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2015/061110/A01

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ROSALEEN DALTON FOR JUDICIAL REVIEW

Appellant

AND IN THE MATTER OF A DECISION BY THE ATTORNEY GENERAL FOR NORTHERN IRELAND

Respondent

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Before: Morgan LCJ, Stephens LJ and Maguire J

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MAGUIRE J (delivering the judgment of the court)

Introduction

[1] This is an appeal against the judgment of Deeny J, hereinafter "the Judge", delivered on 28 March 2017 in relation to a judicial review application of Dorothy Johnstone[1] which had been initiated on 26 June 2015. The applicant had been granted leave to apply for judicial review on 17 June 2016 but only in respect of a single issue relating to the Attorney General for Northern Ireland's ("AGNI's") compliance with Article 2 of the European Convention on Human Rights ("ECHR").

[2] The Judge put the matter, at paragraph [1] of his judgment, in the following way:

> "Leave was granted … on the ground that it was arguable that a fresh inquest was necessary for the

[1] Dorothy Johnstone has unfortunately died and these proceedings have been taken forward by the appellant, Rosaleen Dalton, who is also, like Dorothy Johnstone, a daughter of the deceased, Sean Eugene Dalton.

> purpose of discharging the investigative obligation on the State under Article 2 ... and that the Attorney had misdirected himself on this issue and, if he had properly directed himself, [he] would have directed a fresh inquest."[2]

Factual Background

[3] The appeal relates to the very sad deaths of three persons which occurred in Derry/Londonderry as a result of an incident which happened on 31 August 1988. The original applicant in these proceedings was Dorothy Johnstone who was the daughter of Sean Eugene Dalton, who was the father of six children. Mr Dalton and two others, a Mrs Lewis and a Mr Curran, died as a result of an explosion which occurred within an upper storey flat at 38 Kildrum Gardens, Londonderry, at around 11.50 hours. The flat in question belonged to a person who has been referred to in these proceedings as 'Person A'.

[4] In essence, what had occurred was that the three deceased on the morning in question had gone to Person A's flat because, for a period, they had not seen Person A and were concerned about his welfare. When they arrived at the flat, they could get no reply to their attempts to obtain a response from Person A. It was possible, however, to access Person A's flat from the outside walkway by entering it *via* the kitchen window. Mr Dalton did this while the other two waited at the walkway. Once in the flat, it appears that Mr Dalton's presence set off an explosive device which had been planted in it, probably secreted in a wellington boot.

[5] The effect of the explosion was to kill Mr Dalton; to kill Mrs Lewis who had remained on the walkway and who was blown off the balcony to a position where her body was found in the garden below, beside the bin; and to injure seriously Mr Curran, who survived for a period, before dying at the end of March 1989.

The Police Investigation

[6] As a result of the incident a police investigation began straightaway. Within a short time, there was a statement on behalf of the IRA admitting that this organisation had planted the bomb in Person A's flat. Their purpose in doing so was to lure members of the security forces to the flat. If the IRA statements made subsequently were correct, the bomb had been placed in the flat on 26 August 1988 (5 days before the incident).

[7] The police investigation was led by a senior investigating officer of Detective Superintendent rank and in the region of 22 officers assisted him. It consisted of work at the crime scene; house to house enquiries (subsequently believed to be incomplete); the taking of 47 or so witness statements; the completion of various

[2] [2017] NIQB

technical statements; a series of forensic enquiries; and the making of arrests, two on the date of the incident and 11 later on.

[8] The police investigation, it appears, endured for a relatively short period, to mid-1989, but no one was charged or convicted of any offence connected to the murders.

The Inquest

[9] An inquest was held into the deaths of Mr Dalton and Mrs Lewis on 7 December 1989. At this, the cause of death was established as multiple injuries due to a bomb explosion. The finding recorded that the deceased had "died from injuries received when an explosive device was detonated at number 38 Kildrum Gardens, Londonderry, around 11:50am on 31 August 1988."

[10] The court has seen a set of the inquest papers. From these it can be said that a variety of witnesses gave evidence either personally or by means of a statement including:

(a) A forensic scientist who gave evidence about the post explosion scenes of crime investigation and the results of forensic tests.

(b) Mr Curran who, it appears, must have provided a statement of evidence before his death. This was read at the inquest. He described how the three persons had come to be at the flat that morning and, in particular, their joint concern about Person A's welfare.

(c) Witnesses who heard the explosion and went to the scene of it in its immediate aftermath.

(d) A member of the ambulance team which went to the scene.

(e) A fireman who went to the scene.

(f) Those who identified the bodies of the deceased.

(g) Some police officers who attended the scene following the explosion.

(h) A police photographer who took photographs in the aftermath of the event.

(i) A police mapper.

(j) A police scenes of crime officer.

[11] It is clear from the inquest papers that the State Pathologist, Professor Marshall, conducted post mortem examinations of the bodies of the deceased. It is not clear if he gave evidence personally.

[12] Person A, whose flat had been the scene of the explosion, did give evidence by means of a statement. He recounted how on 25 August 1988 a young man, Person B, had arrived at his flat. There was then a knock at the door around 7-8pm. Masked men appeared and took the two of them away to another location. These men said they were from the IRA. He then explained that the two of them were held at this location for a number of days before being released on to a public road, after the explosion at Person A's flat, on 31 August 1988. At this point he said he contacted the police.

Later Events

[13] Following the completion of the inquest very little further seems to have occurred in respect of the police investigation.

[14] There appears to have been some correspondence between solicitors acting for Mr Dalton's family and the police in the period September-December 1991 but this appears to have been inconsequential, though the family did pose a series of questions about events leading up to the explosion. The family were told by way of reply that the matter was still under investigation but that it was inappropriate for the police to comment on the specific matters raised.

[15] In September 2005, a son of Mr Dalton made a Statement of Complaint to personnel within the Office of the Police Ombudsman ("PO") relating to the way in which the police had behaved in the context of events leading to his father's death, including and in particular, in respect of "the events that led to the death". At the time of the death the complainant was 27 years of age. In his statement, he described how his parents had treated Person A as a member of the family. Person A, he said, had a few problems but his parents would keep an eye on him.

[16] The complainant then referred to various incidents which preceded his father's death at Person A's flat. These included:

(i) An incident on 25 August 1988 which had followed a rocket and shooting attack at Rosemount Police Barracks. He said the car involved in that incident was later found outside "our block of apartments" in Kildrum Gardens. He said he saw a man run from the car shouting that there was a bomb in it and that he had telephoned the police about this but got no response. Later, he saw the car burnt out with what he said was a trail of blood from it to Person A's apartment. However, he said the police "never attended the car or the flat". Later he said that a used rocket launcher was recovered from the burnt out car.

(ii) A robbery which he said had taken place at a fish and chip shop called "McDee's Hot Food Shop" on 27 August 1988. Apparently, as the robbers were leaving the shop one of them dropped a card which had Person A's details on it. When police arrived, they were given this card. A police sergeant when provided with the card was alleged to have said "we can hit this boy now, he'll be fresh from the robbery". Subsequently, however, the complainant noted that the police had not attended Person A's flat.

(iii) On 30 August 1988 a friend of Person A's was abducted by the IRA. Following a query as to his place of residence to Hydebank Young Offenders' Centre there was a phone call that this friend was being held at a location in Kildrum Gardens. However, the complainant claimed that the police had failed to attend Person A's flat.

(iv) Security force patrols in the area of Kildrum Gardens, the complainant alleged, were scaled down leading to the family of the deceased forming the view that the security forces were aware of the bomb in the flat but they had decided not to do anything about it. This, it was alleged, was to protect an informer.

