Neutral Citation No: [2024] NIKB 12	*Ref:*	**HUM12451**
	ICOS No:	**24/11992** **24/12228**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**01/03/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY ROSEMARY BRADLEY FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY MARGARITA DUFFY FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY THE NORTHERN IRELAND PRISON SERVICE FOR JUDICIAL REVIEW

AND IN THE MATTER OF AN APPLICATION BY THE MINISTRY OF DEFENCE FOR JUDICIAL REVIEW

_____

Karen Quinlivan KC & Lara Smyth (instructed by Madden & Finucane) for Rosemary Bradley
Dessie Hutton KC & Stephen Toal KC (instructed by Harte Coyle Collins) for Margarita Duffy
Neasa Murnaghan KC & Tom Fee (instructed by the Departmental Solicitor's Office) for the Northern Ireland Prison Service
Tony McGleenan KC, Mark Mulholland KC, David McMillen KC, Philip McAteer, Julie Ellison, Andrew McGuinness, Mark McEvoy & Leona Gillen (instructed by the Crown Solicitor's Office) for the Ministry of Defence
David Sharpe KC & Helena Wilson (instructed by the Coroners Service of Northern Ireland) for the Coroner in Bradley
Ian Skelt KC & Aidan Sands KC (instructed by the Coroners Service of Northern Ireland) for the Coroner in Duffy
Philip Henry KC & Leona Askin (instructed by the Coroners Service of Northern Ireland) for the Coroner in Coney
Karen Quinlivan KC & Eugene McKenna (instructed by Ó Muirigh Solicitors) for the next of kin in Coney

_____

HUMPHREYS J

Introduction

[1] When the Human Rights Act 1998 ('HRA') came into force, it was scarcely anticipated that one of the least controversial rights, the right to life enshrined in article 2 of the Convention ('ECHR'), would give rise to so much litigation at the highest levels. Much of the jurisprudence has emanated from the issues around the investigation of the events which occurred during the conflict in Northern Ireland.

[2] The ECHR came into being on 4 November 1950, it was ratified by the United Kingdom on 8 March 1951, and it entered into force on 3 September 1953. The right of individual petition for UK citizens to the Strasbourg courts was introduced on 14 January 1966 and the rights were 'brought home' when the HRA came into force on 2 October 2000.

[3] This latest chapter concerns three ongoing legacy inquests, all of which arise out of deaths which occurred during the Troubles, many years before the HRA came into force. Each of the applications before the court has, at its core, the same fundamental question:

> "Does the article 2 ECHR investigative obligation apply to the inquest as a matter of domestic law?"

[4] Ultimately, the consequences which flow from this determination will be a matter for the individual coroner in each case. There may be impacts upon scope, evidence and findings but it is no part of this court's role to be prescriptive in that regard. The question posed is a binary hard-edged matter of law.

Background - Bradley

[5] The first application is brought by Rosemary Bradley whose son Francis was shot dead by members of the British Army on 18 February 1986. An inquest into the death was held in 1987 but the Attorney General ('AG') exercised his power under section 14 of the Coroners Act (Northern Ireland) 1959 ('the 1959 Act') to order a fresh inquest in 2010. This commenced in 2023 and is currently at hearing. The coroner has not yet made a determination as to whether article 2 applies to the inquest.

[6] The application for judicial review seeks to impugn the delays occasioned to the inquest process by the Ministry of Defence ('MOD') which are said to have breached the article 2 rights of the applicant.

Background – Duffy

[7] The second application has been launched by Margarita Duffy, the daughter of Patrick Duffy, who was shot and killed by British soldiers on 24 November 1978. The AG made a section 14 direction in March 2019. At a review hearing before me (in my capacity as the then Presiding Coroner) on 28 February 2022 it was noted that the disclosure process had not been started by the MOD but that there was no particular reason why the case could not be given priority. It was assigned to the coroner, Her Honour Judge Bagnall, on 11 May 2022.

[8] A request for disclosure was made on 31 August 2022 and at a review in October 2022 it was indicated that searches would commence the following month but that resources were limited due to the pressures of other inquests.

[9] The inquest opened on 21 April 2023 but has continued to be beset by delays in disclosure. In November 2023 a timetable was provided to the coroner which indicated that the dissemination of MOD sensitive material to the PIPs would not take place until July 2024. This delay was stated to be due to the limited number of Subject Matter Experts ('SMEs') available to carry out the work and their commitments to other inquests.

[10] It came to the attention of those involved in the Duffy inquest that Ms Ahad of the MOD had given evidence to the coroner in Bradley to the effect that, in relation to cases involving the Special Military Unit ('SMU'), there was, in fact, only one SME who could work on disclosure and public interest immunity issues. Further, this SME was not dedicated solely to this task but was also engaged providing welfare support to SMU witnesses when they were giving evidence.

[11] Ms Ahad was called to give evidence to the coroner in Duffy on 19 January 2024. She stated that her team were doing everything possible to support the work of the inquest, but it was not feasible to complete the disclosure process by 1 May 2024.

