Neutral Citation No: [2022] NIKB 37 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **SCO12024** *ICOS No:* **21/014639/01** *Delivered:* **21/12/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GERALDINE FINUCANE FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

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Fiona Doherty KC and Aidan McGowan (instructed by Madden & Finucane, Solicitors) for the applicant
Paul McLaughlin KC and Philip McAteer (instructed by the Crown Solicitor's Office) for the respondent
Tony McGleenan KC and Leona Gillen (instructed by the Crown Solicitor's Office) for the Chief Constable of the Police Service of Northern Ireland, a notice party
Andrew McGuinness (instructed by the Legal Directorate within the Office of the Police Ombudsman) for the Police Ombudsman for Northern Ireland, a notice party

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SCOFFIELD J

Introduction

[1] By these proceedings, the applicant challenges a decision on the part of the Secretary of State for Northern Ireland ("the Secretary of State"), made on 30 November 2020, *not* to establish a public inquiry at this time in relation to the death of her late husband, Patrick Finucane, and to, instead, await the outcome of a "process of review" by the Police Service of Northern Ireland (PSNI) and certain further investigations being conducted by the Police Ombudsman for Northern Ireland (PONI) ("the Ombudsman"). The PSNI and PONI appeared as notice parties in these proceedings. The applicant further challenged an additional decision on the part of the Secretary of State not to review his earlier decision following the conclusion of the PSNI's process of review on 6 May 2021.

[2] Ms Doherty KC and Mr McGowan appeared for the applicant; Mr McLaughlin KC and Mr McAteer appeared for the respondent; Mr McGleenan KC and Ms Gillen

appeared for the Chief Constable; and Mr McGuinness appeared for the Ombudsman. I am grateful to all counsel for their extremely detailed written submissions and helpful oral submissions.

Factual background

[3] The murder of Patrick ('Pat') Finucane has become notorious in the context of what have come to be termed 'the Troubles' in Northern Ireland. For present purposes, it is unnecessary to set out a great deal of the background to Mr Finucane's murder. He was killed on the evening of 12 February 1989 when gunmen burst into his home and shot him some 14 times, in the presence of his wife and children. Since that time, his family – principally through the efforts of his wife, the present applicant – have been seeking a thorough, searching and independent examination of the circumstances surrounding the murder, including the extent of any involvement of state agents in it. Much of the background to the issue is set out in detail in the decision of the UK Supreme Court in *Re Finucane's Application* [2019] UKSC 7 (see, in particular, paras [1]-[49]).

[4] On 1 November 1998, the applicant applied to the European Court of Human Rights (ECtHR) for a declaration that the UK Government had failed to carry out a proper investigation into her husband's death and for an order requiring the government to conduct a full public inquiry into its circumstances. On 1 July 2003 the ECtHR held that there had not been an inquiry into the death which complied with article 2 of the Convention. It considered that the original police investigation had lacked sufficient independence, as there were allegations that RUC officers had been involved in issuing threats against Mr Finucane (see para 74); that the original inquest was unduly narrow in scope, as it had not included consideration of allegations of state collusion (see para 78); that the necessary element of public scrutiny was not at that time satisfied, in light of the limited amount of information then in the public domain regarding the Stevens I and Stevens II investigations and the lack of clarity as to what of the Stevens III investigation would be made public (paras 79-80); and the failure of the Director of Public Prosecutions (DPP) to give reasons to explain 'no prosecution' decisions which had been made (see para 83). There was also an issue as to lack of reasonable promptitude in the commencement of the Stevens investigation specifically addressing the Finucane murder (see para 80). The respondent emphasises that the ECtHR declined to order a fresh investigation or any other step by the UK authorities. Instead, the Court stated that it fell to the Committee of Ministers acting under article 46 of the Convention to consider "what might practicably be required" by way of the government's obligation to comply with its article 2 obligations (see para 89).

[5] As a result, the Committee of Ministers, the decision-making body of the Council of Europe, then commenced supervision of the execution of the ECtHR's judgment, pursuant to article 46(2) of the Convention. Further details about this process are set out below.

[6] On 23 September 2004, in a statement to the House of Commons, the then Secretary of State made a commitment to hold a public inquiry into Mr Finucane's death. That commitment has not been delivered upon and, as appears further below, much has happened since. From time to time, further consideration has been given to the establishment of a full public inquiry to look into the circumstances surrounding Mr Finucane's death. In 2011 another important decision was taken in that regard, which was the subject of litigation to which I shall turn shortly. It is only right to record that, for a time at least, part of the reason for a public inquiry not being established was the Finucane family's opposition to the type of public inquiry which was proposed, namely one operating under the provisions of the Inquiries Act 2005 ("the 2005 Act").

[7] Meanwhile, on 17 March 2009, the Committee of Ministers decided that its examination of the specific measures taken by the UK on foot of the decision of the ECtHR should be closed. There has been some discussion in the course of these proceedings of the basis for, and import of, that decision. The applicant relies upon the fact that the Committee of Ministers at that point, as later noted by the UK Supreme Court, was proceeding on the basis that the UK Government was actively working on proposals for establishing a statutory public inquiry: that is to say, it closed its examination in the expectation that a public inquiry was going to be held. In accordance with the Secretariat's recommendation, the Committee of Ministers noted with satisfaction "the possibility of holding a statutory inquiry" and "strongly encouraged" the continuation of dialogue between the UK Government and the Finucane family.

[8] In the event, the UK Government then decided *not* to hold a public inquiry, notwithstanding the Secretary of State's previous statement in the House of Commons. Instead, on 12 October 2011, the then Secretary of State made a further statement to the House of Commons outlining that Sir Desmond de Silva QC had been asked to carry out a review of any state involvement in Mr Finucane's murder. In that statement, the Government accepted the clear conclusions of previous investigations that there had been collusion and indicated that it was "committed to establishing a further process to ensure that the truth is revealed." The Secretary of State said, "Accepting collusion is not sufficient in itself. The public need to know the extent and nature of that collusion." The Government now proposed to achieve this through Sir Desmond's review, rather than by way of a public inquiry.

[9] The applicant's response to this change of direction by the Government was twofold. First, she initiated judicial review proceedings challenging the decision; and it was those proceedings which culminated in the appeal to the Supreme Court mentioned above. Second, by letters dated 27 August 2014 and 29 September 2015 the applicant also asked the Committee of Ministers to reopen its supervision of the execution of the ECtHR's 2003 judgment. At its meeting in December 2015 the Committee of Ministers decided to postpone its decision on that request until the conclusion of the domestic legal proceedings initiated by the applicant.

The Supreme Court's decision and declaration

[10] The Supreme Court gave final judgment on 27 February 2019 in the applicant's judicial review proceedings challenging the Secretary of State's decision of October 2011 not to hold a public inquiry. The applicant submits, understandably, that this court's assessment of the present issues should begin with, and be dictated in large measure (if not wholly) by, the outcome in the Supreme Court and associated reasoning on the part of that court. Her challenge at that time focused on substantive legitimate expectation and also on the requirements of article 2 ECHR. Essentially, she was unsuccessful on the first point but successful on the second.

[11] The late Lord Kerr gave a judgment, with which the other four members of the court agreed. By the time of judgment having been given, the Supreme Court had the benefit of the outcome of Sir Desmond de Silva's review. The relief granted by the court was in the form of a declaration, set out within the text of para [153] of the judgment, which reads as follows:

> "I would therefore make a declaration that there has not been an article 2 compliant inquiry into the death of Patrick Finucane. It does not follow that a public inquiry of the type which the appellant seeks must be ordered. It is for the state to decide, in light of the incapacity of Sir Desmond de Silva's review and the inquiries which preceded it to meet the procedural requirement of article 2 , what form of investigation, if indeed any is now feasible, is required in order to meet that requirement."

[12] It is clear from the above that the Supreme Court accepted that the article 2 obligation arose in relation to the death of Mr Finucane. That is accepted by the respondent in these proceedings and has similarly been accepted in earlier litigation brought by this applicant. Although I am aware that the Supreme Court has recently had occasion to look again at the reach-back of the investigative obligation in respect of deaths which occurred some time before the coming into force of the Human Rights Act in the appeal from the Court of Appeal's judgment in *Re Dalton's Application* [2020] NICA 26, in which judgment is awaited, for present purposes I proceed on the unchallenged basis – established in respect of the circumstances of this very case – that article 2 is engaged.

[13] The applicant relies upon the Supreme Court's declaration that there had not then been an article 2 compliant inquiry into the death of Patrick Finucane. She goes on to submit that the court also "expressly identified the vital steps which were necessary to secure an article 2 compliant inquiry but which had not yet been secured by the state" and "expressly rejected the Government's submission that the de Silva review, considered alongside the other investigations and reviews in the case, fulfilled the requirements of article 2." I accept the submission that the Supreme Court did *not* consider the de Silva review and such other inquiries of which it was aware to have

then discharged the state's article 2 investigative obligation. Precisely what the Supreme Court knew of the "inquiries which preceded" the de Silva review, which were the subject of Lord Kerr's reference in that regard, has been the subject of debate in these proceedings. Broadly speaking, the respondent asserts that the Supreme Court was aware of the *fact* of some of the later processes upon which he places reliance, and indeed was aware of their outcome, but was *not* aware (by reason of how the case developed and how the evidence to meet it was assembled) of much of the *detail* of the investigative steps undertaken in some of those inquiries.

[14] In any event, the steps which, in the Supreme Court's view, required to be taken in order to secure article 2 compliance must be gleaned from elsewhere in the judgment, namely the passages to which Lord Kerr was referring back when he said in para [153] that he would "therefore" make the declaration that article 2 had not yet been complied with.

[15] At paras [118]-[119] of his judgment, Lord Kerr said this:

> "118. In the report on his review Sir Desmond had said that he was "left in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements of the state"—see [46] above. This sentence should not be isolated from the overall context of Sir Desmond's report. He had firmly concluded that state agents were involved in the targeting of Mr Finucane. But it matters not as to the precise nature of the doubt entertained by him. The doubt that he expressed must therefore be as to the precise role that state agents played. That was sufficient to warrant further investigation. The doubt, whatever its nature or source, required to be dispelled. The "strands of involvement by elements of the state" needed to be recognised and explained. These were necessary ingredients of an article 2 compliant inquiry.
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> 119. These conclusions are not impelled by the notion that the outcome of the investigation into Mr Finucane's death is unsatisfactory, although it plainly is. They speak to the shortcomings of the procedures that have beset the inquiries that have so far taken place. Those shortcomings have hampered, if not indeed prevented, the uncovering of the truth about this murder. They are discussed at [139]–[141] below."

[16] The shortcomings in the investigations to date were therefore principally to be found in the Supreme Court's discussion at paras [139]-[141] of Lord Kerr's judgment.

Before turning to those passages, however, the applicant also places significant reliance on para [134], which explains some of the limitations of Sir Desmond's review procedure:

> "In deciding whether an article 2 compliant inquiry into Mr Finucane's death has taken place, it is important to start with a clear understanding of the limits of Sir Desmond de Silva's review. His was not an in-depth, probing investigation with all the tools that would normally be available to someone tasked with uncovering the truth of what had actually happened. Sir Desmond did not have power to compel the attendance of witnesses. Those who did meet him were not subject to testing by way of challenging probes as to the veracity and accuracy of their evidence. A potentially critical witness was excused attendance for questioning by Sir Desmond. All of these features attest to the shortcomings of Sir Desmond's review as an effective article 2 compliant inquiry. This is not to criticise the thoroughness or rigour of Sir Desmond's review. To the contrary, it is clear that it was conducted with commendable scrupulousness. But the very care with which he carried out his review and the tentative and qualified way in which he has felt it necessary to express many of his critical findings bear witness to the inability of his review to deliver an article 2 compliant inquiry. It is therefore unsurprising that on 17 May 2011, in a memorandum prepared by the Northern Ireland Office, it was accepted that Sir Desmond's review would not be article 2 compliant. Sir James Eadie claimed that, although it was not necessary to do so, if the review by Sir Desmond was taken with what had gone before, it did fulfil the requirements of article 2. For the reasons that I have given, I do not accept that submission."