[17] In summary the complainant's complaints as presented were, using the complainant's own language:

> "(1) They failed in their duties to properly investigate the death of my father and Mrs Lewis on 31 August 1988.
>
> (2) They failed in their duties by knowingly allowing an explosive device to remain in a location close to where the public had access, this was done in order to protect a police informant.
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> (3) They failed in their duties to advise the local community or its leaders of possible terrorist activities in the area.
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> (4) Under Article 2 of the European Convention on Human Rights, which states "everyone's right to life shall be protected by law" the police failed in their responsibilities to uphold my father's right to life."

The Report of the Police Ombudsman

[18] The above complaints were in due course the subject of investigation by the PO. This led to the publication of a report by him which is dated 10 July 2013. It is

not clear why the report took so long to compile. The report, as published, was 67 pages in length and the court will provide no more than a short summary of it.

[19] At an early stage the PO made clear that "the responsibility for the deaths and the injuries…rests with those who planted the bomb" whereas his investigation was to determine if there was any evidence of police misconduct or criminality.

[20] There is a substantial concentration in the report upon the various incidents referred to by the complainant and the report contains an analysis of them. As regards the Rosemount Police Station incident and the abandonment of the car thought to be involved in the attack on it, the PO noted that, according to intelligence information, the car had been abandoned "convenient to a house" where a booby trap device had been placed. There was also, it appears, intelligence seen by the PO that those who planted the device did not intend to remove it and that "another incident would be planned to lure security forces to the house where the bomb was planted, if the car bomb did not attract the desired response".

[21] The robbery of the chip shop in which Person A's details had been found at the scene on a piece of paper was also recognised, according to the PO, by the police at the time as "a potential come on" to lure officers to a trap.

[22] The PO also recorded that the abduction of Persons A and B formed part of the IRA plan to bring about the deployment of security force personnel to the flat at 38 Kildrum Gardens. However, he accepted there was no evidence that the police knew of the abductions prior to the explosion itself.

[23] The PO was of the view that it was likely that Kildrum Gardens was placed "out of bounds" as a result of consideration by the police of intelligence in the late afternoon of 26 August 1988.

[24] In contrast to his other findings, the PO, having considered the suggestion that police did not attend at 38 Kildrum Gardens because they were attempting to protect an informer, rejected this suggestion as the person who was alleged to be the informer had not featured in the investigation until long afterwards and had never even then been arrested.

[25] Speaking of police knowledge the PO stated:

> "However, police were in possession of three key pieces of intelligence:
>
> - On 5 August 1988 police knew of the IRA intention to plant a booby trapped bomb then stage an incident to lure police to the scene. It is recorded that this intelligence was shared with uniform personnel.

- On 25 August 1988 police were warned after the attack on Rosemount Police Station that there should be no follow up action. It is recorded that Divisional Command was informed of this.

- On 26 August 1988 intelligence was received indicating that a car used in the attack on Rosemount Police Station was abandoned "convenient to" a house in which a booby trap bomb was planted."

Based on this the PO concluded:

> "Having reviewed all of the information available to me, I believe that there was sufficient intelligence and information available to the police to have identified the location of the bomb in 38 Kildrum Gardens or very close by. I further believe that they ought to have known it was in the vicinity of 38 Kildrum Gardens and that steps could and should have been taken to locate the threat and warn the local community and that the failure to do so had tragic consequences for the victims of the bombing. This failure and the continued knowledge that there was a device in a house "convenient to" the car bomb (and as such "next to") resulted in the police not fulfilling their duty to protect the public."

In similar vein later in his report the PO went on:

> "… my only conclusion must be that the police were very aware of the threat of the bomb, its location and their own duty to protect the public and maximise the safety of the police and security staff involved in any response. It is apparent that there was no contingency put in place to protect the public from the bomb, and whilst the responsibility for the murders remains with the bombers, there was a failure by the police to protect the lives of the local community who were in such a real and immediate danger."

[26] In the end, the PO held that complaint 1 – that the police failed in their duty to advise the local community or its leaders of possible terrorist activities in the area – was substantiated. As regards complaint 2 – that the police failed in their duty by knowingly allowing an explosive device to remain in a location close to where the public had access in order to protect a police informant – the PO held this complaint had not been substantiated. In respect of complaint 3 – that under Article 2 of the European Convention on Human Rights which states "Everyone's right to life shall

be protected by law" - it was his opinion that the police had failed in their responsibilities to uphold Mr Dalton's right to life and thus the complaint was substantiated. Finally, as regards complaint 4 – that police failed in their duty to properly investigate the death of the complainant's father and Mrs Lewis on 31 August 1988 – he considered this complaint substantiated.

[27] In point of fact the PO was critical of the way in which the original police investigation had been conducted. In particular, he had criticisms of the forensic examination at the house where Persons A and B had been held. He was critical of the absence of sustained contact between the murder investigation and the families of the deceased and injured. He considered the murder investigation not to be well structured. In particular, he criticised the failure to conduct house to house enquiries and forensic submissions. Best practice was not adhered to in this case. Another factor he pointed to was the absence of a situation report completed by the senior investigating officer at the point where the investigation was run down to a closure. He felt that such a report should have been provided and that if it had been it would have assisted any reopening of the investigation whether at the time of Mr Curran's death or as new intelligence and evidence entered the system. He was also critical of the way in which evidence and information had been collected and preserved and stored, which he described as 'an absence of investigative maintenance'.

Other Shortfalls

[28] In the course of his report the PO referred to two investigative shortfalls as he saw it.

[29] The first related to co-operation with his investigation on the part of some retired police officers. While he acknowledged that he had received the co-operation of many retired officers, he felt that there was "a substantial number of retired police officers who were in key positions to assist this investigation" but who declined to do so. In his view, this significantly hampered his investigation and examination of the case.

[30] Among this group were, for example, the senior investigating officer and his deputy, who chose not to engage with the PO's investigators.

[31] Secondly, the PO felt that there was also a loss of significant documentation concerning the management of the police investigation. This concerned him but it does not appear to have resulted in the PO being unable to arrive at conclusions or findings.

[32] There is no suggestion in the papers that the retired police officers were viewed by the PO as suspects who could be arrested, which would, of course, have been an option open to him, provided the test of reasonable suspicion of an arrestable offence had been met.

Pre-proceedings Correspondence

[33] In this case there was an unusually protracted period of pre-proceedings correspondence between the parties. This began on 25 July 2013 with a request to the AGNI, in the light of the PONI Report which was provided with the request, that he should exercise his discretion pursuant to section 14 of the Coroners Act (Northern Ireland) 1959 to have a fresh inquest into the killing of Eugene Dalton. It ended with a letter from the AGNI of 26 May 2015 which was in the form of a second response to a second pre-action protocol letter issued by the solicitors acting for the family.

[34] The delay in the processing of this matter resulted in part from the initial absence of the inquest papers which were only provided to the respondent on 14 February 2014.

[35] The actual decision of the AGNI which was impugned in the judicial review application was one made on 2 October 2014 although even after that date there were several rounds of what purported to be pre-action protocol correspondence and replies thereto.

[36] In essence the family's case was that a fresh inquest into the death of Mr Dalton was needed in order to take into account the volume of pertinent and relevant material which had been uncovered in the PO's report and which had not been available at the time of the original inquest. One of the family's principal concerns was with the possibility that the police did know or should have known of the existence of an explosive device at or in the vicinity of 38 Kildrum Gardens and did not take any or adequate steps to minimise the threat to the lives and safety of the residents in the area.

[37] Consequently, it was claimed that Article 2 obligations were reactivated in this case. It was also the family's hope that important witnesses who had not co-operated with the PONI investigation would be compellable witnesses at a fresh inquest.