[12] On 26 January 2024 the coroner ruled that the inquest would not be listed before 1 May 2024. Having heard the evidence she found:

(i) Ms Ahad's description of the timescales involved was broadly accurate;

(ii) The process outlined by her was not capable of being materially expedited;

(iii) As a result of the legislative effect of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, resources had been placed under significant pressure;

(iv) The MOD would not be able to complete the disclosure process in time to allow the inquest to conclude by 1 May 2024;

(v) She was not passing judgement on whether the MOD's actions in the past were or were not sufficient.

[13] The applicant contends that the conduct of the MOD has been irrational, represents an abuse of power and a breach of the applicant's ECHR rights.

Background - Coney

[14] The third and fourth applications both arise out of the inquest into the death of Hugh Gerard Coney which occurred at the hands of state agents on 6 November 1974. Given that it was a death in custody, the inquest is being conducted by Coroner Toal with a jury and it commenced on 12 February 2024. On 15 January 2024 the coroner held that article 2 did apply to the inquest. This decision has been challenged by two state agencies, the Northern Ireland Prison Service ('NIPS') and the MOD, by way of these judicial review applications.

[15] I refused an application brought by NIPS for interim relief seeking to stay the Coney inquest pending the determination of the article 2 issue.

HRA

[16] Section 2(1) of the HRA states:

> "A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—
> (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights."

[17] By section 7(1):

> "A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
>
> but only if he is (or would be) a victim of the unlawful act."

[18] Section 22(4) provides:

> "Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but

> otherwise that subsection does not apply to an act taking place before the coming into force of that section."

Article 2

[19] Article 2 of ECHR states:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

[20] Article 2 is a fundamental right which admits of no derogation. Member states are obliged to protect life and to prohibit the intentional deprivation of life, save in strictly delimited circumstances. These are the substantive obligations.

[21] The European Court ('ECtHR') has also interpreted article 2 as containing a procedural obligation to carry out effective investigations into alleged breaches of the substantive limb – see *McCann v UK* [1995] 21 EHRR 27 at para [161]. Such an investigation has, as its aim, the effective implementation of the laws protecting the right to life and ensuring the accountability of those responsible for deaths.

[22] Such investigations must be independent, effective, prompt and open to public scrutiny and participation of the next of kin. A coroner's inquest is one such means by which the article 2 procedural obligation may be satisfied.

[23] The parties to these judicial review applications have taken diametrically opposed positions on the meaning and impact of the various decisions of the higher courts, culminating in *Re Dalton's Application* [2023] UKSC 36. The state agencies contend that this Supreme Court decision means that article 2 has no application to the inquests in question. The next of kin maintain, by contrast, that the proper interpretation of the law is that any inquest commencing after the HRA came into force is governed by article 2.

[24] In order to understand the principles under consideration in *Dalton*, it is necessary to embark on something of an excursus around the caselaw of the last two decades. To place those decisions in context, one must consider some fundamental principles around precedent and the interaction between the domestic courts and those in Strasbourg.

The doctrine of precedent

[25] This doctrine is central to the operation of the common law. In *Willers v Joyce (No. 2)* [2016] UKSC 44, Lord Neuberger observed:

> "In a common law system, where the law is in some areas made, and the law is in virtually all areas developed, by judges, the doctrine of precedent, or as it is sometimes known stare decisis, is fundamental. Decisions on points of law by more senior courts have to be accepted by more junior courts. Otherwise, the law becomes anarchic, and it loses coherence clarity and predictability. Cross and Harris … rightly refer to the "highly centralised nature of the hierarchy" of the courts of England and Wales, and the doctrine of precedent is a natural and necessary ingredient, or consequence, of that hierarchy." (para [4])

[26] In the judicial hierarchy, puisne judges are bound by decisions of the Court of Appeal and the Supreme Court (or the House of Lords). Technically, and by virtue of section 41 of the Constitutional Reform Act 2005, I am only bound by decisions of the Court of Appeal in Northern Ireland and by Supreme Court decisions on appeal from this jurisdiction.

[27] In 1966 the Lord Chancellor made a Practice Statement on the question of judicial precedent in the Appellate Committee of the House of Lords:

> "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so.

> In this connection they will bear in mind the danger of disturbing retrospectively the basis on which contracts, settlements of property and fiscal arrangements have been entered into and also the especial need for certainty as to the criminal law.
>
> This announcement is not intended to affect the use of precedent elsewhere than in this House."'

[28] This power to depart from its own precedents has been invoked only on rare occasions. In *Horton v Sadler* [2007] 1 AC 307 Lord Bingham commented:

> "Over the past 40 years the House has exercised its power to depart from its own precedent rarely and sparingly. It has never been thought enough to justify doing so that a later generation of Law Lords would have resolved an issue or formulated a principle differently from their predecessors."

[29] The Supreme Court has inherited the power but applies a similarly reticent approach to its use. It has stated that the court should be "very circumspect" before accepting an invitation to invoke the Practice Statement – see *Knauer v Ministry of Justice* [2016] UKSC 9, at para [23].