[17] I set out paras [139]-[141] in full:

> "139. Sir Desmond de Silva's conclusion that he was left "in significant doubt as to whether Patrick Finucane would have been murdered by the UDA in February 1989 had it not been for the different strands of involvement by elements of the state" is, in itself, an eloquent statement about the inadequacy of the inquiries into Mr Finucane's murder and the incapacity of those inquiries to fulfil the requirements of article 2 , for the reasons discussed at [118] and [119] above. It has proved to be incapable of establishing the identity of the persons implicated in the

murder of Mr Finucane. A proper inquiry along the lines described in preceding paras was the *means* by which an article 2 compliant inquiry would have been achieved.

140. The proposition that the procedural obligation was not one of result but of means does not, therefore, signify in this instance. Sir Desmond's conclusions are not criticised for their failure to identify the people involved in bringing about Mr Finucane's murder. Rather, the means by which he might have done so had been denied him. I have dealt with these in [134] above. 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, objective, 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 article 2 compliant inquiry into Mr Finucane's death has not yet taken place is inescapable.

141. I reach that opinion notwithstanding the decision of the Committee of Ministers. As I have observed (at para 31 above), the decision of that body to close the examination of the specific measures taken by the UK on foot of the decision of ECtHR was made on the basis that the government was actively working on proposals for establishing a statutory public inquiry. Quite apart from that consideration, however, the most significant inquiry into Mr Finucane's death took place after the Committee of Ministers had reached its decision. It is to the nature of the investigation which came after the Committee's decision that the closest attention must be paid, in order to decide if an inquiry sufficient to meet the procedural requirement of article 2 has been held."

[18] In light of the declaration made by the Supreme Court, it fell again to the state to determine what form of investigation, if any, would then be undertaken in order to meet the requirements of article 2. Significantly, in terms of at least one of the objections raised by the respondent in these proceedings, in practice that assessment has fallen to him (or his predecessors), as Secretary of State for Northern Ireland.

Further developments after the Supreme Court decision

The impugned decision and the commencement of these proceedings

[19] Following the Supreme Court's decision on 27 February 2019, there was some delay on the part of the Secretary of State making a further decision as to how to proceed. The applicant issued further judicial review proceedings ("the delay judicial review") to compel the Secretary of State to adopt a position on how the state proposed to respond to the Supreme Court's judgment. In the course of those further proceedings, on 10 October 2020, the Secretary of State acknowledged that there had been further delay which was in breach of article 2, and an apology was provided. The Secretary of State also paid damages in the sum of £7,500 to the applicant in respect of this further breach. He also committed to make a decision by 30 November 2020.

[20] On that date, 30 November 2020, the Secretary of State decided not to establish a public inquiry at this time but to instead await the outcome of a "process of review" by the Legacy Investigations Branch (LIB) of the PSNI and of investigations being conducted or to be conducted by PONI. It is this decision which is the primary target of this application for judicial review. The respondent prefers to refer to this decision as one "to *defer a final decision* on the establishment of a public inquiry into the murder." He emphasises that he did not refuse to establish a public inquiry but that, after a detailed process of reviewing the previous investigations into the murder and informing himself about the PONI investigations which remain ongoing, and having been advised by the PSNI that it proposed to carry out a further review, he decided to defer his decision on whether to establish a public inquiry, indicating that he would review that after the PSNI review process and PONI investigations concluded.

[21] The respondent communicated his decision to the Finucane family in a (virtual) meeting with them that day; and later explained his position in a statement in the House of Commons. On the same date, he disclosed to the family, for the first time, the content of the PSNI's review report of November 2015 (discussed further below) which followed from the de Silva review. The Northern Ireland Office (NIO) also issued a document entitled, 'UK Government response to judgment of the Supreme Court of the United Kingdom in the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland) [2019] UKSC 7', dated 30 November 2020 ("the UKG response document"). This document described the respondent's position and his reasoning, giving details of recent and ongoing investigations, and putting some further information into the public domain about previous investigations which had been undertaken.

[22] Also on the same date, 30 November 2020, PONI issued a statement following the respondent's impugned decision. It indicated that thirteen matters had been referred to PONI by the PSNI in February 2016, following its 2015 review; that, at that stage, events connected to Patrick Finucane's murder were not central to any of PONI's ongoing investigations; and that, in PONI's view, the most appropriate way of progressing the matters referred would be to consolidate them into ongoing investigations. Two of the relevant issues were already being investigated as part of

a broader investigation into police actions in relation to loyalist attacks in South Belfast in the 1990s (in the Ombudsman's investigation known as 'Operation Achille'). The investigation in that case was complete and findings were to be published as part of Ombudsman's report (which, I note in passing, is now under challenge: see *Re Applicant A and Others' Application* [2022] NIKB 28). A number of the further referred matters had been incorporated into another major investigation about police conduct in relation to the Ulster Defence Association (UDA). However, the remaining issues were not immediately relevant to any existing investigations being undertaken by PONI and would therefore be progressed as standalone cases. Those matters which had not progressed to investigation at that stage as part of a wider investigation were to be advanced when resources allowed, with no indication given of when that might be. An overall impression of this statement might be thought to be that the Ombudsman was seeking to depress expectations as to when, and the extent to which, her investigations would resolve outstanding issues in relation to the Finucane case. I proceed on the basis that this basic information about the state of play in relation to the PONI processes relevant to the Finucane case was known to the Secretary of State at the time of his decision. It certainly would have been readily available to him.

[23] Also on that date, much like PONI, the Chief Constable issued a statement. He echoed the previous apology for state involvement in the Finucane murder. He observed that the decision around the holding of a public inquiry was a matter for the Northern Ireland Office (NIO) and was outwith the statutory responsibilities of the PSNI, noting that, due to the absence of any other solution for dealing with the past in Northern Ireland, the statutory duty for investigating deaths during the Troubles continued to sit with the PSNI. For that reason, Mr Finucane's murder rested within the PSNI's LIB caseload. The Chief Constable also referred to the PSNI's process of reviewing the de Silva report. For present purposes, the significant part of the Chief Constable's statement is in the following terms:

> "It is our view that there are currently no new lines of inquiry. We now need to decide if a further review is merited given all the previous investigations into this case. Once we have determined that, we will inform the Finucane Family. If we determine that a review should take place, we will then have to decide if we are best placed to carry out a review. As it stands it is unlikely that we would enjoy a perception of independence in this case, given the accepted position of State involvement in this matter. Therefore, it is highly likely that any review would need to be conducted independently.
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> A review itself is not an investigation. Any decision to investigate would only be made following the review process. Again, it is likely that any new investigation would need to be independently led. We will also need to be satisfied that given the extensive work of Lord Stevens,

> Judge Cory and Sir Desmond de Silva, that a further investigation has a reasonable prospect of furthering this matter either by bringing more persons to justice or answering the unanswered questions of the Finucane family and their ongoing search for justice."

[24] Ms Doherty understandably emphasises a number of features of this statement: first, the PSNI's stated position that there were no new lines of inquiry; and, second, the explanation that the process about to be undertaken was merely in order to determine *whether* a further review was merited, with the further review itself (if any) being only a precursor to any further actual investigation. The applicant contrasts the tenor of that statement with the reliance placed by the respondent upon the further process to be undertaken by the police.

[25] These proceedings, challenging the Secretary of State's decision of November 2020, were issued in February 2021, with leave being granted in April 2021.

The PSNI decision not to review the case

[26] Some months later, on 7 May 2021, the Chief Constable wrote to the applicant and informed her that the PSNI assessment was now complete and that the police would *not* be conducting any further review at this time. This followed a letter from the Chief Constable to the Secretary of State of 6 May 2021, to similar effect. It stated:

> "Having considered this previous review and all previous investigative work, I do not now consider that a further formal PSNI review would reasonably be expected to bring forward any new lines of enquiry and the PSNI will not therefore be conducting any further review at this time."

[27] The Chief Constable's letter to the Secretary of State included the usual caveat that, as with any case, if new and credible information was to be identified in the future which could provide a further investigative opportunity regarding the murder, the case could be revisited. Aside from that rider, however, the clear message of the Chief Constable's correspondence was that the case was closed from his perspective. What could be done had been done, apart from the investigations into alleged police misconduct which were to be undertaken by the Police Ombudsman. The Chief Constable's letter also indicated that, taking account of the conviction of Ken Barrett in relation to the murder and the previous extensive investigations which had been carried out, the Finucane case had in fact been wrongly categorised in the LIB's case sequencing model so that, in truth, the priority which it had been accorded was higher than it ought to have been. Notwithstanding that, the Chief Constable had determined that it was "appropriate for the assessment of the case to continue, to establish whether a further review should take place." The outcome of this assessment was as described above.

[28] The applicant contends that, in light of that further development, the Secretary of State should have taken a new decision at that stage, since one of the further processes the outcome of which he had been awaiting had come to an end. Her solicitors wrote to the respondent and asked him whether he had reviewed his position in light of the PSNI's decision not to conduct a review. By that stage, of course, this litigation had commenced; and the respondent's basic position is that it was then appropriate for him to await the outcome of these proceedings before reconsidering the matter. A response from the Secretary of State on 11 February 2022 made clear that the respondent had not reviewed his decision at that time "in light of the ongoing proceedings challenging that decision."

[29] The proceedings were case managed at a large number of review hearings between June 2021 and March 2022. On each occasion, an important issue was that the respondent had not yet filed its replying affidavit evidence or that, once that had been done, there were issues relating to that evidence being properly understood (due to concerns regarding illegibility of certain exhibits, missing pages, redactions which did not indicate the basis of redaction, and other issues). These issues resulted in two listings for hearing having to be vacated. I do not need, and do not seek, to apportion blame for any delay during this period, although the applicant's side seeks to lay blame firmly at the door of the respondent. As I emphasised in a number of case management hearings, the delay has been regrettable; but I accept that the respondent's representatives were doing the best they could (in light of the case the respondent wished to make and the practical and public interest considerations which then arose in relation to marshalling the necessary evidence) and were acting in good faith. In March 2022, the applicant took the position that the hearing should simply proceed, notwithstanding a number of concerns she still entertained in relation to the respondent's evidence.

Further developments in relation to the Committee of Ministers' supervision

[30] As noted above, following the Supreme Court's judgment in February 2019 the applicant wrote to the Committee of Ministers seeking that it reopen its supervision of the execution of the ECtHR's judgment. Following its meeting on 23-25 September 2019, the Committee of Ministers made a decision in which it called on the UK Government to submit concrete information by 1 December 2019 as to how it intended to conduct an article 2 compliant investigation into Mr Finucane's death in light of the findings of the Supreme Court; and decided to examine the applicant's request for reopening, in light of that information, at the Committee's meeting in March 2020.

[31] Following its meeting on 3-5 March 2020, the Committee of Ministers made a decision in which it noted with regret that the authorities had not submitted concrete information in advance of the meeting, and called on the authorities to submit concrete information by 31 March 2020. Again, the UK Government failed to do so. Following its meeting on 1-3 September 2020, therefore, the Committee of Ministers made a decision in which it expressed its deep concern that a decision had still not

been made on how to respond to the Supreme Court judgment and underlined that it was urgent that the authorities take such a decision without further delay.

[32] As set out above, the decision which is impugned in these proceedings was made on 30 November 2020. Following its meeting on 9-11 March 2021, having considered the Secretary of State's decision, the Committee of Ministers decided to reopen supervision of the execution of the ECtHR judgment of 1 July 2003. The applicant relies upon this development in a number of respects. Firstly, she observes that it is highly unusual for the Committee of Ministers to reopen supervision of the execution of a judgment of the ECtHR which it had previously closed (both she and her representatives are unaware of a previous instance of this occurring), which underlines the importance and seriousness of the ongoing situation. Secondly, she quite understandably submits that the respondent cannot (or can no longer) rely upon the Committee having closed its supervision in support of its position that what it has done, or is currently proposing, is compliant with the United Kingdom's article 2 obligations. Quite the opposite is the case, she submits.