[38] On the other hand the response of the AGNI was that he was unconvinced that the holding of a new inquest would at present be advisable. He doubted the utility of such an exercise. The AGNI's position is best set out in the final letter in the chain of correspondence, which is a letter dated 26 May 2015. As he thought (and as effectively is common case) there had been no evidence provided within the Police Ombudsman's Report which would go to the identification and/or punishment of those responsible for the bomb so as to make the holding of a further inquest advisable. He summed up his approach in the following way:

> "(a) The circumstances surrounding your application have already been the subject of a detailed examination by the PONI. The Attorney does not

consider that your submission or the material provided make the holding of an inquest advisable.

(b) The Attorney, having taken into account the case of *Janowiec*[3], remains of the opinion that Article 2 does not require proceedings to be held for the purposes of establishing historical truth.

(c) The Attorney has not been provided with any evidence which would suggest that the identification and/or punishment of those responsible could be achieved if a fresh inquest was directed."

The Judicial Review

[39] The papers in the applicant's judicial review application were lodged on 26 June 2015. Leave was granted on a single issue referred to above. As a result an Amended Order 53 Statement was provided on 20 June 2016 which narrowed the grounds of judicial review considerably. As amended, the grounds upon which relief was sought were as follows:

"(c) The Attorney General misdirected himself in concluding that:

(i) The investigative obligation under Article 2 of the European Convention on Human Rights has been satisfied in relation to the death of Sean Eugene Dalton; and

(ii) The investigative obligation under Article 2 of the European Convention on Human Rights could not be satisfied by a fresh inquest."

The Judge's Judgment

[40] In a careful judgment the Judge dismissed the applicant's application for judicial review. Having set the scene by reference to a number of key authorities on the operation of Article 2, he observed that the emphasis in the case of *Brecknell*[4] was on the prosecution and conviction of perpetrators. As he put it:

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[3] *Janoviec v Russia* (2014) 58 EHRR 30

[4] *Brecknell v United Kingdom* (2008) 46 EHRR 42

> "It is obviously in the public interest that those guilty of murder should be brought to justice even after a long delay."

[41] By way of contrast, the Judge referred to the PO's Report which, he noted, was said by the relatives to require the Attorney to direct another inquest. The emphasis in it was, he thought, on the conduct of the police and not the conduct of the perpetrators.

[42] This led him to the view that what a new inquest might achieve *vis a vis* the perpetrators was "entirely speculative" and was a "very frail basis" for saying that the Attorney was entitled, let alone obliged to order such an inquest.

[43] This was not, he thought, a case where there was any evidence of collusion by the police in causing the tragic deaths, and, in his view, there was no evidence of anything amounting to more than a claim of negligence on the part of the police.

[44] The existence of the family's civil proceedings against the police, in his judgment, was not irrelevant to the correct approach which the AGNI might follow as it provided further opportunity to seek documents and to call witnesses.

[45] Having quoted the factors referred to in the course of correspondence by the Attorney General, replicated above at paragraph [38], the Judge concluded that nothing in those factors could be condemned on public law grounds or otherwise.

[46] Overall, the Judge was of the opinion for the reasons he had given that the AGNI's decision was a lawful one.

The main features of the appellant's case on appeal

[47] Ms Doherty QC and Mr Malachy McGowan BL appeared for the appellant on the hearing of this appeal. The court is grateful to them for their well-researched skeleton argument and their economical oral submissions. While the court has considered carefully the totality of the materials which have been put before it, it acknowledges that in the summary which follows only the main features of the appellant's case are referred to in the interests of economy.

[48] The central submission advanced was that this was a case where significant new information had come to light as a result of the detailed investigation conducted by the PO.

[49] This information, it was submitted, raised important questions as to how the police had behaved prior to the explosion occurring. The police had not conducted themselves creditably and had omitted to protect those who frequented the area of Kildrum Gardens, including, in particular, those who died in the explosion or were injured, by taking action to neutralise the device which had been planted in the area

or by warning the local population of the risk they were at by reason of it being planted. The report of the PO demonstrated that the police had key intelligence in advance of the explosion of the trap that was set by the IRA, into which the police would be lured, but despite this, the police failed to take action to safeguard the public.

[50] This left the local population vulnerable.

[51] It was, counsel went on, necessary that this situation, as uncovered by the PO, should be further investigated, especially as there were, through no fault of the PO, deficiencies in his investigation, which could only satisfactorily be repaired by establishing *via* the mechanism of setting up of a fresh inquest, a legal means for ensuring that an effective official inquiry was provided.

[52] These deficiencies included the refusal of retired police officers to give evidence and assist the PO, which severely hampered the PO's investigation, and the loss of some documents to which the PO had drawn attention.

[53] The situation revealed by the PO's conclusions could not be left without a careful probing through a procedure which met the standards of a thorough inquiry. These standards could only be met by a new inquest.

[54] In support of these submissions, it was argued that while the events at the centre of the case had occurred in 1988, and the police investigation had run its course by in or about 1990, this was a case where legally an investigative obligation revived by virtue of the new information which had been brought to light by the PO. This was the effect of the well-known judgment of the ECtHR in *Brecknell v United Kingdom* which set a threshold for the purpose of answering the question when an investigative obligation, for the purpose of Article 2 of the ECHR, arose again. That threshold had been more than met in this case with the impact that the ordering of a new inquest in the circumstances of this case was not discretionary but was obligatory, as the AGNI was required by law to act consistently with his obligations under the Convention.

[55] The Judge in the court below had erred in a variety of ways in the approach he took and he wrongly failed to reach the conclusion contended for above.

[56] Firstly, he interpreted the circumstances in which a *Brecknell* revival could occur much too narrowly. Revival situations were not limited to circumstances where what was at issue was new information which could lead to the identification and punishment of perpetrators, as he appeared to have held. On the contrary, there was ample authority to support the view that an investigation can be revived where the State, here in the guise of the police, was more broadly involved in the manner described above.

[57] Secondly, where, as here, revival of the Article 2 obligation arose effect must be given to it, a requirement which the Judge had not recognised. While it was accepted that the investigative requirement in a revival case was not identical to the obligation which arose in the immediate aftermath of a death, it nonetheless depended on steps being taken which were fundamental to an effective investigation. It should be capable of establishing the culpability which should be borne by the State.

[58] Thirdly, the Judge was wrong to view this case as being about mere negligence on the part of the police. It was, in fact, about much more than that and it could not be excluded that the police may have acted in a way which showed a disregard for the well-being of the local population, though not necessarily collusively with those who planted the bomb.

[59] Fourthly, the AGNI had misdirected himself in his consideration of the case and the Judge had failed to detect this. In particular, the AGNI had wrongly use the case of *Janowiec* for the purpose of excluding the case from the scope of Article 2 on the basis that the sole purpose of the appellant in seeking a fresh inquest was the establishment of historical truth.

[60] Finally, the Judge erred in believing that the existence of civil proceedings, which admittedly some family members had initiated and which were substantially advanced at this time, affected the question of the obligation which rested on the State to comply with its (revived) Article 2 responsibility. A civil claim was insufficient to discharge such an obligation.

[61] This court should therefore, counsel urged, allow the appeal and grant the remedy which had been sought in the original proceedings *viz* a declaration that the AGNI was obliged by the requirements of Article 2 ECHR to order a fresh inquest into the death of Mr Dalton.

The main features of the respondent's case on appeal

[62] Dr McGleenan QC and Mr Compton BL appeared on behalf of the respondent on the hearing of this appeal. The court is grateful to them for their well-researched skeleton argument and their economical oral submissions. As in the case of the appellant's oral and written submissions, while the court has considered carefully the totality of the materials which have been put before it, it acknowledges that in the summary which follows only the main features of the respondent's case are referred to in the interests of economy.

[63] The central submission of the respondent on this appeal was that this was not a case where the respondent was required by Article 2 of the ECHR to order a fresh inquest. While the appellant claimed that there was a legal obligation upon the respondent to take this step, this was denied.

