to borrow the words of Lord Bingham, ought ordinarily to

determine whether or not the outcome of their deliberation has culminated in an expression, however brief, on the disputed factual issues at the heart of the case.

[111] If they have not, the Coroner must then address himself to the obligation under section 31(2) to consider whether or not, in the exercise of his discretion, he should discharge the jury and summon another jury to consider the matter afresh. In such circumstances, as Section 31(2) makes clear, the inquest then shall proceed in all respects as if the proceedings which terminated in the disagreement had not taken place.

[112] "Ought ordinarily" connotes a concept which is not without exception. Thus, if for example, a second or third jury in the instant circumstances were similarly to fail to express a conclusion on the disputed factual issues at the heart of the case after further exhaustive investigation, the Coroner might properly come to the conclusion that whilst the process had been capable of producing the means to bring about a verdict, on this occasion it simply was not possible to obtain a result beyond the extent to which the jury had gone. In short a Coroner might sensibly conclude that any further inquest would simply lead to the same conclusion and accept the determinations of the jury as a verdict as far as it had gone however limited that might be.

[113] Equally so, there might be circumstances where there was such a paucity of objective evidence that no jury could conceivably come to a determination on the disputed factual issues at the heart of the case. Their verdict, which might well be unanimous to this effect, should be accepted by the Coroner as a valid verdict. No purpose would be achieved by attempting the impossible at a further inquest.

[114] An essential disputed fact at the heart of this case was whether or not Sergeant A had used justifiable reasonable force and whether the operation was planned and controlled in such a way as to minimise recourse to lethal force. Of the questions posed by the Coroner to the jury, those at 2(a)-(g) addressed the issue of reasonable force, question 4 dealt with the planning, control and supervision of the operation, question 5 dealt with the role that Mr Jordan had in his death and question 6 sought consideration of any other factor that caused or contributed to the death of Mr Jordan. None of those questions (save for 2(a) dealing with the nature and purpose of the operation in which the RUC was involved) was answered. Those that were answered-- namely question 1 which summarised the scenario in which the death occurred, 2(a) as mentioned above and 3, which specified the wound sustained by Mr Jordan-- did not deal with the disputed factual issues at the heart of the case. In terms there was no expression by the jury on "how" Mr Jordan died within the terms of the Middleton principles.

[115] We have concluded that in the instant case, although his mind was directed to the issue by counsel even before the jury returned, the Coroner misdirected himself on the proper interpretation of section 31(1) of the 1959 Act and did not address the

crucial issue of whether or not this jury had agreed upon a verdict which represented an expression on the disputed factual issues at the heart of the case. The mere fact that the jury had made some findings did not mean necessarily that a verdict had been brought in within the terms of section 31(2) interpreted in light of the Middleton principles

[116] This court cannot be certain what the Coroner's conclusion would have been had he directed himself to the Middleton principles once he had heard the conclusions of the jury. Suffice to say however that it is at least conceivable that he would have been driven to conclude that this jury had not satisfied the Middleton principle, whereupon he would then have had to address his mind to the decision as to whether he would discharge the jury and instruct another given the failure of this jury to bring in a "verdict "or hold a further inquest without a jury.

[117] It seems clear the Coroner did not adopt this approach. Accordingly we are not satisfied that this jury has complied with its obligation under section 31(1) to bring in a verdict or that the coroner has complied with his obligations under section 31(2). Since we are dismissing the appeal against the judge's decision to quash the verdict thus necessitating a fresh inquest, it is not necessary to reach a final conclusion on the Coroner's grounds of appeal on this issue. Had we not already determined that a fresh inquest was required on other grounds, we would have at least considered referring the matter back to the Coroner for him to reconsider the findings of the jury in light of the Middleton principles and thereafter, if necessary, to consider his position under section 31(2).That exercise is now rendered academic by virtue of our earlier findings and it is unnecessary to uphold the decision of the learned judge to quash the verdict on the basis that the verdict was irrational.