[30] The interaction between decisions of the highest court in the UK and those of the ECtHR is an important feature of the article 2 jurisprudence. The question of the proper approach to a conflict between the two was considered in *Kay v Lambeth Borough Council* [2006] 2 AC 465. In such a case, a clear tension exists between the doctrine of precedent and the obligation imposed by section 2 HRA to take account of the Strasbourg jurisprudence. Lord Bingham stated:

> "As Lord Hailsham observed … "in legal matters, some degree of certainty is at least as valuable a part of justice as perfection." That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent, as again the Court of Appeal did here." (para [43])

> "There is a more fundamental reason for adhering to our domestic rule. The effective implementation of the Convention depends on constructive collaboration between the Strasbourg court and the national courts of member states. The Strasbourg court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set, and to those decisions the ordinary rules of precedent should apply." (para [44])

[31] The one exception to this general approach was observed to be where a pre-HRA decision of the House of Lords may not be binding where it "could not survive the 1998 Act."

[32] Otherwise, applying section 2 HRA and the 'mirror principle', the Supreme Court will, absent some special circumstances, follow any clear and consistent jurisprudence of the ECtHR. In *R (Ullah) v Special Adjudicator* [2004] UKHL 26, Lord Bingham explained:

> "In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295* , para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public

> authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less." (para [20])

The caselaw

(i) McKerr

[33] Gervase McKerr was one of three men shot dead by members of the RUC in Lurgan on 11 November 1982. His son lodged an application with the ECtHR, claiming that the state was in breach of the international law obligations imposed by article 2 ECHR, which was upheld in May 2001. It is one of a series of adverse findings which led to the UK engaging with the Committee of Ministers of the Council of Europe in relation to its proposals to rectify the article 2 breaches.

[34] However, Mr McKerr then sought judicial review in the domestic courts of the failure by the state to conduct an effective investigation in the form of a coroner's inquest. The House of Lords held in *Re McKerr* [2004] UKHL 12 that the HRA was not retroactive, subject to the one exception in section 22(4) HRA. As a result, article 2 had no application, as a matter of domestic law, to deaths occurring before 2 October 2000, the date on which the HRA came into force. In this regard, the Law Lords held there was no distinction between the substantive and procedural aspects of article 2.

(ii) Šilih

[35] The position was therefore relatively clear until the Grand Chamber of the ECtHR decided the case of *Šilih v Slovenia* [2009] 49 EHRR 37. The case arose out of a death allegedly caused by medical malpractice and which occurred before Slovenia acceded to the Convention.

[36] The court restated the general principle of non-retroactivity in international law enshrined in article 28 of the Vienna Convention on the Law of Treaties. However, it went on to hold that the procedural obligation in article 2 was 'detachable', ie could be detached from the substantive obligation which was not in play prior to the accession to the Convention. The conclusion was this had evolved into:

> "A separate and autonomous duty … capable of binding the state even when the death took place before the critical date" (para [159])

[37] The procedural obligation was capable of applying to deaths which occurred prior to this date but this was not "open-ended" and applied only where there was a 'genuine connection' between the death and the entry into force of the Convention. The court explained that this genuine connection could be established where a "significant number of the procedural steps required by article 2" had been or should have been carried out after the relevant date, albeit that this was not said to be subject to any particular temporal limit. On the facts, almost all the criminal and civil proceedings relating to the death had commenced after the Convention came into force and therefore the article 2 procedural obligation applied.

[38] It was also held that, in certain circumstances, the necessary connection could be provided by the need to ensure the underlying values of the Convention.

[39] The difficulties presented by this 'genuine connection' test were illustrated by a number of the judges, including Judge Lorenzen who expressed concern that the test lacked legal certainty and failed to define the court's temporal jurisdiction.

(iii) McCaughey

[40] The decision in *Šilih* was the foundation stone of the appeal to the Supreme Court in *Re McCaughey's Application* [2011] UKSC 20. It was argued that, as a result of the Grand Chamber decision, *McKerr* could no longer be regarded as good law. Martin McCaughey and Dessie Grew were shot and killed by members of the British Army on 9 October 1990, nine years and 358 days prior to the coming into force of the HRA. At the inquest, the NOK contended that the scope had to include the question of whether the military operation was planned and controlled so as to minimise, to the greatest possible extent, recourse to lethal force. The issue was therefore whether the 'how' question had been expanded, by virtue of article 2, from "by what means" to "in what broad circumstances" the deaths occurred. The Northern Irish courts inevitably found themselves bound by *McKerr* and the matter therefore fell for determination by the Supreme Court.

[41] The court had considerable difficulty in understanding the ratio and consequences of *Šilih*. Ultimately, it concluded that, as a matter of international law, the United Kingdom had come under a free standing obligation under article 2 to ensure that the inquest complied with the procedural requirements of that article. It was also satisfied that the 'mirror principle' required this duty to be imported into domestic law, by analogy, and therefore to depart from *McKerr*. It was declared that the coroner was obliged to conduct the inquest in a manner which satisfied the article 2 procedural obligation.

[42] The court acknowledged that the legislature had made a policy choice, by enacting section 22(4) HRA, that its provisions were not to apply retrospectively. The substantive limb of article 2 could have no application in domestic law to a death which occurred prior to the HRA coming into force. However, at the time of the

reasoning in *McKerr*, there was no Strasbourg jurisprudence to the effect that the procedural obligation could be detached from the substantive limb of article 2.