[33] Following its meeting on 30 November to 2 December 2021, the Committee of Ministers made a decision noting that the present proceedings had now commenced. The decision also "expressed concern about the authorities' lack of clarity on the intended next steps, urged them to provide information of the investigative steps previously announced and to cooperate efficiently with the judicial review proceedings and to inform the Committee without delay of their outcome; …" Following its further meeting on 8-9 March 2022, the Committee of Ministers made another decision in relation to the present case "reiterating their deep concern about the authorities' lack of clarity on the intended next steps in the case of Finucane" and urged them again to take the steps mentioned in the Committee's previous decision.

Summary of prior investigations considered by the respondent

[34] As discussed in further detail below, the respondent reached the impugned decision in this case having commissioned and considered a review of earlier investigations carried out in relation to, or touching upon, the murder of Mr Finucane. These are addressed in some detail in the affidavit evidence of Ruth Sloan, a senior official in the NIO, filed on behalf of the respondent. A brief summary (drawn largely from the respondent's skeleton argument in these proceedings) is set out below.

[35] First, there was an initial Royal Ulster Constabulary (RUC) investigation carried out between 12 February 1989 and April 1990. Amongst other things, it recovered one of the guns used in the murder and identified that this had been stolen from Palace Army Barracks in 1987 by an Ulster Defence Regiment (UDR) Colour Sergeant (who was later convicted of theft and sentenced to five years' imprisonment). This investigation further identified that the gun had been sold to Ken Barrett (who pleaded guilty to the murder of Mr Finucane in 2004). It also resulted in the conviction in April 1990 of three individuals, who were charged with possession of the weapon

and membership of the Ulster Freedom Fighters (UFF) but who could not be linked to the murder.

[36] There was also an inquest held into the death on 6 September 1990. This was limited to the direct cause and immediate circumstances of the death and appears to have been relatively perfunctory.

[37] The Stevens Inquiry followed ("Stevens I"): an investigation led by John Stevens, an independent senior police officer who was then the Deputy Chief Constable of the Cambridgeshire Constabulary. (Lord Stevens, as he now is – Baron Stevens of Kirkwhelpington – had a distinguished policing career in a number of forces, including appointment as Commissioner of the Police of the Metropolis. He was knighted in 2000, before being created a life peer in 2005. He conducted a number of inquiries, now known simply by his surname and a number, into policing in relation to Troubles-related incidents in Northern Ireland. I use those shorthand references in this judgment and sometimes refer to Lord Stevens simply by his surname for convenience.) Stevens I looked into allegations of collusion between members of the security forces and loyalist paramilitaries. To date, only a summary of his findings have been published. As a result of this investigation, however, 94 persons were arrested, with 59 reported for or charged with offences, 45 of whom were later convicted of terrorist-related offences (mostly possession of materials likely to be of use to terrorists). Those convicted included 32 members of the Ulster Defence Association (UDA) and 11 members of the UDR. No charges were brought against any members of the RUC.

[38] Significantly, however, Stevens I also uncovered the existence of the military intelligence agent, Brian Nelson. Investigation into Nelson led to him being prosecuted for and pleading guilty to various offences, including five counts of conspiracy to murder. He was sentenced to ten years' imprisonment but none of those convictions related to the murder of Mr Finucane.

[39] The respondent has also drawn attention to the fact that the applicant commenced civil proceedings against the Chief Constable, the Ministry of Defence (MOD) and Brian Nelson on 11 February 1992. These proceedings remain ongoing; have been bogged down at the discovery stage for years; and do not appear to be anywhere near being set down for trial.

[40] A BBC 'Panorama' programme was aired on 8 June 1992 called "Dirty War", which made significant allegations of failures in the Army's handling of Nelson as an agent, as well as of his involvement in murders for which he had not been prosecuted (including that of Mr Finucane) and in weapons procurement for loyalist paramilitaries. This prompted a further investigation, carried out between 1992 and 1995, by John Stevens, then Chief Constable of Northumbria Police ("Stevens II"). The investigation produced two interim reports and a final report. These have never been published; but the final report was submitted to the Director of Public Prosecutions

(DPP) on 21 January 1995. On 17 February 1995, the DPP gave a direction to the Chief Constable that there should be no prosecutions as a result of these reports.

[41] There was then a report by British Irish Rights Watch (BIRW), a non-governmental organisation, and what is referred to as "the Langdon report." In February 1999, the applicant presented the respondent with a report prepared by BIRW. This report, inter alia, alleged that members of the RUC suggested that the UDA kill Patrick Finucane; that Brian Nelson was involved in the murder; that the Force Research Unit (FRU) within the Army had misled the Stevens investigation and the Crown Court about Nelson's knowledge of, and involvement in, the murder in various ways; and that RUC Special Branch had had detailed information about the plot to murder Patrick Finucane but did not warn him that he was being targeted. A senior civil servant, Anthony Langdon, was then tasked with investigating these allegations to assist the Secretary of State to consider whether any further inquiries were required, either in relation to the activities of Brian Nelson or security force collusion in the murder of Patrick Finucane.

[42] The resulting Langdon report was disclosed in the course of the proceedings which culminated in the Supreme Court judgment. Mr Langdon concluded that the Army had failed to cooperate with Stevens I; that the evidence given by Colonel J of FRU was seriously misleading and did mislead the trial judge in Nelson's trial; that FRU assisted Nelson with intelligence material in some respects; that Nelson's handlers were aware of his efforts to support the UDA towards the targeted assassination of Republicans; and that there were grounds for thinking that Nelson had mentioned something about the threat to Patrick Finucane to his handler before his murder. The report also indicated that one of the items of available evidence was a note made by Nelson's handler recording that Nelson had reported certain information about Patrick Finucane being on his "P card" (a reference to 'personality card', notes used by Nelson to summarise information about potential UDA victims, although no 'P card' relating to Patrick Finucane has ever been found). These conclusions obviously gave rise to serious concerns.

[43] There followed a further investigation by John Stevens, "Stevens III." This was specifically an investigation into the murder of Pat Finucane (and that of Adam Lambert) and the broader allegations of collusion contained within the BIRW report. This investigation resulted in the prosecution of William Stobie for the murder of Pat Finucane; but that trial collapsed after the prosecution offered no evidence on the basis that a key witness was not capable of giving evidence as a result of his mental condition. Stobie was therefore acquitted but was later murdered by gunmen on 12 December 2001. Stevens III also resulted in the conviction of Ken Barrett for the murder, for which he was sentenced to life imprisonment.

[44] In April 2003, Stevens submitted a large body of materials to the DPP. The respondent says that the Stevens investigation was one of the largest, if not the largest, criminal investigation ever undertaken in the UK. The body of materials and evidence accumulated has not been made public – but an "Overview and Recommendations

Report" was provided to the Chief Constable which contained recommendations for the Finucane case. This report was published and stated, inter alia, that sufficient evidence had been uncovered to conclude that there was collusion in the murder of Patrick Finucane.

[45] Stevens III concluded, inter alia, that the murder of Patrick Finucane could have been prevented; that the RUC investigation of the murder should have resulted in the early arrest and detention of his killers; that informants and agents had been allowed to operate without effective control and to participate in terrorist crimes; that there was collusion in the murder, ranging from a wealth of failures to keep records, absence of accountability, withholding of intelligence and evidence, up to the extreme of agents being involved in the murder; that Nelson had contributed materially to the murder; that, prior to the murder, Nelson had supplied information of a murder being planned; and that he had also provided significant information to his Special Branch handlers in the days after the murder, principally concerning the collection of a firearm, but that this information did not reach the original murder enquiry team. The findings and recommendations of the Stevens Team were submitted to the DPP. In June 2007 the DPP decided that there should be no prosecution arising from the investigation and published a statement of reasons for this.

[46] Subsequent to Stevens III, the governments of the UK and Ireland agreed to appoint Justice Peter Cory, a retired judge of the Canadian Supreme Court, to review a number of controversial legacy cases in which collusion was suspected which were identified in the Weston Park Agreement. Judge Cory delivered his reports to the Secretary of State on 7 October 2003 and they were published on 1 April 2004. In all four cases Judge Cory recommended holding a public inquiry, including therefore in the Finucane case, although he also recommended that any inquiry should be postponed until the conclusion of any ongoing prosecutions. The respondent says that his report into collusion in respect of the murder of Patrick Finucane is very detailed and was prepared having had access to all of the materials generated during the Stevens III investigation and with the full cooperation of the Stevens investigation team. The applicant submits that Judge Cory's exercise was not designed to reach conclusions but merely to consider whether a public inquiry was warranted (which, he said, it was). Judge Cory concluded that there is strong evidence that collusive acts were committed by the Army (FRU), the RUC and the Security Service; that the records leave little doubt that, on occasion, handlers provided information to Nelson that facilitated his targeting activities; that little or no effort was taken to prohibit or discourage Nelson from committing criminal acts; that the evidence given by the commanding officer of the FRU at Nelson's trial could only be described as misleading; and that the weight to be attached to the Nelson statement to the Stevens inquiry could only be determined at a hearing where the evidence could be tested by examination and cross-examination in a public forum. Judge Cory also concluded that the documentary evidence which he had reviewed was contradictory regarding whether the FRU had advance knowledge of the targeting of Patrick Finucane. Whilst the inference could be drawn that they had such advance knowledge, these questions could only be resolved at a public hearing.

[47] Judge Cory also looked at other information held by state agencies suggesting that Mr Finucane was a potential target for loyalist paramilitaries. In 1981, the Security Service was aware that the UDA had plans to kill him but, after consultation, the RUC Special Branch decided to take no steps to intervene or halt the attack. In 1985, the Security Service was aware that a leading loyalist considered Mr Finucane to be a priority target. In December 1988 it also had information from an agent that there were plans afoot to kill various targets, and that Patrick Finucane had been singled out for special attention, but again no action was taken to warn him or to intervene. Judge Cory considered that these matters should be considered in the context of a public inquiry, individually and cumulatively.

[48] All of the above processes were able to be taken into account by the Supreme Court in reaching its judgment in 2019. The de Silva review then followed. Its conclusions are summarised in para [45] of the Supreme Court judgment and may properly be described as shocking. The de Silva review also identified materials which were described as "new and significant" (now known to relate to propaganda or 'counter action' initiatives undertaken by the Security Service) and which were not available to either the earlier Stevens inquiries or Judge Cory. The de Silva review was complete by the time of the Supreme Court's decision and, as is evident from the portions of that judgment set out above (see paras [11]-[17]), was referred to throughout the judgment.

[49] Separately, however, additional investigative steps were set in train by the outcome of the de Silva review. Mr de Silva did not himself recommend referral to the PSNI but, in the course of the 2011 proceedings, the first instance judge (Stephens J, as he then was) said that these materials should be examined by the PSNI and that there should be a further decision by the PPS. The Chief Constable then directed the Historic Enquiries Team (HET) to undertake two strands of work arising out of the de Silva report: first, to review the report and ascertain whether further action by the PSNI, or as a result of anything contained within the report, could progress the investigation; and, second, to review the 'new and significant material' to which de Silva had referred.

[50] The Court of Appeal and Supreme Court in the 2011 proceedings had evidence of the outcome of the two PSNI pieces of work. There were affidavits from Detective Superintendent Jason Murphy (Deputy Head of LIB) and Mr Michael Agnew (Deputy Director of the PPS), as well as correspondence from the PSNI to the Finucane family explaining the outcome of the further process. A range of matters had been referred to PONI but, otherwise, the PSNI and PPS agreed that there were no further investigative opportunities and that the additional work had not revealed sufficient new evidence to require a new PPS prosecution decision. The underlying reports from the PSNI were not themselves placed in evidence in the 2011 proceedings. The respondent lays some emphasis on this. Those reports have now been considered by him and have been put in evidence before me.