[64] A true depiction of the situation, it was submitted, was that even now there had been no refusal by the respondent to order a new inquest. On the contrary, no final decision had been made and any decision made to date should not be viewed as final.

[65] While it was not disputed that the recent report of the PO demonstrated that he had investigated a variety of allegations and charges which had not been heretofore put forward, this was not a case where what had been investigated was new or where the report, for the first time, had uncovered material which itself now needed to be investigated. Rather this was a case where a proper investigation had been carried out by the PO and the fruits of it were now known and did not require further investigation.

[66] The above had been evidenced by the fact that the information which the PO had investigated was of considerable vintage and by the fact that his investigation had resulted in conclusions (referred to above at paragraph [26] above) but without either a recommendation in favour of a further investigation to be carried out hereafter or a referral of any matters to the Public Prosecution Service ("PPS").

[67] The invocation by the appellant of the case of *Brecknell*, as the basis for the existence of a revived Article 2 investigation was, counsel argued, inappropriate. *Brecknell* was concerned with a particular situation where a dormant criminal investigation had been revived because new information had emerged for the first time which spoke to the issue of the possible identification and punishment of perpetrators of serious crime. It was this possibility which led the court to set out a number of criteria which, if satisfied, could give rise to a renewal of the Article 2 obligation (albeit as modified appropriately) in a case where the original investigation had long since ended.

[68] The *Brecknell* tests, in short, had no application to a case of the sort now before the court where there could be no credible suggestion that the police had in any way been involved in the planting of the bomb which had exploded killing Mr Dalton and others.

[69] Accordingly, this court should follow the course taken by the Judge and hold that this was not a case where there could be the revival of the Article 2 obligation, however modified.

[70] In the event that the court should not accept the submission contained in the last paragraph, it was submitted on behalf of the AGNI that even if *Brecknell* applied in the sense that there was enough to revive the Article 2 obligation, it did not follow that he was under an obligation to order a fresh inquest. The question of what sort of investigation was needed to satisfy the obligation was dependant on a judgment call by him.

[71] It was pointed out that in reaching a view about this, the issue was case sensitive and the form of inquiry which would meet the obligation depended on a range of factors, including what the new information, allegation, or material which had come to light consisted of; whether such material was weighty or compelling; how important the material was when placed in context; and how easy or difficult it might be to obtain evidence, especially quality evidence, on the matters in question. At one extreme, all that might be required would be verification or otherwise of the credibility of the information in question.

[72] Likewise, a judgment had to be made about the lengths to which an investigation would be taken. An impossible or disproportionate burden should not be imposed on the investigator.

[73] It was submitted by counsel that the AGNI carried out an assessment in this case but concluded that there was insufficient to be gained arising from the outcome of the PO's investigation to warrant a fresh inquest being ordered. The PO's examination already had met the standard of an effective investigation and there would be little to be achieved by the putting in place of a still further investigation.

[74] As regards other points made by the appellant, the respondent supported the Judge in his view that the accusations now levelled at the police amounted to no more than a claim in negligence and also supported the Judge's view that the existence of civil proceedings in this case could properly be taken into account when considering what steps should be taken. Counsel gave as an example that it would be reasonable for the AGNI to seek that the civil proceedings be completed, especially as they were well advanced, so that any further information which might emerge through that forensic process would be available to him in deciding on the merits of holding a fresh inquest.

[75] Finally, the respondent did not accept that the AGNI has acted wrongly in drawing attention to what the Grand Chamber of the ECtHR had said in *Janowiec* about investigations which only had as their function the establishment of historical truth, which he thought was a category into which the appellant's claim was capable of falling. He accepted that it was not the case that this point has, as yet, been conclusively dealt with in the case law, but insofar as the concept remained open-ended, the AGNI could not be held to have acted unlawfully in considering it.

Recent Case law

[76] The central issue before the court is whether the AGNI was obliged on the facts of this case to order a fresh inquest into the death of the deceased by reason of the requirements of Article 2 of the ECHR.

[77] In respect of this, an anterior issue relates to how Article 2's procedural obligation to carry out an effective official investigation, operates in the context of

historic cases, that is cases, like the present, where the death at issue precedes the introduction of the HRA in October 2000.

[78] This issue has produced its fair share of litigation in recent times, both in the Strasbourg court and in the domestic courts.

[79] However, there has been increasing clarity as to how to approach this issue. The court will not seek to describe the twists and turns which have occurred *en route* to where the law stands now. These have been discussed elsewhere[5]. Instead, it will describe the position which appears now to have been reached. This can best be done by reference to three principal authorities, two of which were not available to the Judge when he decided this case at first instance. The first is the case of *Brecknell v United Kingdom*, a Strasbourg case of 2007; the second is the decision of the Supreme Court in *Finucane's Application*[6] in 2019; and the third is this court's decision in *McGuigan and Another's Application*[7], also decided in 2019.

Brecknell

[80] A key question is how the Strasbourg case of *Brecknell* is to be interpreted and applied to the facts. This is so because *Brecknell* is the authority which deals, archetypically, with the situation which has arisen here. The court here is dealing with deaths in 1988. At that time the HRA had yet to be enacted and any obligation on the state to carry out an effective official investigation into a death bound the United Kingdom only in international law. As has already been noted, the police in the present case had carried out an investigation into the deaths in this case but the investigation had run its course by 1990 and it had remained dormant for a considerable period of time to 2005 when the relatives of the deceased raised a series of issues which hitherto had formed no or little part in the original police inquiry. *Brecknell* had dealt with a similar situation where an initial investigation had run its course but where later, after a long period of dormancy, new issues arose[8].

[81] The question of law which the Strasbourg court dealt with was whether by the time the new issues arose the requirements of Article 2 had been spent or whether, in view of new materials coming to light after a long break when nothing had been occurring, obligations under Article 2 revived and so applied in some form to investigative activity thereafter.

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[5] See, for example, the discussion, in Lord Kerr's judgment in Finucane.
[6] [2019] 3 AER 191; [2019] UKSC7.
[7] [2019] NICA
[8] The death under investigation in Brecknell occurred in 1975 but became dormant after those thought to be involved produced alibis. After a period of dormancy, it became active again in 1978 but only for a short time to 1981. In 1999/2000 it became active again with a substantial report being eventually provided to the Serious Crime Review Team in November 2003. It was after this stage in 2004 that the issue of non-compliance with Article 2 arose as a result of an application to the Strasbourg Court. The applicant contended that there was new evidence giving rise to an obligation to conduct an Article 2 compliant inquiry.

[82] In *Brecknell* the court favoured the view that Article 2 can revive in such circumstances.

[83] It is helpful to set out how the court in *Brecknell* described its conclusion and what it meant by the language of reviving the Article 2 obligation. The applicable principles were set out by the court in the following eight paragraphs. The court has italicised certain sentences which appear to be of particular importance:

> "65. The obligation to carry out an effective investigation into unlawful or suspicious deaths is well established in the Court's case law. When considering the requirements flowing from the obligation, *it must be remembered that the essential purpose of such 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…*
>
> 66. The obligation comes into play, primarily, in the aftermath of a violent or suspicious death and in the normal course of events, a criminal trial, with an adversarial procedure before an independent and impartial judge, must be regarded as furnishing the strongest safeguards of an effective procedure for the finding of facts and the attribution of criminal responsibility. There is no absolute right, however, to obtain a prosecution or conviction and the fact that an investigation ends without concrete, or with only limited, results is not indicative of any failings as such. *The obligation is of means only. However, as in this case, it may be that some time later, information purportedly casting new light on the circumstances of the death come into the public domain. The issue then arises as to whether, and in what form, the procedural obligation to investigate is revived.*
>
> 67. The Court must reject the Government's argument that no new obligation arises and that a strict six month time-limit must be applied, rendering applications more than six months after the end of the original investigation out of time…It has already had cause to examine cases in which new evidence came to light after the conclusion of the original proceedings concerning a death. In *McKerr v United Kingdom*[9] where there had been a criminal trial of three officers charged with murder of unarmed IRA

[9] (2002) 36 EHRR 20

suspects and subsequently serious concerns arose that this incident, together with two others at the time, involved a practice of excessive use of force by the RUC and the deliberate concealment of evidence, the Court held:

> '…there may be circumstances where issues arise that have not, or cannot, be addressed in a criminal trial and that Article 2 may require wider examination…the aims of reassuring the public and members of the family as to the lawfulness of the killings had not been met adequately by the criminal trial. In this case therefore, the Court finds that Article 2 required a procedure whereby these elements could be examined and doubts confirmed or laid to rest. It considers below whether the authorities adequately addressed these concerns.'