[43] In the analysis of Lord Phillips:

> "Is the presumed intention of Parliament when enacting the HRA that there should be no domestic requirement to comply with this international obligation? This is a very different question from that considered by the House of Lords in *In re McKerr* [2004] 1 WLR 807, and so far as I am concerned it produces a different answer. The mirror principle should prevail. It would not be satisfactory for the coroner to conduct an inquest that did not satisfy the requirements of article 2, leaving open the possibility of the claimants making a claim against the United Kingdom before the Strasbourg court. On the natural meaning of the provisions of the HRA they apply to any obligation that currently arises under article 2. These appeals are concerned with such an obligation. The mirror principle reinforces an interpretation that does not exclude this obligation from the ambit of the HRA. It may be that this involves a departure from the decision of the House of Lords in *In Re McKerr*. I am inclined to think that it does. If so, it is a departure that it is right to make having regard to the fact that the decision in *In Re McKerr* was premised on the existence of an international obligation which was very different from that which is now seen to exist." (para [62])

[44] Lady Hale considered, in application of the *Ullah* principle:

> "If the evolutive interpretation of the Convention rights means that they now mean something different from what they meant when the 1998 Act was passed, then it is our duty to give effect to their current meaning, rather than to the one they had before." (para [91])

[45] Similarly, Lord Dyson observed:

> "The Convention is a "living instrument" which evolves over time as a result of interpretative decisions of the ECtHR. The procedural obligation implicit in article 2 is itself a good example of such evolution." (para [136])

[46] Significantly, the Supreme Court did not invoke the Practice Direction to overrule *McKerr*. There can be no doubt, however, that the court regarded their

decision as a departure from the principle of non-retroactivity established in that case. This is evident from the judgment of Lord Phillips referred to above. The premise upon which *McKerr* was based had changed in light of the ECtHR decision in *Šilih*.

[47] Following *McCaughey*, inquests which took place after the coming into force of the HRA were required to comply with relatives' article 2 rights, even where the death occurred before its commencement. This is entirely consistent with Lord Brown's conclusion:

> "On this approach I too, in common with Lord Phillips (para 61) and Lord Hope (para 77), would hold that any inquests still outstanding, even, as in these cases, in respect of deaths occurring before 2 October 2000, must so far as remains possible comply with the relatives' article 2 Convention rights." (para [101])

(iv) Janowiec

[48] In 2013, the Grand Chamber gave judgment in *Janowiec v Russia* [2013] 58 EHRR 30 in which it sought to clarify its previous decision in *Šilih*. The case related to the massacre of Polish prisoners of war by the Soviet authorities in 1940. Russia acceded to the Convention in 1998. It was alleged there had been a failure to conduct an article 2 compliant investigation into the killings. This factual scenario threw the lack of any temporal limit on the genuine connection test into sharp relief.

[49] The court therefore took the opportunity to clarify *Šilih* and stated that the 'genuine connection' test required two criteria to be met:

(i) the period of time between the death and the entry into force of the Convention must have been reasonably short, and

(ii) a major part of the investigation must have been carried out, or ought to have been carried out, after the entry into force.

[50] In relation to the 'period of time', the court said:

> "The court considers that the time factor is the first and most crucial indicator of the 'genuine' nature of the connection. It notes … that the lapse of time between the triggering event and the critical date must remain reasonably short if it is to comply with the 'genuine connection' standard. Although there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined, it should not exceed ten years. Even if, in exceptional circumstances, it may be justified to extend the time-limit further into the past, it should be

> done on condition that the requirements of the 'Convention values' test have been met."[para 146]

[51] Neither criterion applied on the facts of *Janowiec* since the events occurred 58 years before Russian accession and no steps had been taken to investigate the deaths after 1998.

[52] The Convention values test could supply the required connection if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention, such as war crimes, genocide or crimes against humanity. It had no application in that case, however, since the events took place ten years before the ECHR came into existence.

(v) Keyu

[53] In 1948 24 unarmed civilians were shot dead by Scots Guards in Selangor, part of colonial Malaya. In *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, the Supreme Court decided that there was no obligation on the UK to hold a public inquiry into these killings.

[54] Lord Neuberger considered the Grand Chamber's judgment in *Janowiec* and, in particular, the question of the critical date. He concluded that the ten year period runs from the date of the right of individual petition, ie January 1966, and therefore the genuine connection test could not be met. Lord Neuberger grappled with the judgments in *McKerr* and *McCaughey*, holding that the court had adopted a "somewhat modified position" in the latter case. (para [94])

[55] Ultimately, he did not decide whether *McKerr* remained good law and left open the question whether, if the Strasbourg court concluded the relatives were entitled to an article 2 investigation, the UK courts would have been bound to order an inquiry.

[56] Lord Kerr noted that *McCaughey* did not overrule *McKerr* on the question of retrospectivity but modified its result in light of the detachable nature of the procedural obligation as explained by the Strasbourg jurisprudence, in what he described as:

> "the evolutionary development of the procedural right under article 2." (para [209])

(vi) Finucane

[57] Pat Finucane was shot dead on 12 February 1989, 11 years and eight months before the HRA came into force. When the matter came before the Supreme Court in 2019, the issue of whether the inquiry which had taken place satisfied the requirements of article 2 hoved into view, it not having featured in the lower courts.