[51] In particular, there were three reports generated by the two further strands of work carried out by the PSNI (mentioned at para [49] above) in the wake of the de Silva review:

(i) The 2015 PSNI review of the de Silva report ("the 2015 review report"): This was designed to provide "an assessment of the gaps which potentially exist between what Stevens previously investigated and what De Silva now asserts across a very broad range of issues." It was focused on identifying and referring to PONI any potential wrongdoing by the police; but also considered the impact of additional material considered by de Silva and its impact upon the outcome of the Stevens inquiries and subsequent recommendations the DPP. One of the team members who assisted the PSNI with the work of this review was Mr Phil James, who had been a member of the Stevens inquiry team but who was then working with the HET.

(ii) The PSNI report to the PPS of December 2016: In addition to its review of the entire de Silva report, the PSNI also identified and analysed all of the new and significant information, with a view to determining its impact upon the prior investigations and prosecutorial recommendations. The first report arising from this process was provided in December 2016 and focused upon potential criminal offences such as conspiracy or incitement to commit murder.

(iii) The PSNI report to the PPS of May 2017: The second such report, at the request of the PPS, focused upon the possible offence of misconduct in a public office.

[52] The two latter reports concluded there was no evidence within the material which created reasonable grounds to suspect that an offence of incitement, conspiracy or an analogous offence had been committed; and that the evidence was such that proving an offence of misfeasance in public office would be impossible. In both cases the PPS agreed with the conclusions reached by the PSNI, having considered for itself the underlying evidence and having taken the independent advice of counsel. Again, the respondent emphasises that at the time of the Supreme Court hearing only the outcome and conclusions of these reports were available to the Secretary of State, but not the detailed reasoning for the decisions or copies of the PSNI reports themselves. (The applicant's riposte is that, if and insofar as these documents were relevant, which she does not accept, it was entirely open to the respondent to obtain them and place them in evidence in the 2011 proceedings, as he has now done, rather than merely referring to the outcomes.)

[53] The broader 2015 review report contained a range of recommendations in chapter 19. Four of these (recommendations 8, 9, 11 and 12) were addressed to the PSNI and identified further working analysis which the PSNI could conduct which "could provide the basis for investigative lines of inquiry relating to the murder of Patrick Finucane." Thirteen recommendations related to referrals to PONI. Eleven recommendations were made regarding work which could be undertaken which may be of assistance in the civil proceedings brought by the applicant against the RUC and

MOD arising out of the murder. The entire report was referred by the PSNI to PONI in January 2016. PONI's position following that referral is addressed in further detail below.

[54] The respondent also relies upon a further process, referred to as an independent review of the prior investigations, undertaken by counsel commissioned by him for this purpose. (The applicant disputes that this review was truly independent, since the counsel instructed are also instructed by the Chief Constable in the civil claim she has brought and the review was overseen by the senior counsel instructed by him in these proceedings – but little turns on this in my view). This exercise was undertaken with a view to informing the Secretary of State's options for any future inquiries, on the basis of a full understanding of what had gone before. The Secretary of State submits that this review made clear that prolonged, detailed and extensive investigative efforts had been made to identify all those involved in Mr Finucane's murder, including investigation of the acts and omissions of police, military and security service personnel, together with the paramilitary suspects. The report contained separate analysis of suspected misconduct by RUC officers; suspected misconduct by members of the military; paramilitary suspects; previous threats to Mr Finucane and to solicitors more generally; the oversight of agent handling; and the new and significant information referred to in the de Silva report. Once this review was complete, in December 2019, the Secretary of State shared copies of the resulting report with the PSNI, the MOD, the Security Services, the PPS, PONI, the Home Office and the Cabinet Office, requesting general comments from each agency in relation to the report and addressing certain questions to them.

[55] NIO officials then prepared a "gap analysis" which considered each of the areas of investigative deficiency identified by the Supreme Court, together with other investigative issues identified through the review process. This analysis was shared by the NIO with the MOD, PSNI, Security Service and the PPS for observations and comment. In the course of a detailed response to this from the PSNI, received on 2 November 2020, the respondent says that the NIO was advised *for the first time* of PSNI's intention to review the Finucane case and investigation through its LIB. This arises from a statement made in the course of general comments at the end of the PSNI response, which stated as follows: "The murder of [Patrick Finucane] is the next in line for review in the LIB caseload as a result of the Case Sequencing Model." In the following days, there was some additional engagement between the PSNI and the NIO as to what this process would involve. The PSNI also highlighted its view, however, that any renewed investigative steps taken by PSNI were unlikely to enjoy the confidence or cooperation of the Finucane family.

The PSNI's current position

[56] The Chief Constable was represented as a notice party in these proceedings. He has not filed separate evidence, as the police's actions have been set out in some detail in the evidence filed on behalf of the Secretary of State. His submissions overlapped to a large degree with those of the respondent. He lays emphasis on the

significant investigative efforts which have already been undertaken in relation to the Finucane case and has indicated that, at this stage, from the PSNI's perspective, there are no further lines of enquiry to pursue. His position remains as set out at paras [26]-[27] above. The Chief Constable has also described the progress with the four recommendations for police which came out of the 2015 review. Several of these have been referred to PONI and await investigation by the Ombudsman. The issue in relation to the 'journey' of weapons used to kill Mr Finucane cannot be taken any further. The weapons were forensically examined at the time and evidential reports were completed but the weapons have since been disposed of. Efforts were made to request access to Mr Finucane's own personal records of threats and intimidation but no response was received from the applicant's solicitor. In view of the current position, the Chief Constable supports the respondent's position that the flaws identified by the Supreme Court in previous investigations have, on analysis, "been addressed in previous investigations."

The Ombudsman's current position

[57] Further to the Secretary of State's decision of 30 November 2020, the Ombudsman set out her position in a public statement of the same date (see para [22] above). She later indicated in correspondence of 2 February 2021 that of the thirteen matters which had been referred to PONI by the PSNI in 2016, two had been investigated; four were being incorporated into 'Operation Medfield', with it being difficult to envisage a public report in relation to that investigation being released prior to 2025; with the seven remaining matters having been identified as matters for investigation in future years, with the timescales for these investigations yet to be determined.

[58] The respondent relies upon the fact that several of the matters referred by the PSNI to PONI as a result of the 2015 review report fall squarely (he submits) within the areas of investigative deficiency identified by the Supreme Court, relating to potential involvement of RUC officers in leaking information to loyalist terrorists, proposing Patrick Finucane as a target to loyalist paramilitary suspects and handling of intelligence from Stobie, amongst other matters. PONI's submissions in this case proceed on the basis, as one would expect, that she will investigate the matters referred to her as quickly and as thoroughly as she can. Nonetheless, her submissions highlight the practical difficulties facing her in doing so, both as to timescales and resources and on the basis that her office's "powers are limited."

[59] As to that, the Ombudsman's submissions have emphasised that her powers do not permit her to investigate a complaint where it is not in respect of a current or former police officer. Her officers enjoy the powers and privileges of a constable throughout Northern Ireland; but she has no power of compulsion in respect of retired officers. Nor does she have a statutory power to compel the provision of information or documentation by bodies other than the PSNI. At the end of an investigation, she will consider referral to the DPP if she considers that a criminal offence may have been committed. Otherwise, she will consider the question of disciplinary proceedings;

but, where a police officer has resigned or retired, that officer will no longer be subject to any disciplinary process. The Ombudsman has power to publish a statement as to the exercise of her functions pursuant to section 62 of the Police (Northern Ireland) Act 1998 ("the 1998 Act") but this power is constrained in the way described by the Court of Appeal in *Re Hawthorne's Application* [2020] NICA 33, which the Ombudsman's submissions say describe "a "legislative steer" away from having the power to make determinations of the commission of criminal offences or disciplinary misconduct in a Public Statement", although she may provide a comprehensive narrative around the investigation, her decisions and determinations.

[60] The Ombudsman's evidence and submissions in these proceedings also provide further explanation as to why the matters referred to her office in 2016 by the PSNI have been allocated for investigation as part of existing PONI investigations. This was a matter which was given careful consideration. The approach which has been taken was thought to have the benefit of building upon and exploiting the iterative intelligence picture which would become evident as investigations proceeded on a chronological basis. She rightly notes that there is no challenge to this operational decision on her behalf.

[61] Some of the matters referred to her for investigation arising out the PSNI 2015 review (recommendations 6 and 15) have to date been considered in two PONI reports; but remain to be further considered by PONI, both in ongoing and future investigations. Four further matters (the subject of recommendations 14, 20, 21 and 22) are to be incorporated into the initial phase of Operation Medfield (an investigation associated with murders attributed to the UDA); and it is envisaged that the remaining recommendations could be subsumed in the later phases. This operation was suspended after initial prioritisation work for a variety of reasons, although principally due to resource constraints. That is explained in the affidavit evidence filed on behalf of the Ombudsman from Paul Holmes, her Senior Director of Investigations, which explains that (at that point) PONI had 457 cases in the Historic Directorate with 181 cases under active investigation. Additional funding has now been made available but there are severe difficulties recruiting staff arising from, inter alia, the specialised requirement for qualified investigators who were former police officers in forces outside Northern Ireland, the uncertainty around the effect of legacy proposals generally and the coronavirus pandemic. PONI is still making efforts to recruit further staff. It is impossible to say, however, when all of the matters which have been referred to PONI in relation to Patrick Finucane's murder will start being investigated, let alone when all of this work will be complete. It is clear that, in respect of some of these issues, an outcome is likely to be many years away.

The Article 2 investigative obligation

[62] I do not need to rehearse at length the nature and features of the investigative obligation under article 2 ECHR. These have been addressed in a range of recent authorities, both in Strasbourg and domestically, including in the very context of

Patrick Finucane's murder in the Supreme Court judgment referred to above. I include only a brief summary of the pertinent features below:

(a) In addressing the requirements of article 2 in this case, I bear in mind the overarching purpose of the Convention, which is to make human rights protections practical and effective (see *McCann v UK* (Application 19009/04), at para 146).

(b) In *Finucane v UK* (2003) 37 EHRR 29, at para 67, the ECtHR discussed the essential purpose of this obligation, which 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." The obligation is not simply focused on criminal investigations and prosecutions but, in state agent cases, is also directed to ensuring accountability.

(c) Part of the article 2 investigative obligation is that state authorities must investigate of their own motion once the matter has come to their attention (see *Finucane v UK*, at para 67).

(d) The requirements for an article 2 compliant investigation include that the investigation be:

    (i) independent (*Finucane v UK*, para 68);

    (ii) adequate (*Finucane v UK*, para 69);

    (iii) conducted with promptness and reasonable expedition (*Finucane v UK*, para 70); and

    (iv) conducted with a sufficient element of public scrutiny and participation of the next of kin (*Finucane v UK*, para 71).

[63] As to the requirement of promptness and reasonable expedition which is implicit in the investigative obligation, it must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts: see *Kelly v UK* (Application 30054/96) at paras 97 and 130-134; *Jordan v UK* (Application 24746/94) at paras 108 and 136-140; *McKerr v UK* (Application 28883/95) at paras 114 and 152-155; and *Shanaghan v UK* (Application 37715/97) at paras 91 and 119-120. This has led both the Strasbourg Court and domestic courts to examine the relevant authorities' conduct where delay is alleged and to consider whether any significant periods of delay are adequately accounted for. Examples in this jurisdiction include *Re Mongan's Application* [2006] NIQB 82, at

paras [11]-[17]; and *Re Jordan's Application* [2014] NIQB 11, at paras [122]-[125] and [341]-[359] (upheld on appeal on the salient aspect: see [2019] NICA 61, at para [26]).

[64] Recent authoritative guidance on the approach to requisite independence is contained in the judgment of the Supreme Court in *Re McQuillan's Application* [2021] UKSC 2021.