68. Similarly, where in *Hackett v United Kingdom*[10] a book was published in which the author alleged that he had been wrongly convicted of the murder of the applicant's husband years earlier and purported to name the actual perpetrator, *the Court noted that events or circumstances may arise which cast doubt on the effectiveness of the original investigation and trial or which raise new or wider issues and an obligation may therefore arise for further investigations to be pursued. It considered that the nature and extent of any subsequent investigation required by the procedural obligation would inevitably depend on the circumstances of each particular case and might well differ from that to be expected immediately after a suspicious death has occurred.*

69. The Court would also comment that there is little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity.

[10] *Hackett v United Kingdom* App No 34698/04 May 10 2005

70. The Court would, however, draw attention to the following considerations. *It cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the state authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further*. Both parties have suggested possible tests. The Court has doubts as to whether it is possible to formulate any detailed test which could usefully apply to the myriad of widely differing situations that might arise. It is also salutary to remember that the Convention provides for minimum standards, not for the best possible practice, it being open to the contracting parties to provide further protection or guarantees… Lastly, bearing in mind the difficulties in policing modern societies and the choices which have to be made in terms of priorities and resources, positive obligations must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.

71. With those considerations in mind, *the Court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures*. The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such investigation may in some cases reasonably be restricted to verifying credibility of the source, or of the purported new evidence. The Court would further underline that, in the light of the primary purpose of any renewed investigative efforts, the authorities are entitled to take into account the prospects of success of any prosecution. The importance of the right under Article 2 does not justify the lodging, willy-nilly, of proceedings. As it has had occasion to hold previously, the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals and they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of

> arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would not in fact have produced concrete results.
>
> 72. The extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny will apply will again depend on the particular circumstances of the case, and may well be influenced by the passage of time as stated above… ."

Finucane

[84] In *Finucane* a solicitor in Northern Ireland had been murdered in 1989 by loyalists in his home in the presence of his wife. It emerged that there was collusion between the murderers and members of the security forces. A variety of investigations subsequently were conducted into the death over a prolonged period. In 2011 a decision was taken by the then Prime Minister not to hold a public inquiry into the case but instead to have an independent review conducted by a former United Nations War Crimes prosecutor into the issue of state involvement in the murder. This review resulted in a report prepared by him which, in turn, led to a judicial review application on the part of the deceased's wife. One of the arguments raised in the judicial review related to the failure of the state to establish a public inquiry which, it was argued, constituted a breach of Article 2 of the ECHR. In respect of this argument, the Supreme Court held that there had been a breach of the procedural obligation to carry out an effective official investigation and that this obligation had been revived as there had emerged information and material which potentially undermined earlier conclusions or earlier inconclusive investigations. The court noted that the need for an effective obligation went well beyond facilitation of a prosecution. In the court's view, there had been constraints placed on the review and its capability to establish vital facts had been undermined. This was particularly so because the reviewer lacked the power to compel the attendance of witnesses. Further, those who had met with him had not been subjected to testing to probe the veracity and accuracy of their accounts. In the court's opinion, the review had not been conducted in sufficient depth and lacked the tools necessary to uncover the truth with the result that it could not satisfy the requirements of Article 2, which remained unmet.

[85] In the light of the above, the Supreme Court made a declaration that there had not been an Article 2 compliant inquiry into the death though it declined to order that a public inquiry of the type sought by the appellant be provided.

[86] The leading judgment was delivered by Lord Kerr, with whom the other members of the court agreed. His judgment was wide ranging. While he agreed that

the *Brecknell* test was satisfied in the *Finucane* case, he concluded that the requirements referred to by the Strasbourg court in the cases of *Silih* and *Janowiec* were satisfied as well. These requirements post-dated the *Brecknell* decision but it appears clear, to use the language of *Janowiec*, that in a case where the triggering event (usually the death) lies outside the court's jurisdiction *ratione temporis*, the discovery of new material after the critical date may give rise to a fresh obligation to investigate only if either the 'genuine connection' test or the 'Convention values' test had been satisfied. Thus, the satisfaction of either one or other of these tests is of great importance. To satisfy the former, there must be a reasonably short period between the death and the entry into force of the Convention in the respondent State. Moreover, a major part of the investigation must have been or ought to have been carried out after the entry into force of the Convention in the state in question. On the other hand, the Convention values test, which was viewed as applying only to 'extraordinary situations', would arise for consideration only where it could be said that the underlying values of the Convention were at risk. This suggested that 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.

[87] Lord Kerr concluded on the facts of the *Finucane* case that the 'genuine connection' test had been met which relieved him of having finally to determine whether the 'Convention values' test had been satisfied.

[88] The judgment of Lord Kerr is generally of assistance in the present case as, while every case will be different, there is a good deal in common between *Finucane* and the present case in terms of the themes which arise. Thus, the following references taken from Lord Kerr's judgment are worthy of being highlighted:

(i) Speaking generally of the Article 2 procedural obligation, Lord Kerr remarked that "evolving human rights jurisprudence, both from Strasbourg and domestically, has, of course, established that the procedural obligation to investigate deaths can extend beyond those deaths in which state authorities are alleged to be implicated" (para [83]). Later (to similar effect) at para [127], Lord Kerr made the point that the opportunity to prosecute as a result of evidence uncovered [by the reviewer's review] "does not foreclose on the question whether an effective investigation into Mr Finucane's death, compliant with Article 2, has taken place. The need for an effective investigation into a death goes well beyond facilitating a prosecution".

(ii) More than once Lord Kerr made the broad point that the revival of the duty to investigate had to be viewed in the light of the fundamental importance of Article 2. The state authorities had to be sensitive to any information which had the potential either to undermine the conclusions of an earlier investigation or which allowed an earlier inconclusive investigation to be pursued further (see paras [93] and later [114]).

(iii) Linking the limitations of the review to the sufficiency of the inquiry, Lord Kerr noted that the reviewer's capability to establish vital facts such as the identity of those involved was undermined (para [130]); that much of what the reviewer said in his conclusion was qualified or expressed in terms of generality; that officers who were in a position to give warnings could not be identified (para [131]; that a particular view of the reviewer was unmistakenly an instance of inconclusiveness [para 135]; and that overall there was an inability for the review to deliver an Article 2 compliant inquiry (para [134]).

(iv) Further, as Lord Kerr noted at para [137], it was on the deficiencies of the inquiries that have been conducted to date that the court must focus. As he was at pains to explain, the reviewer's conclusions were not being criticised for their failure to identify the people involved in bringing about the murder because the means by which he, the reviewer, could do this, had been denied to him (para [140]). As Lord Kerr put it: "If he had been able to compel witnesses; if he had had the opportunity to probe their accounts; if he had been given the chance to press those whose testimony might have led to the identification of those involved in targeting Mr Finucane; if the evidence of the handler had been obtained, or alternatively, medical evidence of her incapacity to provide it had been forthcoming, one might have concluded that all means possible to identify those involved had been deployed. Absent those vital steps the conclusion that an art 2 complaint inquiry into Mr Finucane's death has not yet taken place is inescapable" (*ibid*).