[58] Lord Kerr gave the judgment of a unanimous court in *Re Finucane's Application* [2019] UKSC 7, finding that the genuine connection test was satisfied. He rejected the contention that there was a strict immutable ten year time limit and stated:

> "Nothing in *Janowiec* detracts from the proposition in *Šilih* that the decision as to whether there is a genuine connection involves a multi-factorial exercise and the weight to be attached to each factor will vary according to the circumstances of the case." (para [108])

[59] The only two factors the court alluded to were the passage of time between the two events and the consideration of the extent to which the investigation took place after the entry into force of the HRA. The court was satisfied that article 2 applied and that no compliant inquiry had taken place.

[60] Lord Kerr commented that it was "significant" that the court had not been invited to depart from the decision in *McCaughey*.

(vii) McQuillan

[61] Two separate appeals were dealt with by the Supreme Court in *Re McQuillan's Application* [2021] UKSC 55 – firstly, relating to the death of Jean Smyth in 1972 and, secondly, concerning the treatment meted out to the Hooded Men in 1971. The seven judge court delivered a single judgment, following the reasoning in *Janowiec* and holding that for the genuine connection test to be satisfied:

(i) The lapse of time between the critical date and the triggering event must be reasonably short and should not exceed ten years; and

(ii) Much of the investigation into the death must have taken place or ought to have taken place after the critical date.

[62] The court expressed some doubts about the reasoning of Lord Kerr in *Finucane*, but held that an extension of up to two years beyond the ten year period could be permitted where:

(a) any original investigation into the triggering death can be seen to have been seriously deficient; and

(b) the bulk of such investigative effort which has taken place post-dates the relevant critical date.

[63] The court found that:

> "It would significantly undermine the legal certainty which the Grand Chamber sought to achieve in *Janowiec* if

> longer extensions than this were to be contemplated or permitted." (para [144])

[64] The court confirmed that the 'critical date' was 2 October 2000, ie the date the HRA came into force. It was recognised that this finding would mean that not all rights would be "brought home." The rights created by the HRA would not fully mirror the rights before the ECtHR since there would be cases where the UK had violated rights prior to 2 October 2000 for which there would be no remedy in domestic law, but a remedy would lie in Strasbourg. In this context:

> "In our view, against the background of the general position of non-retrospectivity of the HRA and in recognition of the distinct nature of the rights established by the HRA, the only plausible inference is that Parliament intended only a modest qualification of the non-retrospectivity of the domestic law regime in current circumstances by analogy with the principle in *Šilih* and *Janowiec*, treating 2 October 2000 as the "critical date" for the purposes of application of the genuine connection test articulated in those cases. Interpreting the HRA in this way gives effect to the general mirror principle of the Act, by following the principle laid down in the jurisprudence of the Strasbourg Court, while at the same time taking account of the non-retrospective effect of the Convention rights in the Act, which is a specific and cardinal feature of the Act … In the context of interpretation of the HRA, the mirror principle can only justify a departure from that general position to the limited extent we have indicated." (para [167])

[65] In relation to the Jean Smyth case, the court held that military logs which came to light were sufficient to trigger a fresh investigative obligation under the principle in *Brecknell v UK* (2008) 46 EHRR 42 but since the death occurred 28 years before the critical date, no article 2 obligation existed. The second limb of the genuine connection test would have been satisfied since the investigation into the military logs only occurred after the critical date.

(viii) Dalton

[66] Sean Dalton was murdered in Derry on 31 August 1988, along with two others, when they went to check on the welfare of a neighbour and triggered an IRA booby trap bomb. The intention had been to target members of the security forces lured to the property. No one was charged and the police investigation closed down in 1989. The original inquest determined how the victims died but did not examine, for example, the state of knowledge of the police prior to the explosion.

[67] A Police Ombudsman report in 2013 found failings both in the police's response to the bomb being planted and also the investigation carried out after the deaths. This resulted in the Dalton family approaching the AG asking him to exercise the power under section 14 of the 1959 Act to direct a fresh inquest. The AG declined to do so and the next of kin sought a judicial review of this decision. Leave was granted on a single ground, namely that the AG had misdirected himself in concluding that the article 2 investigative obligation had been satisfied in relation to the death and that the obligation could not be satisfied by a fresh inquest. Deeny J dismissed the application, the appeal was allowed by the Court of Appeal and the AG then appealed to the Supreme Court.

[68] Mr Dalton's death occurred just over 12 years before the critical date of the coming into force of the HRA.

[69] There are four separate judgments in Dalton, each of which merits consideration.

(1) Lord Reed

[70] Lord Reed's judgment commences with a summary of his conclusion that there is no procedural obligation under article 2 in domestic law to investigate the death.

[71] Lord Reed found that both *Finucane* and *McQuillan* were correctly decided and, in particular, that the proper approach to the genuine connection test was set out in *McQuillan*. The ten year period therefore applies in the general run of cases and the 12 year period in particular circumstances. He rejected the argument that *Janowiec* imposed a bright line limit of ten years for the genuine connection test.

[72] On his analysis:

> "… the ten year and 12 year periods discussed in *McQuillan* should in my view be understood as marking points beyond which it is in practice inconceivable that the application of the principles laid down in the case law might result in the imposition of the article 2 procedural obligation in our domestic law." (para [44])

[73] The President acknowledged the impact of *McCaughey* at para [28] of his judgment:

> "It was, however, generally accepted that inquests held after the Human Rights Act came into force should comply with the relatives' article 2 rights, even if the death occurred before the commencement date."