Summary of the parties' arguments

[65] The applicant founds her case on the basis that, notwithstanding the Supreme Court declaration, and previous acceptance on behalf of the Government that state agents had an involvement in her husband's murder in some respects, the investigations to date have failed to identify the precise role that stage agents played; have failed to uncover the identity of those members of the security services who engaged in collusion or the precise nature of the assistance which they gave to the murderers; and have failed to provide the means by which these matters might have been established. She contends that she is in essentially the same position as is described in para [2] of Lord Kerr's judgment in the Supreme Court.

[66] The applicant then submits that the Secretary of State's decision of 30 November 2020 is unlawful as perpetuating, and giving rise to further, excessive and egregious delay by the state in conducting an article 2 compliant investigation into her husband's death. She has relied upon an article from the *Belfast Telegraph* dated 28 January 2021 indicating that, at that date, only five cases out of a total of 953 (involving 1,184 deaths) were currently being probed by the LIB, while nine were "under review." She also observes that the delay in PONI legacy investigations is significant and a matter of public record (discussed, for instance, in *Re Martin's Application* [2012] NIQB 89 and *Re Bell's Application* [2017] NIQB 38, in which the then Ombudsman made concessions that he had failed to investigate within a reasonable time in breach of his obligations under the 1998 Act).

[67] Leaving aside the issue of timescales and delay, the applicant further submits that the two processes the respondent decided to await could not in any event cure the article 2 deficiencies which had been identified by the decision of the Supreme Court. She initially contends that they would fall foul of "all four of the Article 2 essential parameters", namely independence, adequacy, expedition, and involvement of the next-of-kin. That position was refined somewhat during these proceedings, particularly in light of the Supreme Court's decision in the *McQuillan* case, given on 15 December 2021. In particular, the applicant recognised the impact of that decision and continued to press her contention that the PSNI lacked the necessary independence, somewhat more faintly, on the basis that she was suing the Chief Constable in respect of police involvement in the murder and that he had served a denial defence. Nonetheless, the applicant argues that neither the PSNI nor PONI processes could secure an adequate investigation given the context of this case, including the acknowledgement by the Government of significant levels of state collusion, the investigative delay and shortcomings to date, and the limitations in the

relevant processes. The PSNI was not proposing an investigation, or even a full case review, but merely a determination as to whether to conduct a review into the question of whether there should be a further investigation into the four recommendations made in the 2015 review report which were directed to police. The PSNI's view at the time of the impugned decision was that there were currently no new lines of inquiry. PONI's remit is limited to the actions of the police and it has no power to investigate the actions of the military or security services; and no power to secure cooperation from retired police officers, unless there are grounds for arrest. In those circumstances, the applicant argues, the further two processes could never result in article 2 compliance.

[68] A particular issue arose in relation to the potential evidence of the agent handler for Nelson, Soldier G (also known as A/13). This was relevant, for instance, to the extent to which the FRU had advance knowledge of the targeting of Mr Finucane. Sir Desmond wished to interview her but was unable to, which drew particular adverse comment in paras [47] and [134] of Lord Kerr's judgment. The applicant contends that there must be a process which has the power to compel her attendance (or, alternatively, obtain and test objective medical evidence in relation to her contention that she is incapable of providing evidence).

[69] In addition, the applicant contends that neither the PSNI nor PONI further processes would be accessible to the family of the deceased or allow for adequate public scrutiny. As to the issue of transparency and participation, the applicant complains that the PSNI review report of November 2015 was not disclosed to her family until 30 November 2020, some five years later. She also complains that the PSNI did not respond promptly to correspondence from her or on her behalf; that there was a lack of clarity around PSNI's processes; and that the respondent himself did not appear to understand the PSNI's process. As to the PONI process, it is said that the applicant and her family will have little or no involvement in that before the publication of a public statement.

[70] The applicant further submits that the approach adopted by the Secretary of State was unlawful by virtue of a range of mistakes of fact which his decision disclosed (in relation to the nature of the PSNI process which was underway and in relation to the powers enjoyed by PONI); that it was irrational; and that it was infected with error of law (insofar as the respondent considered that the two further processes to which he deferred could "bring compliance" with article 2, as he said in Parliament on 30 November 2020). As noted above (see para [28]), she further challenges the respondent's failure to reconsider his stance once the PSNI's position was clarified, contending that this was a free-standing breach of article 2 and/or was irrational. Her ultimate position is that only a public inquiry can remedy the non-compliance with article 2 which was identified and declared by the Supreme Court.

[71] On the other hand, the respondent contends that he has not positively determined that a public inquiry should not be held in this case; merely that he would defer a decision on that until the outcome of further processes was known. As to the

Supreme Court judgment, the respondent accepts that it "provides an important backdrop to these proceedings." However, he emphasises that that was a challenge to a 2011 decision (not to establish a public inquiry into the murder, but instead to establish the de Silva review) and that matters have moved on to some degree since. He also relies upon the fact that the Supreme Court did not itself find that the holding of a public inquiry was either an essential response, or the only available response, to its findings. The respondent also says that it is significant that this court has the benefit of the primary investigative materials being included in the evidence which, except for the de Silva report, were not placed in evidence in the 2011 proceedings. As a result, he submits that this court can now examine in greater depth than could the Supreme Court some of the materials which those investigations generated and the methodology which they followed.

[72] One example in this regard is the position of the agent handler, referred to at para [68] above. Although Sir Desmond was unable to secure her attendance, she provided written statements to the Stevens inquiry and was interviewed under caution on several occasions by the Stevens team in the course of Stevens III (although she gave 'no comment' interviews). This was provided as an example of a concern which, when properly understood, had been addressed by an earlier process.

[73] In respect of the PONI and PSNI processes mentioned above, the respondent's position is that those procedures were, at least in principle, capable of discharging outstanding article 2 obligations or contributing towards their discharge; and that they also had the potential to inform consideration of what form of investigation, if any is now feasible, is required to meet article 2 obligations.

[74] Returning to the decision of the Supreme Court in the 2011 proceedings, the respondent further submits that it must be considered in its context. That includes the fact that the Supreme Court had none of the underlying investigative materials generated by Stevens or de Silva, nor the actual reports from the PSNI generated in 2015 in response to the de Silva review explaining their view that no further investigative opportunities arose. In turn, that was because the previous proceedings raised different grounds to the present case, in a different factual and legal context. Put bluntly, the respondent contends that the Supreme Court, in considering that no article 2 compliant investigation had been held, was too focused on the de Silva review, without separate or detailed analysis of the powers available to the previous inquiries, several of which *had* the power to question under compulsion or secured witness input through voluntary attendance.

[75] Since, in the respondent's submission, the establishment of a public inquiry "lies at the extreme end of the spectrum of investigative options", prior to making a decision to hold such an inquiry, it was essential for him to know the extent to which previous investigations had identified individuals who may have engaged in the conduct highlighted by de Silva (and which were the cause of concern in the judgment of Lord Kerr at paras [131]-[133]) and whether they had been subject to an investigation with the appropriate powers of compulsion. In light of what had gone

before, and what was yet to come, he was entitled to defer any further decision on the establishment of a public inquiry.

Consideration

Preliminary matters

[76] The respondent does not contend that an article 2 compliant investigation in this case has become unfeasible. It follows from the decision of the Supreme Court, which reflects the observations of the ECtHR in para 89 of its decision in the *Finucane* case, that there may come a point where no useful further investigation can be carried out or provide any redress. That is most likely to arise by virtue of the passage of time, with a corresponding effect on the availability of evidence and the availability and recall of witnesses. However, the respondent has not contended that that point has been reached. I was informed by his counsel that he has not at any point made a decision on feasibility and was in receipt of no advice in relation to that issue. He submits that, in some instances, investigative processes have hit a dead end. However, he accepts that, in other respects, relevant investigations are either ongoing or the potential of further investigation remains. Indeed, that is the premise upon which his decision to await the further LIB review and PONI investigations was based. I therefore proceed on the basis that an article 2 compliant investigation can still be carried out.

[77] I do not accept that it is a valid defence to this application for the Secretary of State to observe that the relevant responsibility (the investigation of suspicious deaths) is devolved or that he is only one organ of the state which, as a matter of international law, bears the responsibility of securing an article 2 compliant investigation into Mr Finucane's death. The Secretary of State was the respondent in the previous judicial review proceedings. He has already committed to making a further decision as to how best to proceed in response to the Supreme Court judgement and, indeed, in the delay judicial review acknowledged that his failure to make such a decision was a further breach of article 2. He has expressly committed to revisiting the issue in the future. It was also the NIO, at the direction of the respondent, which issued the UK Government's formal response to the Supreme Court judgment (see para [21] above). Realistically, a public inquiry into Mr Finucane's death, or some other such process designed to secure article 2 compliance, will trespass on the territory of national security and could not lawfully be established by local minister (see section 30(3), (4) and (7) of the 2005 Act). That is to say nothing of the highly contentious nature of the political debate in relation to legacy matters in Northern Ireland which renders unrealistic any further investigative step outside those already ongoing at the instance of the devolved administration. I am satisfied that the Secretary of State is the appropriate respondent to represent the state authorities in response to the present claim and either bears, or has assumed, responsibility for the state's response to the declaration issued by the Supreme Court.

Delay and reasonable expedition

[78] Turning to the question of delay, the applicant finds herself in a sorry situation. It is now over 33 years since her husband was murdered. It is now almost 19 years since the ECtHR held that there had not been an article 2 compliant inquiry into his death. The Prime Minister has accepted in Parliament that the executive branch of the state (police and security forces) colluded in his murder. Notwithstanding that, the investigations undertaken to date have failed to identify the precise role which state agents played; have failed to uncover the identity of those members of the security services who may bear any responsibility in relation to the death and the precise nature of any involvement they may have had; and have failed to provide the means by which these matters might be established. More immediately, it is now over 3½ years since the Supreme Court declared that there was an ongoing breach of article 2 on that basis; and the applicant finds herself, in substance, no further forward. The delay in the Secretary of State taking a further decision (which led to public law proceedings to force him to do so) and the nature of the decision which he then took, along with a number of other matters about which the applicant complains, has led her, understandably, to harbour grave suspicion that there is an unspoken strategy to delay matters at every turn until either an article 2 compliant investigation into her husband's death is unfeasible or until she is no longer able or willing to press for it. That is particularly so when one has regard to the length of time likely to be taken for the PONI investigations (the outcome of which the respondent was awaiting) to conclude; and the length of time likely to be taken by a further PSNI review, had that in fact been pursued.

[79] I have no hesitation in concluding that the United Kingdom Government (represented in these proceedings by the respondent, the Secretary of State) remains in breach of article 2 on the basis of the ongoing delay in completing an investigation which satisfies the requirements of that provision. Even assuming that the PSNI or PONI processes which the Secretary of State determined should proceed first could remedy or 'top up' deficiencies which existed in the investigative processes which went before, these could not be considered to do so within a timeframe which did anything other than give rise to delay which was a further breach of the article 2 requirement of reasonable expedition. Both the PONI and LIB legacy investigation workloads are considerable and, regrettably, are notoriously beset with systemic delay. The Secretary of State had some reassurance that the process of review he was expecting to be undertaken by the PSNI was due to commence shortly, as the case had reached its turn in the case sequencing model. He would or should have known, however, that there was no prospect of all the matters which had been referred to PONI being dealt with anytime soon, indeed in some instances for many years.

[80] There is some support for the proposition that, where there has been prior delay, state authorities should move to act with greater urgency so that the prospects of an effective investigation being completed are not definitively compromised (see *Mocanu v Romania* (Applications 10865/09, 45886/07 and 32431/08), at para 337). On any reading, the impugned decision in this case was likely to give rise to significant further delay and would not result in a concluded article 2 compliant investigation

within a reasonable period of time (either viewed from the date of Mr Finucane's death or, more pertinently, viewed in the context of the timeframe following the UKSC declaration).