(v) Finally, Lord Kerr was critical of how the Court of Appeal had dealt with the matter. He noted that the Court of Appeal did not agree that a declaration should be made and he took issue with a reference in that court to the new information referred to by the reviewer being described as "something of an unknown quantity". In Lord Kerr's view, this involved looking at the question from the "wrong end of the telescope". In his opinion, "the proper focus should be on the inquiries which have been conducted to date and an examination of whether they constitute an art 2 compliant inquiry, not on whether material yet to be disclosed and considered established that the inquiries were or were not susceptible of meeting the procedural requirements of art 2" (para [149]).

McGuigan and others

[89] This is the most recent of the cases the court has focussed on and is a decision of this court.

[90] It concerns events going back to the early 1970s and, in particular, the treatment of the applicants who were part of a group of internees who were known as the 'hooded men'. These men had undergone interrogation in depth and their central complaints related to what they viewed as techniques of torture used against them in breach of Article 3 of the ECHR.

[91] Part of the argument involved the contention that their complaints had not been properly investigated and that as a result there continued to be an ongoing breach of Article 3's procedural aspect which, long after the 1970s, had been revived in accordance with the case of *Brecknell*, by the receipt of new information which had come into the public arena and required investigation.

[92] At first instance, the Judge held that materials which had been broadcast in 2014, which tended to suggest that torture had been authorised by a senior United Kingdom Minister and that the UK Government had withheld from the Strasbourg institutions evidence which undermined their case that the effects of the use of the five techniques were not long-lasting or severe had been sufficient to satisfy the test at paragraph [71] of *Brecknell* and so revive the Article 3 procedural obligation.

[93] But on appeal this court reached a different conclusion mainly on the basis of what was described as the 'revision' judgment of the Strasbourg Court in the case of *Ireland v United Kingdom* which was decided after the first instance judgment.

[94] In the course of its judgment this court reviewed all of the recent authorities in this area, including *Brecknell* and *Finucane.*

[95] In a helpful summary the majority of the court provided a statement of principles derived from *Finucane* at paragraph [96]. The following propositions were put forward:

> "(i) The decision in *McKerr* has not been overruled but its application must be revised in light of the detachability of the procedural obligation.
>
> (ii) The critical date for the establishment of Convention rights in domestic law is 2 October 2000 when the HRA was commenced.
>
> (iii) Where it is sought to establish procedural or ancillary Art 2 or 3 rights after that date in respect of a death prior to 2 October 2000 the genuine connection and Convention values tests set out in *Silih* and *Janowiec* apply.

(iv) The 10 year time limit set out in *Janowiec* is not inflexible. Although it is a factor of importance its significance may diminish particularly where the vast bulk of the enquiry into the death or breach of Article 3 has taken place since the HRA came into force.

(v) The *Brecknell* test can provide a basis for the revival of the procedural obligation but *Janowiec* makes clear that the genuine connection or Convention values test must be satisfied."

[96] Later at paragraph [102], the court noted that:

> "It is common case that there must be a trigger before the obligation to conduct a procedural investigation arises. Any other approach would offend the principle of legal certainty upon which the Convention places great weight as is demonstrated by the revision judgment. In *Janowiec* at [144] the Grand Chamber described the *Brecknell* test as depending upon new material emerging which should be sufficiently weighty and compelling to warrant a new round of proceedings."

[97] In the end, in the view of the court, the material which had been disclosed in 2014 was not thought to constitute "new material raising reasons for the conduct of an adequate investigation beyond those that have been known for a long time" (paragraph [106]).

The issues which arise

[98] The question of the application of the principles described above to the present case appears to the court to raise the following issues:

(a) Does the doctrine of revival apply to a case of this type which does not involve the identification and punishment of those who were responsible for planting the device which killed the deceased?

(b) If revival is available on the facts of this case, is it correct to conclude that there has been a revival?

(c) In this case, in the light of the PO's report, have the requirements of Article 2 been satisfied?

(d) If they have not been satisfied does it follow that the court should order the AGNI to exercise his discretion to require the holding of a fresh inquest?

The court will consider each of these in turn.

Does the doctrine of revival apply in this case?

[99] This question has divided the parties in this case. The appellant argues that the doctrine of revival applies equally in this case as it would apply in other cases. On the other hand, the respondent disagrees, as did the Judge. The argument which was accepted was that revival was inextricably linked to cases where the new information or material fed into the prospects of identifying and punishing those who were responsible for the deaths. As there was no realistic prospect that this would be the effect of any further investigation, the availability of new information or material could not properly be viewed as being such as to bring the doctrine of revival into play.

[100] The court accepts that in *Brecknell* there is a strong emphasis on further investigative measures being required where there exists a bridge between the relevant new material which has emerged and the goal of eventual prosecution or punishment of those who perpetrated the unlawful criminal behaviour. But care needs to be taken not to read too much into that.

[101] In the first place, it needs to be remembered that *Brecknell* itself was a case about bringing perpetrators to justice. Unsurprisingly, therefore, there is an emphasis on this aspect. But it does not necessarily follow that 'identification and/or punishment of perpetrators' is the only circumstance in which revival can occur. There is scope, it seems to the court, for a broader interpretation to be adopted. In this regard the court reminds itself that at paragraph 65 of *Brecknell* the Strasbourg court spoke of the essential purpose which underlay the need for investigations into unlawful or suspicious deaths. That purpose was "to secure the effective implementation of the domestic laws which protect the right to life". Such laws will normally include laws which enjoin the State to refrain from the intentional and unlawful taking of life but it will normally also include laws which are designed to require the State to safeguard the lives of those within its jurisdiction. It is to this latter aspect that the materials uncovered in this case were relevant.

[102] Secondly, the court is inclined to the view that there is value in looking at cases in which the 'effective official investigation' requirement within Article 2 attaches to the State even though the object of such an investigation is not to identify and/or punish perpetrators but is to consider State responsibility more broadly. These are cases where commonly there is no suggestion that the State itself has directly brought about the death in question. Ms Doherty, on this aspect, drew the

court's attention to cases such as *Amin*[11], *Edwards*[12] (decided by the Strasbourg court); *R (Smith) v Oxfordshire Assistant Deputy Coroner*[13]; and *Oneryildez v Turkey*[14], a Strasbourg decision.

[103] The court has considered these cases and has found them helpful. *Amin* and *Edwards* are both death in custody cases where a deceased prisoner was killed by his cell mate. There was no suggestion that the cell mate, in either case, was acting other than on his own, with no State involvement. Nonetheless, the House of Lords in *Amin* and the ECtHR in *Edwards* applied to them the principles which applied to an Article 2 compliant investigation, including the need for an effective official investigation. Lord Bingham in *Amin*, commenting upon *Edwards*, indicated that it was important because, though it addressed a case in which there had been no killing or alleged killing by a state agent and the responsibility of the State (if any) could only rest on a negligent failure to protect the life of Mr Edwards, the same principles, as in cases involved with killings by State agents, applied. Those principles, which were set out fully at paragraph [20] of *Amin*, included the need for some form of effective official investigation.

[104] In contrast *Smith* involved a quite different situation. It concerned the death of a serving soldier in Iraq. He died of hyperthermia while carrying out duties away from his army base. The case had no link at all with state agents. The question which arose was whether the State may have breached Article 2 by reason of a systemic failure by the military authorities to protect a soldier from the risk posed by the extreme temperatures in which he had to serve. Such a risk was held to exist, at least arguably, and this was held to be sufficient to trigger the need for an inquiry into compliance with the requirements of Article 2.