[74] In considering the application of the mirror principle, Lord Reed pointed out that this relates to the content of the rights created by the ECHR and HRA. The issue in hand is not the content of the article 2 right but whether the procedural obligation arose in particular circumstances. The domestic courts have acted by analogy with the ECtHR approach to temporal jurisdiction, one is not a 'mirror' of the other.

[75] At para [46], Lord Reed reiterates:

> "… the gap in time between the death of Mr Dalton on 31 August 1988 and the commencement of the Human Rights Act on 2 October 2000 exceeded 12 years, and is therefore beyond the outer limit indicated by *McQuillan*."

[76] In that regard, he agreed with Lord Leggatt and with Lord Burrows and Dame Siobhan Keegan.

(2) Lord Hodge, Lord Sales & Lady Rose

[77] These justices found that the ECtHR in *Janowiec* had laid down a bright line rule of ten years for the genuine connection test in light of the criticisms levelled at the reasoning in *Šilih* and that a longer period could only be justified in the case of the Convention values test being satisfied.

[78] As such, their analysis was that the decision in *Finucane* cannot be reconciled with the Grand Chamber's approach, although the court in *McQuillan* had not been invited to depart from it. The learned judges were critical of Lord Kerr's "multi-factorial" approach which they regarded as inimical to the principle of legal certainty.

[79] However, in light of the other judgments, the justices determined that the Practice Statement should not be invoked to depart from *Finucane*.

[80] The justices summarised their conclusions, upholding the result in *Finucane* whilst disagreeing with its reasoning. They treated *McQuillan* as the correct analysis of the domestic test and therefore there is an "outer period" of 12 years prior to 2 October 2000 to bring an HRA claim, unless the Convention values test is met. This is the case even if there is a *Brecknell*-type revival. For any death between ten and 12 years prior to the critical date, the genuine connection test may be satisfied only in exceptional circumstances.

(3) Lord Leggatt

[81] Lord Leggatt firmly rejected the invitation to overrule *Finucane*, holding both that it was correctly decided and that it would be an affront to the rule of law to require the Finucane family to have their claims determined in Strasbourg rather than in the courts of Northern Ireland.

[82] In his analysis, the genuine connection and Convention values tests as propounded in *Janowiec* do not speak to the content of the procedural obligation in article 2 but to the question of the ECtHR's jurisdiction to examine the complaints. For this reason, the mirror principle has no application, but the tests are applied by analogy to the issue of the retroactivity of the HRA.

[83] Following the guidance given by the Supreme Court in *McQuillan* and *Finucane* in relation to the meaning of "reasonably short period", the death in *Dalton* fell outside the temporal scope of the HRA.

(4) Lord Burrows & The Lady Chief Justice

[84] In this judgment, it was emphasised that precedent, stability and certainty all mean caution should be exercised before departing from established principle, particularly that which emanates from a recent seven judge Supreme Court. There was no need or justification to overrule *Finucane* although the 'multi-factorial' approach advocated by Lord Kerr was determined not to be preferred.

[85] In *McCaughey* the Supreme Court chose to adopt the reasoning of the ECtHR by analogy since this was not a true application of the mirror principle. Significantly, the critical dates are different, being 2 October 2000 for HRA rights and 14 January 1966 in relation to ECHR rights enforceable against the UK in the Strasbourg courts.

[86] *McQuillan* establishes:

> "(i) The "genuine connection" test requires that there is a "reasonably short" period between the triggering death and the critical date.
>
> (ii) Normally, that time period should not exceed ten years.
>
> (iii) For compelling reasons (and leaving aside the "Convention values" test), there can be an extension for a further two years to an outer period of 12 years. The compelling reasons spelt out as justifying that extension are where the original investigation was "seriously deficient" and where "the bulk of [the] investigative effort" has taken place after the critical date." (para [332])

[87] The judges also held that the Convention values test imposes an extremely high hurdle which will only be surmounted in cases akin to genocide, war crimes or crimes against humanity.

[88] In their opinion, *McQuillan* brought the necessary quality of certainty to the law, based on a fixed outer limit of 12 years, with the normal period of ten years only being departed from when the two specified compelling reasons exist. Applying this principle, the death in *Dalton* could never have triggered the article 2 procedural obligation since it fell outside the 12 year limit.

The coroner's decision in Coney

[89] Coroner Toal heard argument from the MOD, the NIPS and the NOK in relation to whether article 2 applied to this death which occurred in custody in 1974. She concluded that it did and, in doing so, found that there was a particular category of case where the state had decided to hold an inquest after 2 October 2000 into a death which occurred before this date. This category was not subject, on her analysis, to the same temporal scope limitation as set out in *McQuillan* and *Dalton*. The distinguishing feature between the case in hand and the issue in *Dalton* was that in the former a decision had been made to hold an inquest whilst it had been refused in the latter.