[81] Having said that, it must also be acknowledged that the applicant's preferred manner of proceeding, namely the establishment of a public inquiry, is also unlikely to give rise to a speedy resolution. Such inquiries require considerable time and resource to be committed to their establishment. The process of setting terms of reference can be complex. The time and expense required to appoint an inquiry panel; to appoint a legal team; to recruit executive and administrative staff; and to find, equip and move into premises are considerable. The inquiry must then carry out its investigations and any public hearings, ensuring fairness to all participants. Considerable further time can then be required before the inquiry reports. At least, the applicant might argue, once an inquiry has been established it can use its evidence-gathering powers to immediately take steps to obtain or preserve evidence. However, a public inquiry is also unlikely to be a speedy option. Any challenge in relation to the Secretary of State's decision at this stage (leaving aside the applicant's complaint that a public inquiry should have been established many years ago) which is based wholly or mainly on the issue of delay must be considered in that context. To my mind, the more important question is whether the PSNI and PONI processes could secure compliance with article 2 in light of the Supreme Court's judgment.

Could the LIB and PONI processes secure article 2 compliance?

[82] The situation is less clear-cut when one comes to this question and, in particular, the question of whether the additional PSNI and/or PONI processes could, in substance and *taken together with what has gone before*, result in an article 2 compliant investigation. The Strasbourg case-law is clear that article 2 compliance can in principle be secured by a range of means, including compendiously by way of a combination of different processes (see, for instance, *Jordan v United Kingdom* (*supra*), at para 143; and *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, at para [21](10)).

[83] Resolution of this issue turns upon whether the requirements of an article 2 compliant investigation in this case, as explained by the Supreme Court, will or could be satisfied by the processes which have already occurred in combination with those contemplated by the Secretary of State in the decision which is impugned in this case. There is a further complication: when I refer to the processes which have already occurred, the respondent places emphasis upon processes which were not taken into account (or not fully or properly taken into account, he submits) by the Supreme Court at the time of its decision in February 2019.

[84] I accept the Secretary of State's submission that, since the Supreme Court did not order a public inquiry or mandate any particular form of inquiry, it was necessary (or at least appropriate) for him to gather information about what previous inquiries there had been in order that he might understand whether and how the deficiencies

which the Supreme Court had identified in those investigations might now be addressed.

[85] Nonetheless, in principle, and leaving aside the issue of delay dealt with above, it seems to me that a further police investigation could not have remedied the non-compliance with article 2 identified by the Supreme Court in this case. For reasons explained below, I consider the resolution of this issue ultimately to be a relatively straightforward one because of the conclusion and reasoning in the Supreme Court decision.

[86] I do not accept, in light of the Supreme Court decision in *McQuillan*, that the PSNI necessarily lacks the practical and hierarchical independence required for an article 2 compliant investigation. The Chief Constable had concerns about the Finucane family's faith in any such investigation but did not concede that it would be impossible for the PSNI to lawfully conduct such an investigation. For my part, I am not satisfied that an investigation conducted by the LIB would breach the independence requirement of article 2 at this remove from Mr Finucane's death. It would certainly not necessarily do so. I do not consider the mere fact that the Finucane family have issued civil proceedings against the Chief Constable, or that he has taken early steps to defend those, to be determinative of the PSNI's ability to conduct an independent investigation.

[87] Nor do I accept the argument that a further PSNI investigation (or, for that matter, a PONI investigation) will inevitably breach the article 2 requirements of transparency and involvement of the next-of-kin. Both PSNI and PONI have developed sophisticated mechanisms for engaging with complainants and bereaved or affected families in order to secure their input into investigations and keep them apprised of developments and outcomes. The practice adopted by the Ombudsman of publishing statements (insofar as she may lawfully do so) contributes to the public nature of the discharge of her functions. As this case demonstrates, there are also ways in which the outcome of police investigations (or prosecutorial decision-making) can be communicated and publicised. The Secretary of State has, at the very least, sought to bring more transparency to some of the earlier investigative processes, and their outcomes, than was previously the case. The mere fact that the Finucane family have been dissatisfied with the level of transparency to date (for instance, the non-disclosure to them of the PSNI 2015 review report until November 2020) does not mean that a future investigation by the PSNI could not satisfy the requirement for their involvement. Moreover, article 2 does not require the full level of engagement which often comes with the conferral of properly interested person status at an inquest or core participant status in a public inquiry, which might be regarded as the gold standard of next-of-kin involvement in such processes.

[88] However, in light of the Supreme Court's finding that the Stevens inquiries, taken together with the de Silva review, did not result in article 2 compliance, it is extremely difficult to see how a further police investigation would be considered adequate in the very particular circumstances of this case. It is impossible to read

paras [119], [134], [139] and [153] of that decision as doing anything other than making clear that the de Silva review *and all of the inquiries which preceded it* had failed to satisfy what article 2 required in this case. It is also clear from reading Lord Kerr's judgment, with which the remainder of the court agreed, that Sir Desmond de Silva had been denied the means to remedy the previous article 2 deficiencies which had arisen in this case, *including* those which remained after the Stevens inquiries. The Stevens investigations were in essence, or at least included, an independent police investigation in relation to the Finucane case. Logically, the Supreme Court has determined that article 2 compliance in this case requires something more than the powers of arrest available to a constable, which were enjoyed by the Stevens investigators, in order to be capable of ensuring accountability of state agents or bodies for a death which may have occurred under their responsibility. As Lord Kerr noted in para [125] of his judgment, decisions by the police and prosecuting authorities are relevant to the question of whether the state's procedural obligation under article 2 to investigate the circumstances of a death has been met but they cannot alone be determinative of that issue. Much of the rest of his judgment explains why they were not determinative of that issue in the present case.

[89] It does not follow, of course, that this requirement arises in every case where there has been a controversial Troubles-related death, even those where there is some credible suggestion of state involvement. In many cases, a police investigation (or an equivalent investigation) with the possibility of later prosecution may be sufficient for the purposes of article 2. Certainly, as the respondent and Chief Constable accepted, a central ingredient will be pursuing all credible lines of criminal enquiry. But the requirement to secure accountability of state actors may well necessitate a process going beyond criminal investigation. In many cases, an inquest will suffice. (Both sides accepted that a fresh inquest in this case, even if directed by the Advocate General for Northern Ireland under section 14 of the Coroners Act (Northern Ireland) 1959, would not be effective in the circumstances of this case because of the likely national security issues which would arise.)

[90] Nonetheless, for the reasons outlined above, it seems to me that the Supreme Court had determined that the comprehensive police investigations which had been undertaken in the course of the Stevens inquiries, even supplemented by the additional layers of investigation and analysis contained in the Cory and de Silva reviews, were not adequate in the circumstances of this case to deliver the type of investigation required in order to be practical and effective in ensuring state accountability in light of the particular nature of the Finucane case. In view of the UKSC's decision and reasoning, it seems to me that even a significant further police investigation by the PSNI (had that been the ultimate outcome of the review process) would not have secured compliance with article 2. That conclusion is equally if not even more clear, in my view, in relation to the extant PONI investigations, to which I now turn.

[91] As to the further PONI investigations, the applicant contends that the respondent wrongly proceeded on the basis that "whether any disciplinary action

against RUC officers is appropriate will be further considered by OPONI in its investigations" (set out at para 53 of the UKG response document). The applicant points out that, in fact, only *serving* officers can be the subject of disciplinary action. Many, if not all, of the RUC officers involved at the relevant time (in the 1980s) will no longer be police officers now or at the time when the Ombudsman's investigations proceed. That is a forceful point, both in terms of the non-availability of disciplinary action and the Ombudsman's lack of power to compel them to cooperate with her investigations (in circumstances where experience has shown that non-cooperation of such officers with her investigations can give rise to investigative lacunae).

[92] It is correct that PONI officers have all the powers of a constable to carry out such investigations. As I have said, in many circumstances, an investigation by the police with normal powers of arrest or (in the case of PONI) an equivalent investigation by a body with similar powers capable of giving rise to a prosecution of wrongdoers may be sufficient for article 2 purposes. However, as I have also already observed above, there will be other cases where wider powers of inquiry are required. That is one reason why our legal system principally employs the inquest system to satisfy article 2 obligations – because a coroner has power to summons relevant witnesses for examination, in public and without the need to establish reasonable suspicion of an offence having been committed. A public inquiry enjoys similar, if not wider, powers; and often supplements the tools in its armoury to compel answers by requesting and receiving an undertaking from the Attorney General or DPP that evidence given to it will not be relied upon for the purposes of criminal proceedings (thereby effectively removing the privilege against self-incrimination).

[93] In this case, the Ombudsman herself took the opportunity, in correspondence of 25 June 2021, in response to a letter on behalf of the Secretary of State seeking a progress update, to clarify what she described as "the narrow scope of [her] role when investigating complaints about the police." This referenced the same limitations described in her submissions which are summarised at para [59] above. In her letter, the Ombudsman indicated that she had no statutory powers to investigate the actions of the military or the Security Service or to require them to produce documentation. She then explained:

> "My statutory powers are to be found in the Police (Northern Ireland) Act 1998 (the 1998 Act). The Court of Appeal in *Re Hawthorne and White's Application* [2020] NICA 33 held that the Police Ombudsman has no power to determine or substantiate a complaint where criminal or disciplinary proceedings are involved. The Court confirmed the role for the Ombudsman is limited in those circumstances, to communicating the outcome of those proceedings to the complainant. The principal role of the Police Ombudsman is an 'investigatory role', with a power to make appropriate recommendations to both the PPS and

> the disciplinary authority as to the nature of any proceedings.
>
> Further, I have no power to compel retired police officers as witnesses. Section 56(3) of the 1998 Act gives my investigators the powers and privileges of a constable throughout Northern Ireland. However the power of arrest only arises in respect of suspected criminality. Where I am of the view that conduct does not reach that threshold, rather that it could amount to misconduct, there is no power of compulsion on those retired officers responsible for the conduct. This presents particular challenges when investigating historical matters related to the 'Troubles.'"

[94] Due to the limited scope of her field of inquiry and limited powers in respect of former officers, which were specifically drawn to the respondent's attention by the Ombudsman herself, I cannot accept the proposition that PONI's outstanding investigations would secure compliance with article 2 in this case (whether taken alone or with the further PSNI investigation which might have resulted from the LIB review, had it proceeded). At this remove, and with the limitations the Ombudsman described, her investigations would not measure up to what was required, particularly in light of the Stevens inquiries not having satisfied the Supreme Court that article 2 obligations had already been discharged. The Ombudsman enjoys no greater powers than did Stevens.

[95] This drives me back to the respondent's essential submission – although not couched in quite such blunt terms – that the Supreme Court was wrong in its judgment in 2019 to conclude that article 2 obligations remained unmet in light of the investigative processes which had by then concluded. I cannot accept the respondent's case that the additional processes of which the Supreme Court was inadequately informed (assuming that to be the case and without apportioning responsibility for how that came to be so), even taken together with those upon which the Secretary of State relied in making the impugned decision, have discharged or are capable of discharging the state's article 2 obligations in terms of remedying the deficiencies identified in the Supreme Court judgment.

[96] Although the Supreme Court may not have been aware of the full detail of some of what had happened (in relation to, for instance, the PSNI 2015 review and resulting recommendations), it was well aware of the basic nature of the processes which had been undertaken or were in contemplation. Those included the previous investigations, principally the Stevens inquiries, which were thorough and had appropriate powers of arrest. It was clear from the time of the establishment of the de Silva review and from his report that Sir Desmond would have, and did have, access to the full Stevens archive and all Government papers. His review was to be the culmination of all that went before. Nonetheless, that was not considered sufficient for the reasons set out in Lord Kerr's judgement. Something more was required in the

circumstances of this case, with greater inquisitorial powers. The limitations of the PONI process are such that it simply cannot fill the gap. Other than a blunt power of arrest, it is not equipped to compel the cooperation of former officers. It has no role in holding accountable those within the employ of the Army or of the Security Services who may bear some responsibility for Mr Finucane's death. There is no further police investigation being pursued. Even if there was, the Supreme Court's conclusion that the Stevens inquiries did not cut the mustard in article 2 terms *in the particular circumstances of this case* lead me to conclude that further investigative action on the part of the PSNI could similarly not remedy the remaining article 2 investigative deficiencies.