Disposal

[118] For the reasons given we consider that this matter should be remitted to a different coroner. We do so, however, with limited enthusiasm. In Jordan v Senior Coroner [2009] NICA 64 Girvan LJ described the state of coronial law in October 2009.

> "The current state of coronial law is extremely unsatisfactory. It is developing by means of piecemeal incremental case law. It is marked by an absence of clearly drafted and easily enforceable procedural rules. Its complexity, confusion and inadequacies make the function of a coroner extremely difficult. He is called on to apply case law which does not always speak with one voice or consistently. One must sympathise with any coroner called on to deal with a contentious inquest of this

nature which has become by its nature and background extremely adversarial."

[119] This court returned to that theme in Re C and others [2012] NICA 47 in October 2012. Despite the unsatisfactory nature of the present coronial system no material step has been taken to address this lamentable state of affairs and there is no realistic prospect of the present Assembly legislating to resolve this situation before the expiry of its present mandate in May 2016. In those circumstances it may well be close to 2020 before appropriate legislation which reflects the impact of the European Convention on Human Rights is put in place.

[120] The absence of a satisfactory coronial system adversely affects the work of the Coroner's Service particularly in the conduct of inquests. The theory is that the Coroner should conduct an investigation designed to establish the truth, identify wrongdoing and learn lessons for the future. It is, however, impossible to effect such an inquisitorial role in the absence of coroners' officers to assist with the investigation, powers to take statements and secure documents and appropriate procedural rules to govern public hearings.

[121] The impact of these deficiencies has been most pronounced in the conduct of legacy inquests. This is the group of historical inquests in which there are allegations of state involvement in the deaths and issues including murder of suspected terrorists, collusion, planning and control, individual error and cover-up. There are at present 51 such cases involving 78 deaths. The oldest of the cases relates to a death in February 1971 and the most recent to a death in July 2005. This number may increase as a result of future referrals by the Attorney General.

[122] The absence of adequate powers for Coroners and procedures suitable for investigation and hearings has resulted in the inquests becoming an adversarial battleground instead of a Coroner led inquiry. The adversarial nature of the proceedings is evidenced by the fact that in the case of the death of Pearse Jordan alone there have been 24 judicial reviews, 14 appeals to the Court of Appeal, 2 hearings in the House of Lords and one hearing before the European Court of Human Rights. The issues in dispute have included questions of scope, relevance and disclosure of materials. If the existing legacy inquests are to be brought to a conclusion under the present system someone could easily be hearing some of these cases in 2040.

[123] Each legacy case must satisfy the obligation for an effective investigation as set out at paragraph 20 above. The ECHR has recently restated in Margus v Croatia [2013] 56 EHRR 32 that the rights under Article 2 rank as the most fundamental provisions in the Convention. That was a case which arose from the national armed conflict in Croatia. It was primarily concerned with a claim for amnesty under national legislation but the Court took the opportunity to dismiss the application by

reference to the investigatory obligation arising from Articles 2 and 3 of the Convention.

[124] It is not the function of this court to determine how the United Kingdom should honour its Article 2 investigatory obligations in the legacy cases but it seems inevitable that the requirement of reasonable expedition will continue to be breached unless there is a new approach. There are models within this jurisdiction, such as the Historical Institutional Abuse Inquiry, which might provide the basis for an effective solution. It would be possible to have all of the legacy cases taken out of the inquest system and all of them considered in a time bound inquiry. Past experience suggests the need for a chair with senior judicial experience. The inquiry would need facilities for independent investigation and powers of compulsion in respect of witnesses and documents. PII would have to be addressed by redaction and gisting so that the families would have a proper opportunity to comment on the evidence and be involved to the appropriate extent. The procedures for any oral evidence would need careful consideration. Common themes might be identified. It seems to us that all of this could be achieved in a Convention compliant manner.

[125] Although we recognise that it is for the executive and the legislature to find a solution to this issue it is abundantly clear that the present arrangements are not working. Unless a solution is achieved we will continue to incur considerable public expense in legal challenges and claims for compensation such as those arising in this case and the subject of further hearing. We hope that these observations are of assistance to those charged with finding a solution.