[90] On this basis she concluded that article 2 did apply. In summary she stated:

> "*McCaughey* has not been overruled nor even disturbed by the more recent decisions outlined above culminating in *Dalton* and applies to the specific factual context before me, where the death occurred before 2 October 2000 but the decision to hold an inquest has been taken by the state after that date." (para [70])

Application to these inquests

[91] It has been necessary to dilate extensively on these authorities as a result of the diametrically opposed positions adopted by the parties to these applications. The NOK contend that the decision in *McCaughey* was specific to the conduct of legacy inquests in Northern Ireland and that it remains good law. The point is made forcefully that it can only be overturned by the Supreme Court invoking the Practice Statement and not by some inferior court or tribunal or, indeed, by inference or implication. Reliance is placed on the importance of the principle of legal certainty in this field.

[92] However, it must be recognised that *Dalton* also concerned legacy inquests and the particular issue of when the article 2 procedural obligation applied. In *McCaughey* the Supreme Court wrestled with the difficult ratio of *Šilih*, variously describing the genuine connection test as "extremely obscure", "deeply unsatisfactory" and "totally Delphic." By the time *Finucane* and *McQuillan* reached the highest court, the clarification judgment in *Janowiec* had been delivered which, for the first time, referenced a ten year period for the application of the test. This was adopted, by analogy, and the ten year general rule with the possibility of two further years if certain exceptional conditions are met, has now emerged in domestic law.

[93] It is accurate to say that this process did not involve the express overruling of *McCaughey* by the court in any of the three most recent decisions on the issue. Whilst the court was invited to overrule *Finucane* in *Dalton*, it has never been invited to overrule *McCaughey*.

[94] The court in *McCaughey* itself was able to depart from *McKerr* without the invocation of the Practice Statement. In turn, the court in *Finucane, McQuillan* and *Dalton* has done the same thing to *McCaughey*. It is able to do so through the evolutionary process referred to in both *McCaughey* and *Keyu*. The courts do so because of the changing nature of the article 2 obligation as a matter of international law. Whilst not an application of the mirror principle stricto sensu, this process has been recognised as a modified mirror principle or the application of the principle by analogy.

[95] If the next of kin argument is correct, the decision of seven justices in *Dalton* is rendered virtually meaningless. This cannot be the case. It is the expressed view of the UK's highest court, on appeal from the Court of Appeal in Northern Ireland and is binding on me.

[96] The approach adopted by Coroner Toal is superficially attractive, seeking as it does to distinguish those cases where a decision to hold an inquest has been made after the critical date. However, closer analysis reveals that it must be flawed. If, as the Supreme Court has stated, the genuine connection test cannot be met in respect of deaths which occur before 2 October 1988 at the latest, how could the legal position be altered by the decision to hold an inquest? The inquest is recognised as one means as satisfying the article 2 procedural obligation, when it exists, but it is not of itself a trigger for the obligation to apply. In the vernacular, this is to put the cart before the horse. One only has to consider the facts of *Dalton* itself to understand why this approach cannot hold water. If the AG had exercised his power to direct a fresh inquest under section 14 of the 1959 Act, then, on this logic, article 2 applies. If, however, other forms of investigation were to take place by the police, PONI or the forthcoming ICRIR, then article 2 would have no application. This cannot be correct. The proper analysis of *McQuillan* and *Dalton* does not depend on the means of satisfying the obligation but on the obligation itself.

[97] The reference by Lord Reed at paragraph [28] in *Dalton* to the impact of *McCaughey* on legacy inquests in Northern Ireland has to be read in the context of the rest of his judgment. It is expressed in the past tense and must represent the position as it was previously understood, not the continuing requirement. Neither he nor any of the other justices in *Dalton* found that there was an exception to the temporal limit of the genuine connection test to be found in cases where inquests were ongoing or pending. Indeed, he described it as "inconceivable" that the article 2 procedural obligation could arise in domestic law outwith these time limits, aside from a Convention values case. Had he meant to say that an entirely different rule applied

in the case of legacy inquests, regardless of the date of death, he would have done so. The decision of the coroner is therefore wrong in law.

[98] The dates of the three deaths at issue in these applications were 18 February 1986, 24 November 1978 and 6 November 1974. All of these fall outside the 12 year outer limit and therefore the article 2 procedural obligation does not apply to these inquests as a matter of domestic law.

[99] The principle of legal certainty, espoused by all parties to this litigation, delivers the following outcomes:

(i) No death which occurred before 2 October 1988 can engage the article 2 procedural obligation as a matter of domestic law, save where the Convention values test is met. This is the fixed and outer limit of the genuine connection test;

(ii) Where a death occurred between 2 October 1988 and 2 October 1990, the article 2 obligation may be engaged where:

  (a) The original investigation was seriously deficient; and

  (b) The bulk of the investigative effort was carried out after 2 October 2000.

(iii) Where a death has occurred between 2 October 1990 and 2 October 2000, the temporal aspect of the genuine connection test will be satisfied but the article 2 procedural obligation will only apply when much of the investigation took place, or ought to have taken place, after 2 October 2000;

(iv) For any death occurring after 2 October 2000, the article 2 procedural obligation will apply;

(v) If the Convention values test is satisfied, then the article 2 obligation will apply to a death occurring after 14 January 1966.

What difference does it make?

[100] It will be a matter for individual coroners charged with the conduct of a particular inquest to determine the scope, the relevant evidence and the nature and extent of the verdict and conclusions. Whether or not article 2 applies may have an impact on some or all of these questions. However, it may be observed that the difference might not be all that pronounced.