[105] Lord Mance in *Smith*, in an interesting exercise sought, at paragraph [210], to draw together categories of cases in which the substantive right contained in Article 2 had been held to be potentially engaged, with the result that the procedural obligation had been held to exist. Among these categories was his fifth which he described as follows:

> "(v) Other situations where the state has a positive obligation to take steps to safeguard life."

He went on:

> "Such situations exist not only where the right to life is inherently at risk, but also where the state is on notice of a specific threat to someone's life against which protective steps could be taken".

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11 *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 653

12 *Edwards v United Kingdom* (2002) 35 EHRR 19

13 [2011] 1 AC 1

14 (2005) 41 EHRR 20

[106] Lord Mance then quoted a variety of cases. One of these was *Oneryildiz* which is mentioned above. This involved allegations that the State tolerated and, for political reasons, encouraged slum settlements close to a huge uncontrolled rubbish tip, without making any effort to inform the settlers of dangers posed by the tip, which in the event exploded, killing some 39 residents. The ECtHR said that, where lives had actually been lost, "in circumstances potentially engaging the responsibility of the state", the procedural aspect of Article 2 entailed a further duty on the state "to ensure…an adequate response – judicial or otherwise – so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished (para 91)". The applicable principles, the court noted, were "rather to be found in those the court has already had occasion to develop in relation notably to the use of lethal force, principles which lend themselves to application in other categories of cases"(para 93).

[107] Later in his judgment (at paragraph [212]) Lord Mance said that:

> "Both the substantive and the procedural limbs of article 2 are therefore capable of giving rise to obligations of investigation on the part of state authorities, including the courts".

[108] In a similar vein, Lord Kerr, giving judgment in the case of *Finucane's Application* [2019] UKSC 7 at [83] indicated, speaking of the procedural obligation within Article 2, that, "[e]volving human rights jurisprudence, both from Strasbourg and domestically, [has] established that the procedural obligation to investigate deaths can extend beyond those deaths in which state authorities are alleged to be implicated"[15].

[109] If a procedural obligation under Article 2 can apply in relation to the above selection of cases, as it certainly appears to do, it does not appear to be a substantial jump to be able to accept that where new evidence emerges at a later date after an initial investigation has been completed, it can follow that the Article 2 obligation can be revived in such cases.

[110] The court therefore is of the view that the doctrine of revival can apply in this case, notwithstanding that it is not the object of the investigation to identify and punish those who are the direct perpetrators.

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[15] He cites *Calvelii and Ciglio v Italy* (App No 32967/96); *Lazzarini and Ghiacci* v Italy (17 January 2001; *Angelova and Iliev v Bulgaria* (2007) 47 EHRR 236 and *Byrzyhowski v Poland* (2006) 46 EHRR 32 for this proposition.

Is it correct to conclude that there has been a revival?

[111] The acid test for when a revival occurs is found at paragraph 71 of *Brecknell.* What triggers it, is the existence of a "plausible or credible allegation, piece of evidence or item of information" which is relevant. The investigation which had been carried out by police in 1988-89 and the inquest which followed in December 1989 focussed on the responsibility of those who planted the bomb. There was no investigation into the responsibility or accountability of the police for the protection of life. In this regard the material or allegations which raised new issues were those introduced by a son of Mr Dalton in 2005. These are described at paragraphs [15]-[17] above and are the matters that gave rise to the investigation carried out by the PO.

[112] However, the case which has been made by the appellant is not that the above matters brought about a revival but that it is the report of the PO which has done so. In contrast, the respondent's positon appears to be that it is not the PO's report which may be viewed as reviving any Article 2 obligation. In particular, his report was not the occasion for the discovery of something new.

[113] Looking at the matter objectively, the conclusion which this court draws is that the initiation of the complainant's complaint in 2005 and the disclosure of material in support of it by the complainant, meets the *Brecknell* paragraph 71 revival test. In other words, what was asserted and was put forward at that time was sufficient to give rise to a requirement that the matters raised should be investigated.

[114] The court will, therefore, provisionally conclude that Article 2 was revived in this case in 2005. Plainly, since then still further investigative activity has been carried out. This is reflected in the publication of the PO's report in 2013 which causally is linked to the complaints of 2005. That report is to be viewed as a response to the investigation obligation which had been revived. In these circumstances the court is of the view that the question is not whether the PO's report itself has revived the Article 2 obligation but rather the different question of whether, at this time, it can be said that the Article 2 obligations resting on the state as a result of the revival in 2005 have been satisfied. In this respect, the case is not unlike *Finucane*. If the obligations have been met, no further steps will have to be taken to achieve compliance. However, if the state's Article 2 obligations have not been satisfied, in principle, more will need to be done, provided any further round of investigation realistically can result in compliance.

[115] This leaves, however, the question of whether in 2005 it could be said that either the 'genuine connection' or 'Convention values' test, as they have now been explained in *Silih* and *Janowiec,* had been satisfied. In this regard, it seems to the court that in 2005 a distinct trigger was pulled when the deceased's relative put forward his various complaints, which hitherto had not been the subject of any effective investigation. At this stage the complainant put into the arena a series of questions which had not before been addressed. While it is right to acknowledge

that in this case some 12 years had passed by from the date of the deceased's death to the critical date (2 October 2000), as this court indicated in the hooded men case, the 10 year time-limit set forth in *Janowiec* should not be viewed inflexibly. In *Finucane*, the Supreme Court viewed this aspect as part of a multi-factoral exercise which depends on a view taken as to the weight to be attached to the various relevant factors in accordance with the circumstances of the case: see paragraph [108]. A countervailing factor, it may be said, is that after a basic investigation at the time of the incident, the matter within a very short period became dormant but later revived in 2005. It has remained live since then so that it now can be said that a substantial proportion of the procedural steps taken in this case can be viewed as taken after the critical date. The case, the court notes, is not unlike that of *Re McQuillan's Application*[16] where this court was willing not to regard a period of 28 years between the death and the critical date as being a barrier to the application of Article 2's procedural obligation. Indeed, in *McQuillan* the court went so far as to say that "as a matter of general principle we consider that little if any weight should be attached to the passage of time in a *Brecknell* case" (paragraph [135]).

[116] In the light of these factors the court inclines to the view that the genuine connection test on the facts of the present case is on balance satisfied.

[117] While this leaves the question of whether in this case the Convention values test is also satisfied it is not necessary for this to be determined and the court will leave this open, whilst accepting that a strong case can be made for saying that establishing compliance with this test would probably be an uphill struggle.

Has the state's obligations pursuant to Article 2 been met at this time as a result of the PO's report?

[118] While the PO at the end of his investigation was able to draw a series of conclusions in relation to the original complainant's complaints and while the complaints, save for one significant exception (that relating to whether a police informer was being protected), were generally sustained, it does not follow from this that the objective of an Article 2 obligation has been met. The issue for the court is not simply about whether the complainant and/or the families may feel some measure of vindication from the conclusions which have been reached by the PO. It is also about whether, having regard to the context and to the evolution of the investigative process to date, an effective investigation has been provided. Bare conclusions alone will often not be enough to satisfy the Article 2 obligation, if the basis upon which they have been reached, and the reasoning leading to them, remain unexplained. In this case, the families have been told that the police ought to have known that a device was in the vicinity of 38 Kildrum Gardens in the period running up to the death of the deceased and they have been told that steps could and should have been taken to locate the threat and warn the local community. Additionally, they have been told that the failure to take protective measures had

[16] [2019] NICA 13.

tragic consequences and that this may be viewed as the police not fulfilling their duty to protect the public. But, there appears, equally, to be much which remains shrouded in mystery.