[97] None of this is to underestimate the huge amount of time and resource which has been spent over many years investigating the circumstances of Mr Finucane's death. This is summarised in the UKG's response document to the Supreme Court's judgment. I can quite understand the reliance placed by the respondent upon the very significant amount of work which has been done in the course of previous investigations and reviews. He is quite right to assert that the outcome of that work cannot and should not be set at naught; and nor did Ms Doherty so contend. I can also understand that there may be many other victims of the Troubles who look on with envy at the investigative efforts which have been made over the years in this case. At the same time, I understand the family's position that what the Government has done has consistently been too little, too late, or only when left with no alternative. A salutary lesson which might be drawn from the history of this case is that the sooner a comprehensive and robust independent investigation occurs, the better; and that a piecemeal approach may well prove to be a false economy.

[98] On one view, the Secretary of State's response to the Supreme Court judgment has been quite logical: namely, to consider the shortcomings identified by the judgment and undertake a process of trying to understand what remains to be done in order to remedy those. Fundamentally however, I consider the approach to that exercise to have been misguided, in that it amounts to an attempt to demonstrate that those deficiencies (in large measure) did not exist because each of the areas identified have been considered by previous investigations. In my view, that exercise suffers from two fatal flaws – even leaving aside the unattractiveness of a party to prior proceedings trying to sidestep a finding against him by the final court of appeal in proceedings against the same party on the same issue:

(i) First, it fails to properly recognise that the factual issues identified in the Supreme Court's judgment which had not been adequately resolved were not, nor did they purport to be, exhaustive. They were *examples* of how the procedures adopted up to that point had not adequately resolved issues going to potential state responsibility for the death (demonstrated by the use of the phrase "for instance" in para [131] of Lord Kerr's judgment).

(ii) Second, and more importantly, it fails to grapple with the central holding in the Supreme Court judgment, namely that the processes which had been adopted

up to that point were not, in the circumstances of this case, adequate to meet article 2 demands. The article 2 investigative obligation, as is well known, is one of *means* rather than result. The Supreme Court has held that the state has not yet provided an adequate means of getting to the bottom of the core contentious issues in this case. To suggest – which might of course be the case – that a different procedure equipped with the powers Lord Kerr envisaged would not make any further investigative headway is not the point. That cannot be assumed unless and until an adequate investigative process has been given an opportunity to run its course. For this reason, many of the detailed submissions eloquently and forensically made by Mr McLaughlin on the substance of what may have happened in Mr Finucane's case and the previous steps taken by Stevens and de Silva to probe these were (in my judgement) beside the point. He accepted that some gaps remained. However, even where he contended that little if anything more could be uncovered, in the absence of making a case that an article 2 compliant investigation is now unfeasible, that does not meet the objection that the Supreme Court has determined what has gone before to have been incapable of meeting the state's obligations in the particular circumstances of this case: both because of an insufficient focus on accountability, rather than criminal prosecution, and, crucially, a lack of the requisite powers to compel and probe evidence, such that doubts remained about the key aspects of state involvement. And that is to say nothing of the finding in the de Silva review that RUC officers, RUC special branch and army officers obstructed the Stevens investigations (upon which the respondent principally relies) and lied to his investigation team.

[99] On this basis I do not need to definitively resolve whether the respondent is estopped from making the case which he has in these proceedings on the basis of *res judicata*. There is now high authority that this doctrine applies in the public law context: see Lord Carnwath in *R (DN (Rwanda)) v Secretary of State for the Home Department* [2020] AC 698, at para [64] (although the other members of the court declined to express a view); and *Craig v HM Advocate* [2022] 1 WLR 1270, *per* Lord Reed (giving the judgment of the court) at para [46]. If required, I would have held that the Secretary of State should simply not be permitted to maintain, as in substance he has, that the Supreme Court misunderstood the nature and depth of the Stevens inquiries and/or what followed the de Silva review in 2015 to such a degree that it was wrong to conclude that article 2 requirements had not been met (or had not been met in at least some of the respects it identified).

[100] It is clear from the Supreme Court's judgment that the compatibility of prior investigations was an issue before it (see paras [93], [134] and [149]). In the Court of Appeal below ([2017] NICA 7), the judgment recorded the respondent's counsel as submitting that, even if article 2 was applicable, the investigative obligations had been satisfied. The Court of Appeal considered the compatibility of the investigations at para [187]. The respondent was permitted to, and did, file further evidence in the form of additional affidavits from Det Supt Murphy in the course of both the Court of Appeal proceedings (in June and October 2016) and the appeal to the Supreme Court

(in June 2018). The Secretary of State sought to meet the case that the investigations to that point did not satisfy article 2 requirements and was permitted to file evidence on those issues, which *could* have included much of the detail upon which he now relies. Whether viewed as an instance of the operation of *res judicata*, or the court exercising its inherent jurisdiction to protect its process from abuse, I accept the submission of Ms Doherty that the argument presented by the respondent, whilst ingenious, amounts to an inappropriate attempt to re-litigate or circumvent the clear findings of the Supreme Court, which formed part of the reasoning leading to the declaration it made. The very paragraph of the Supreme Court judgment in which the terms of its declaration are set out include reference to the "incapacity of Sir Desmond de Silva's review *and the inquiries which preceded it* to meet the procedural requirement of article 2" [my emphasis]. In the event, I do not consider the respondent's argument to be well-founded and thought it better to deal with it on its merits, rather than dismissing it *in limine*.

[101] For the above reasons, I accept the submission on behalf of the applicant that the processes to date, in combination with those contemplated by the Secretary of State when he made his decision in November 2020, could not secure compliance with the requirements of article 2 ECHR in this case. The Secretary of State therefore proposed to await the outcome of further processes which could not secure article 2 compliance in this case. Insofar as he considered that they would (or might) – and I am satisfied that he did – he erred in law. His decision must be set aside on that account.

[102] It is clear to me that the respondent's predecessor took this view since, in answer to a contribution from the Shadow Northern Ireland Secretary (Louise Haigh MP) in the debate in the House of Commons on 30 November 2020 – in which she made the basic point (as I have held above) that what the Secretary of State announced would not remedy the basic failings of *process* identified by the Supreme Court – Brandon Lewis MP made the point that the outcome of the PONI and LIB processes should be awaited because it was "too soon to know whether that would bring compliance with article 2." It is also clear from the respondent's response to pre-action correspondence in this case, sent on his behalf by the Crown Solicitor's office on 1 February 2021, that this was his position. It said:

> "In summary, the Secretary of State's position is that the ongoing review and investigation procedures being undertaken by the PSNI and Police Ombudsman are *capable of either discharging in full* the outstanding Article 2 ECHR obligations of the state to conduct an investigation into the death of Patrick Finucane or alternatively they are likely to make a material and meaningful contribution towards the fulfilment of those obligations."
> [italicised emphasis added]

[103] Mr McLaughlin was keen to emphasise the alternative proposition, namely that these processes could materially "contribute" to the satisfaction of article 2. I am not

sure that is the case. But even assuming that to be so, they would never be enough on the basis of the discussion above; and awaiting them, in that knowledge, would not be consistent with the requirement of reasonable expedition. In any event, for reasons I have given, I am satisfied the respondent proceeded on the basis of an error of law, namely that the PSNI and LIB processes might result in full discharge of the article 2 obligation.

Did the respondent misunderstand the PSNI process? And should he have reconsidered his position once it concluded?

[104] The conclusion set out in the preceding paragraph holds even if both processes relied upon by the Secretary of State were proceeding. In fact, it quickly became clear that the process being undertaken by the PSNI was not a full review of the Finucane case: rather, it was a consideration (later described as an "assessment") of whether or not to conduct such a further review. In the event, it came to nothing. This ties in with a further ground relied upon by the applicant, namely that, in making his decision, the respondent operated on a mistaken basis as to the nature of the PSNI process (if any) then underway. She submits that the respondent operated on the basis that the PSNI would be carrying out a "process of review" early in 2021 in order to identify whether there was anything new that would inform the decision around article 2 obligations, whereas in fact it is clear from the Chief Constable's statement of 30 November 2020 that that was not the nature of the PSNI process: it was no more than a consideration of *whether* to have a review, in circumstances where the PSNI had already concluded that there were then no new lines of inquiry. That the Secretary of State did not understand this is clear, the applicant submits, from an exchange in Parliament on the day of the announcement of his decision. The Member of Parliament for Slough (Mr Tanmanjeet Singh Dhesi) quoted the Chief Constable's statement made that day to the effect that "there are currently no new lines of inquiry." In response the Secretary of State said:

> "I think [the hon. Gentleman] might be getting his timelines wrong in terms of what he is referring to, because it is not until that is completed that the PSNI can know whether there is anything new that will also inform our decision around our article 2 obligations."

[105] The applicant submits that this makes clear that the Secretary of State did not understand the nature of the PSNI process. I was initially attracted by the submission that the respondent must have misunderstood the PSNI's position and the process it was proposing to undertake at that time; or, at the very least, failed in his duty of inquiry to properly inform himself about these matters. This impression is immediately gained by comparing the respondent's statement on 30 November 2020 to that of the Chief Constable of the same date. On further reflection however, and having carefully considered the evidence, I do not believe it right to condemn the Secretary of State's decision on this basis. The truth of the matter is that he took steps

to inform himself of what the PSNI was proposing and that it was only *after* the event that the very limited nature of that process became clear.

[106] In particular, there was a telephone conference between NIO officials and police staff, including the Chief Constable, on 3 November 2020, after the NIO had received the PSNI document the day before indicating that the Finucane case was next in line for review in the LIB caseload. In the course of this meeting, the Chief Constable indicated that he was under a legal obligation to review the case and to pursue any investigative opportunities identified. The Chief Constable expected a decision to be made on how the review would be conducted within the next three months. He explained that a legacy case review would *normally* entail a full review of all issues associated with the case in order to determine whether there were any further investigative opportunities that could be pursued. NIO officials also considered written guidance as to the nature of an LIB review of this type.

[107] In due course, the Secretary of State received a letter, on 25 November 2020, from the Head of LIB in relation to "the impending Police Review into the investigation of the murder of Patrick Finucane." He was informed that the review process would commence in early 2021 and that it would "initially be by way of setting Terms of Reference and engagement with the Finucane family." The Chief Constable wrote to the Secretary of State further on 27 November 2020. The import of that correspondence was that, whilst he considered his service "competent lawfully" to carry out legacy investigations, this was in the face of objections to the PSNI's practical independence (and before the Supreme Court had decided the *McQuillan* case). He was concerned that any further investigation by the PSNI would "not enjoy the confidence of either the late Mr Finucane's family, or parts of the wider community." He was also concerned that, from discussions in the National Police Chiefs' Council, the PSNI would be unlikely to be offered resources to meet these concerns from external forces. The Secretary of State responded on 30 November 2020. This letter appears, at least in part, to have been designed to offer reassurance that, if the assistance of external officers was required, the necessary systems were in place to achieve this.