[101] In *Middleton*, Lord Bingham said:

> "It must be 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."

[102] In *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2010] UKSC 29, Lord Phillips stated:

> "I question whether there is, in truth, any difference in practice between a *Jamieson* and a *Middleton* inquest, other than the verdict. If there is, counsel were not in a position to explain it." (para [78])

[103] Similarly, per Popplewell LJ at first instance in *R (Morahan) v HM Assistant Coroner for West London* [2021] EWHC 1603 (Admin):

> "In many instances, of which the current case is an example, there will be no practical difference in the scope of the inquiry conducted at a *Jamieson* inquest from that at a *Middleton* inquest." (para [70])

[104] Lord Brown commented in *McCaughey*:

> "…it may be doubted whether in reality there is all that much difference between an article 2 compliant inquest (a *Middleton* inquest: see *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182*)* and one supposedly not (a *Jamieson* inquest: *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1*)*"

[105] This observation around the difference in verdict has to be seen in the context of coronial law in England & Wales. Section 5 of the Coroners and Justice Act 2009 sets out that the purpose of a coroner's investigation is to ascertain who the deceased was and how, when and where he came by his death. By section 5(2), where article 2 applies, the 'how' question includes 'in what circumstances' he came by his death.

[106] Section 10 requires the coroner or jury to make a determination as to the section 5 questions without making any determination of civil liability or criminal liability on the part of a named person. The practice in that jurisdiction is to adopt one of a list of short form conclusions or, in certain cases, for a narrative determination to be given instead of or in addition to the short form conclusion.

[107] In this jurisdiction, verdicts (as they are still known) are not given in short form but, as a matter of course, extend to a set of narrative conclusions. Rule 16 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 prohibits a coroner or jury from expressing an opinion on any issue of civil or criminal liability. The latter

is not restricted to a 'named person' as it is in England & Wales, and this explains the ability of coroners' courts in that jurisdiction to deliver a finding of unlawful killing.

[108] Having noted the restrictions, the coronial jurisprudence in recent times has recognised that the coroner is nonetheless under a duty "to ensure that the relevant facts are fully, fairly and fearlessly investigated" (per Sir Thomas Bingham MR in *Jamieson*). The same judge said in *Jordan v Lord Chancellor* [2007] UKHL 14 that whilst a verdict of unlawful killing is not open in Northern Ireland, an inquest may find facts which may point very strongly to the existence of criminal liability.

[109] Given the potential scope for such findings, and the need for a full fact-finding exercise, it may be therefore in any given case that the application or otherwise of article 2 is a point of academic interest only, making little practical difference to the running or the outcome of the inquest.

The remaining grounds in Duffy

[110] The finding on the application of article 2 is sufficient to dispose of the applications relating to the Bradley and Coney inquests. However, the applicant in Duffy also argues that the MOD has acted in bad faith and/or irrationally.

[111] The editors of Supperstone & Goudie on Judicial Review (7th Edition) state at para 13.2:

> "For the purposes of this chapter the expression 'bad faith' when referring to a decision-maker will be confined to cases where that person acts dishonestly, taking action which is known by the actor to be improper. It is long established and uncontroversial that such action in the exercise of a public law power will vitiate that exercise of power."

[112] There was not a shred of evidence to justify a plea of bad faith in this case. When Ms Ahad gave evidence, it was not suggested to her that she was being dishonest or had been motivated by an improper motive. There are no doubt legitimate criticisms which can be levelled against the MOD in relation to its compliance with disclosure obligations, but these cannot, without more, ground a claim of bad faith.

[113] In the absence of a proper evidential basis, the claim of bad faith ought never to have been pleaded.

[114] The plea of irrationality suffers from the same want of evidential foundation. The Order 53 statement avers:

> "the failure to allocate sufficient resources to ensure that the disclosure would be completed in this inquest is a deliberately unlawful action by a public authority not to comply with their obligations to a coroner's court and is irrational."

[115] It is evident that the MOD could have engaged greater resources at a much earlier stage in order to satisfy its disclosure obligations across the range of legacy inquests. It may well be fair to say that the SMU SME ought to have spent all of his time addressing PII and disclosure rather than providing welfare support. However, decisions made in the context of the original five year plan have to be seen in the changed landscape of the 2023 Act which has created a race to the finish line of 1 May 2024.

[116] The next of kin has every right to feel aggrieved at being denied the completion of the inquest into the death of Mr Duffy. However, this has come about as a result of an Act of Parliament, a fact I recognised when making a statement as Presiding Coroner on 17 November 2023.

[117] The coroner herself accepted that the evidence presented to her was truthful. The judicial review court does not act as a court of appeal from coroners and, in any event, this application does not seek to impugn the coroner's decision. There is therefore no basis to impeach her findings.

[118] The irrationality claim is unsustainable as there is no evidence of a deliberately unlawful act taken by the public authority. The application for judicial review will therefore be dismissed.

Conclusions

[119] For the reasons outlined, I make the following orders:

(i) I dismiss the application for judicial review in Bradley;

(ii) I dismiss the application for judicial review in Duffy;

(iii) In Coney, I make an order of certiorari quashing the decision of the coroner dated 15 January 2024.

[120] I will hear the parties on the issue of costs and any consequential matters.