[119] In particular it is unclear how key conclusions were arrived at. While there are references to police intelligence which the PO has seen and while there is reference to some police officers or retired police officers who assisted the PO's work, there is little which is which nailed down or specified in detail.

[120] An effective investigation, it might be thought, will entail a picture of the investigative process which leads to particular conclusions so that the extent of the investigation can be seen together with the investigator's reasoning to his or her conclusions. This enables those affected to arrive at a balanced view of the quality of the process which has been undertaken. Such will expose or be likely to expose failings or omissions or shortcomings.

[121] In a case such as this, where there has been a refusal to co-operate with the PO by senior and well placed retired police officers and where it is known that a range of documents are missing from the investigation these matters assume great importance. Where the investigator – here the PO – feels obliged to say, as he has done in relation to his report – that his work has been "significantly hampered" in relation to the investigation and examination of the case, this inevitably detracts from the level of public confidence a report of this type enjoys and points towards the need for still further probing of the facts.

[122] A good example of the deficiency of the PO's report from an Article 2 perspective relates to the decision to take the area around Kildrum Gardens 'out of bounds'. The report tells the reader that this occurred on 26 August 1988 as a result of a consideration by police of police intelligence, but there is no evidential material offered to show why, or by whom, this decision was arrived at or what alternatives to this step were considered. This is so notwithstanding that this, from an Article 2 standpoint, was probably a key decision which would have needed to be carefully modulated so as to ensure that key Article 2 obligations in respect of the local population were not being overlooked. It seems to the court, that an effective investigation would have focussed, *inter alia*, on this decision, as it appears to have been crucial to later events.

[123] On the other hand, the court is conscious that it has been suggested that the PO must have had confidence in the views he expressed in his report, especially as he eschewed the need, in his report, to propose further investigation or referral of any particular matter to the public prosecution authorities. The court bears this in mind, but does not consider that it is decisive of the issue before it, though it is a factor to be considered.

[124] Having regard to the history of the present case and to the particular role which the police played in this case as a body safeguarding the right to life of the

local population, the court concludes that the argument that the PO's report has satisfied the Article 2 obligations which have been revived should be rejected for the reasons which have been outlined above.

Should the court order the AGNI to exercise his discretion to require the holding of a fresh inquest?

[125] In view of the conclusion reached above, the court must consider whether it should order the AGNI to exercise his discretion to provide a fresh inquest.

[126] The starting point, which the court should not neglect, is section 14 of the Coroners (Northern Ireland) Act 1959 ("the 1959 Act"). This provides that the AGNI may direct any coroner to conduct an inquest into a death where the AGNI has *reason to believe* that a deceased person has died in circumstances which *in his opinion* make the holding of an inquest *advisable* (the court's emphasis). It is evident from the words in italics that this provision ordinarily lays not an inconsiderable emphasis on the matter being very much one involving the personal judgment and assessment of the AGNI.

[127] However, it is not in dispute that the AGNI, as a public authority for the purposes of the Human Rights Act 1998, is obliged to act in conformity with the requirements of Article 2 where they are engaged, as they are here, albeit in the context of a revival of the procedural obligation after a period of relative inactivity.

[128] Ordinarily, the court would expect the AGNI to broach this question of what he should do on the basis that if an Article 2 compliant inquiry into a death has not yet been provided then steps should be taken to rectify the position.

[129] But this is not to say that necessarily and in every case the court will impose on the AGNI an obligation of the nature sought in this case by the grant of an order of *mandamus* directed to him to provide a fresh inquest.

[130] This is because it would be a mistake for this court to see the matter as being so black and white as to fetter the discretion of the AGNI.

[131] In the court's opinion, there will be a need for further consideration to be given to the case by the AGNI in the light of the judgment of this court. Not only is he the possessor of the power but he should have the opportunity to consider the available options.

[132] Without seeking to analyse the potential options exhaustively, the court is, for example, conscious of the fact that the AGNI would, even at this stage, be entitled to ask himself whether a further round of investigations realistically can bring about compliance with the requirements of Article 2. An obvious subject of consideration by him would concern the availability of witnesses at this stage and the state of the documentation which is available. This is no more than a reflection of the simple

fact that there will be situations where, with the best will in the world, the ability now to conduct a meaningful inquiry may have been lost. If the unmet obligations of Article 2 can be met the court would expect this to be the course which should be taken, but equally, if they can't be met, this may indicate a need to acknowledge this and to bring the process to an end.

[133] It is also the case that attention should be devoted by the AGNI to the issue of the extent to which a modern inquest will be able to overcome logistical difficulties. In this context the court notes that a coroner, if appointed to hear a fresh inquest, now possesses power – in section 17A of the 1959 Act – to require the attendance of witnesses and to procure the production of documents. These are powers not possessed by the PO. But they are not a cure all, especially in the context of lost documents.

[134] Another aspect of the matter, which should also be considered by the AGNI, relates to whether, apart from the mechanism of a coroner's inquiry, there are other ways of satisfying the requirements of Article 2 in a case of this kind. In a case like the present, where it is a paramilitary organisation which planted the bomb which killed the deceased, there may be room for other ways of approaching the satisfaction of Article 2.

[135] In the course of the argument in this case the fact that the applicant and the deceased's family have already issued civil proceedings, which the court was told were now well advanced, was raised as a potential vehicle which could be deployed, if not to satisfy Article 2, to assist in the process of satisfying it.

[136] It seems to the court that the AGNI would be entitled to consider this aspect further.

[137] While the court would be slow to say that any particular route to the satisfaction of Article 2 should be viewed as set in stone, it is conscious that the contribution which can be made by civil proceedings in a context such as this should not be dismissed out of hand.

[138] It has long been the case that the form of the investigation required by Article 2 may vary according to the circumstances, as the cases of *Mastromatteo*[17] *v Italy* and *Calvelli*[18] *and Ciglo v Italy* show. The trend, moreover, might reasonably be viewed as pointing towards a greater use of civil proceedings for this purpose, provided the investigation to be provided may be viewed as adequate and thorough and appropriate to the subject matter in question.

[139] The court is conscious that in a recent Strasbourg case the ECtHR stated as follows:

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[17] No 37703/97 24 October 2002.
[18] No 32967/96 (2002).

> "The court reiterates that the choice of means for ensuring the positive obligations under Article 2 of the Convention is in principle a matter that falls within the Contracting State's margin of appreciation. There are different avenues for ensuring Convention rights and even if the State has failed to apply one particular measure provided in domestic law, it may still fulfil its positive duty by other means…[t]he Court's task, having regard to the proceedings as a whole, is to review whether and to what extent the domestic authorities submitted the case to the careful scrutiny required by Article 2 of the Convention"[19].

[140] The court should not be interpreted as saying that in this case the AGNI should not order a fresh inquest or should regard civil proceedings as the means of taking the matter forward.

[141] All the court is saying that the matter is not so open and shut in favour of the remedy which the applicant seeks as to cause the court to resort to an order of *mandamus.*

Conclusion

[142] The court is of the opinion that the Judge erred in this case, in particular, by viewing the width of the *Brecknell* judgment too narrowly. In the court's opinion, the AGNI also committed the same error. As a consequence the issue of compliance of past investigations with the requirements of Article 2 was not satisfactory addressed.

[143] The key finding of this court is that to date the Article 2 investigative obligation which was revived has not been satisfied. Again, this was not the view of the Judge or the AGNI. In these circumstances, the court will allow the appeal.

[144] Like the Supreme Court in *Finucane*[20], this court will make a declaration, though the terms of this may need some discussion with the parties.

[145] However, it declines to order *mandamus* against the AGNI for the reasons which have been given.

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[19] See Dumpe v Latvia No 71506/13 16 October 2018.

[20] See paragraph [153]