[108] When the Secretary of State made his decision on 30 November 2020, he had before him a submission from his senior officials which made clear that the NIO did not know the precise format or scope of the review to be undertaken by the PSNI (which was a matter for the PSNI itself) but considered it likely that this review would have a wide ambit. The impression given in the exchanges between the NIO and PSNI in advance of the respondent's decision is that there would be a review; that it would be a significant undertaking; and that it could well lead to a further investigation into certain aspects of the case, which might then require the involvement of external officers. The respondent took steps to inform himself as to what the LIB was going to do and, although there was no certainty about this at the time of his decision, he can be forgiven for having anticipated that the review may have been more substantial than turned out to be the case. Indeed, in my view, the Chief Constable's statement of 30 November downplayed the nature of the exercise as compared with what the

respondent was entitled to have thought may be happening from the enquiries which had been undertaken. The Chief Constable may understandably have wished to manage expectations in light of all of the investigative work which had previously been undertaken in the case and the other calls on LIB resources. In any event, his statement certainly struck a different tone from that of the respondent.

[109] I have not been satisfied, in these circumstances, that the respondent erred in relation to a clearly established fact (the nature of the PSNI review) at the time when he made the impugned decision. When the PSNI's further process was one of the two central pillars of that decision, I consider that the applicant was entitled to have expected better in relation to a shared understanding between the PSNI and NIO as to what was going to happen. The mixed messaging has not helped matters. Nonetheless, I do not consider that the lack of clarity as to this, such as it was, is sufficient to render the decision unlawful on that account. In truth, it was not entirely clear how the review process was going to pan out until sometime later. On the basis of what he had been told, the respondent was entitled to proceed on the basis that the review might have resulted in the investigation (or certain aspects of it) being reopened.

[110] That brings me to the applicant's further case that, once this confusion was cleared up, by virtue of the Chief Constable making his position entirely clear in May 2021, the respondent ought to have taken a new decision. I have considerable sympathy for the applicant's submission that, once the PSNI's position became clear, the Secretary of State ought to have reconsidered his approach to the Finucane case generally and reconsidered the position he had adopted in the impugned decision in particular. One of the two further investigative processes the outcomes of which he was awaiting had then fallen away. The applicant is right to say that the fact that these proceedings had been commenced did not constitute any legal or factual impediment to the respondent reconsidering matters. But was it unlawful not to reconsider at that point?

[111] There are two bases upon which the applicant contends that the respondent's failure to take a fresh decision at this point was legally flawed: irrationality and breach of article 2. Although not without some misgivings, I do not consider it to have been an irrational decision for the respondent to have considered that, at that point, he should await the conclusion of these proceedings before determining how he ought to proceed. By the same token, I reject the applicant's submission that it was irrelevant for the Secretary of State to take into account that this application for judicial review was ongoing. The applicant had commenced these proceedings and was seeking, inter alia, a mandatory order directing the holding of a public inquiry. In the event that the applicant was successful in obtaining that relief, matters would be taken out of the respondent's hands. In any event, the decision of the court could be expected to provide further guidance as to the Secretary of State's obligations, or at least the legal context in which any further decision on his part would be taken. I do not consider it can be said to have been *Wednesbury* irrational for the Secretary of State to decide, in May 2021, that he would await the outcome of the proceedings before

deciding what should follow. As we now know, the progress to hearing was thereafter slower than might have been hoped.

[112] However, a different standard of review applies when considering whether this failure to reconsider represented a free-standing breach of article 2. The respondent's decision need not be irrational for a challenge to succeed on this basis. I have concluded that the respondent's continued failure, after the Chief Constable's correspondence of May 2021, to take a fresh decision as to how to proceed represented a further breach of his obligation to act with reasonable expedition. I do so partly on the basis that this has needlessly delayed the applicant being informed of whether the Secretary of State stands over his decision now that the anticipated PSNI review is no more, *viz* whether he would have made the same decision in November 2020 if he had known then what he knows now about the PSNI taking no further action. If he would not have done so, the family should have been informed of this and he should have then decided how he would now proceed. If he would have done so, nothing would have been lost by his informing the family of this.

[113] Additionally, I reach this conclusion partly on the basis that the more *immediate* aspect of the further processes on which the respondent had relied had concluded. All that was left was the outstanding PONI investigations. Rather than a review conducted in the early part of 2021, the result of the respondent's impugned decision was that he was now awaiting only the outcome of referrals to PONI with (at least in some cases) no date of commencement for the investigation and no anticipated date at all for completion, with an expectation that this would be many years away. For the respondent to countenance this as the only steps in train to remedy the article 2 deficiencies identified by the Supreme Court amounts to further culpable delay in my view. The respondent ought to have reconsidered the matter afresh once it was clear that the PSNI process had concluded and that whatever resolution the PONI investigations would bring was years away.

Alleged mistakes of fact

[114] The applicant also contends that the respondent's decision was vitiated by a number of mistakes of fact made by him. A helpful summary of review for mistake of fact, albeit in a slightly different context, is contained in *E v Secretary of State for the Home Department* [2004] 2 WLR 1351, at para [66]. The mistake should be as to an existing fact which is "established" (in the sense that it is uncontentious and objectively verifiable), in circumstances where the applicant or her advisers are not responsible for the mistake and where it played a material (although not necessarily decisive) part in the decision-maker's reasoning. The alleged mistakes relied upon are:

(i) Mistake as to the nature of the planned PSNI review process;

(ii) Mistake as to the powers of PONI; and

(iii) Mistaken belief that the issue of the identity of the RUC, military or Security Service officers who had failed to warn Patrick Finucane in 1981 and 1985 about threats to his life and the circumstances surrounding these events had been investigated by Lord Stevens

[115] I have already dealt with the first of these contentions at paras [105]-[109] above. I do not consider that the nature of the PSNI review was sufficiently clearly established at the time of the respondent's decision for his decision to be vitiated by error as to a material fact in relation to that. In addition, the applicant also complains that the respondent indicated in a meeting with her family that the PSNI process was not the continuation of its response to the de Silva review (which had been ongoing since 2015 and which pre-dated the Supreme Court declaration). However, she submits that the PSNI's statement of 30 November 2020 made clear that the process it was undertaking *was* in fact a continuation of its response to de Silva. I am not sure the position was as clear as that submission suggests. It seems to me that the planned LIB review arose *separately* from the PSNI response to de Silva, albeit that, during the course of that review, the PSNI was going to consider again the four recommendations for it which arose from its 2015 review. I would not consider any confusion about this to represent an error as to a clearly established fact or, in any event, a fact which was sufficiently material to undermine the legality of the respondent's decision. The important thing for him was that the PSNI had indicated an intention to conduct a further review which might result in further significant investigative steps being undertaken (albeit that did not ultimately come to pass). Whether, or the extent to which, that was a continuation of the PSNI response to the de Silva report does not appear to me to have been of particular import in the Secretary of State's reasoning.

[116] As to the alleged mistake as to PONI's powers, there is a basis for suggesting that the Secretary of State misstated the position. In the UKG response document, at para 53, it is said that "whether any disciplinary action against RUC officers is appropriate will be further considered by OPONI in its investigations." The applicant points out that only serving PSNI officers can be the subject of disciplinary action. At the same time, one must approach statements of the type relied upon in a common sense manner and in the full context of other contemporaneous statements and the evidence generally in order to determine whether or not the respondent materially misdirected himself. It might be the case – although admittedly unlikely – that an RUC officer involved in the 1980s may still be a serving officer today. In any event, the Ombudsman will no doubt consider whether she *would have* recommended disciplinary action against an officer involved at that time had they continued to be a serving officer against whom such action could be taken. The Court of Appeal suggested in *Hawthorne and White*, at para [55], that this might be an issue which could be addressed in a section 62 public statement. To that degree, PONI would be considering whether disciplinary action against RUC officers *would have been* appropriate (as compared with whether such action "is" appropriate, with the applicant emphasising the present tense). Again, I have not been persuaded that the reference seized upon by the applicant's representatives demonstrates a material error of fact. In any event, this aspect of the applicant's challenge is to some degree

subsumed within, or overtaken by, her challenge to the capacity of the Ombudsman's investigations satisfying article 2 obligations in view of her limited powers, which is addressed above.

[117] Finally (as to mistake of fact), the applicant also contends that the respondent's decision was vitiated by a mistaken belief that the issue of the identity of the police, military or intelligence officers who had failed to warn Mr Finucane in 1981 and 1985 about threats to his life and the circumstances surrounding these events had been investigated by Lord Stevens. She submits that the respondent's response to pre-action correspondence indicates that this issue had been investigated by Lord Stevens and that he concluded that there was no direct breach of policy by any officer. In contrast, the PSNI 2015 review report makes clear (at para 4.1.1) that Lord Stevens' conclusion that "there was no direct breach of policy by any officer" related to the failure to warn *another* person (known as T/27) of a threat to his life.

[118] The respondent referred to the full text of para 23 of the UKG response which dealt with this issue. It stated that the PSNI 2015 review "touched upon the *general* approach to intelligence relating to threats to life, without specifically dealing with this particular issue", before going on to observe that Stevens had accepted there was no direct breach of policy by any individual officer at the time. The final report recommended that the PSNI consider analysis in relation to threats to life to enable a comparison between cases such as that of T/27 and Patrick Finucane, suggesting that this needed to be looked at further. Para 25 of the UKG response also makes clear that this report "did not deal specifically with the threats made to Pat Finucane in 1981 and 1985." In the response to pre-action correspondence on which this ground of challenge is founded, the statement that it was "clear" that the issue *was* investigated by Lord Stevens reads naturally as if it had been investigated in relation to Mr Finucane in particular. But that is qualified by the content of the earlier UKG response document, which was contemporaneous with the respondent's impugned decision, and by the further statement in the pre-action response that the Secretary of State was "unaware of the reasoning of either Sir Desmond de Silva or Lord Stevens" on this point. Ultimately, I am not satisfied that this was a material error of fact sufficient to vitiate the decision, because I am not satisfied that the Secretary of State actually misunderstood the issue at the time he made his decision (as opposed to it being over-stated on his behalf in pre-action correspondence later); and, even if he did, it seems clear to me that his decision would have been the same even if he correctly understood the position (on the basis that this issue would in any event be looked at again, as he then expected, in the PONI and/or PSNI processes he was awaiting).

[119] I would not, therefore, set aside the respondent's decision on the basis of any of the alleged errors of fact.

Irrationality

[120] The remaining ground of challenge is that of irrationality. The applicant submitted that the context of this case warrants a heightened scrutiny of the rationality

of the respondent's decision not to hold a public inquiry at this time and to await the outcome of the PSNI and PONI processes. She further submitted that that decision was irrational for essentially the same reasons as she contended that the approach adopted was article 2 non-compliant. I do not consider that this ground adds much, if anything, to the article 2 complaints I have dealt with above. If article 2 requirements *could* be satisfied by the LIB and PONI processes the Secretary of State was expecting, I would not consider his decision to have been irrational. The Supreme Court left the decision on how to proceed to the Government. Decisions as to the establishment of public inquiries are significant and multi-factorial. If the further processes the respondent took into account could do the job, it would not be irrational for him to favour them instead of (or before) establishing a public inquiry. In the result, I have held that they would not be sufficient and that his decision must therefore be quashed. He has not (yet) made a decision on a correct basis in order for the rationality of that to be assessed.

[121] Amongst other things, the applicant has pleaded that the Secretary of State's decision is "a contravention of the rule of law." I did not find this pleading of assistance. The rule of law is a constitutional principle which rightly underpins much of our public law; but 'contravention of the rule of law' is not a generally recognised ground of judicial review. In this case, the respondent did not act in defiance of a court order, in light of the way in which the Supreme Court's declaration was framed. Had he done so, he would have been in contravention of an order and, so, in contempt of court. 'Contravention of the rule of law' in this context may simply be a way of expressing an allegation that the decision is one which, in the words of Lord Diplock in the *Civil Service Unions* case, is "so outrageous in its defiance of… accepted moral standards" that no sensible person could have arrived at it, or is otherwise unreasonable in the *Wednesbury* sense. It also may be a way of expressing a submission that the public law failing alleged is particularly egregious. There is an increasing trend, however, to plead the rule of law as an established basis for the exercise of the High Court's supervisory jurisdiction which, for my part, I do not find helpful. Humphreys J made a similar observation in the recent case of *Re Graham's Application* [2022] NIKB 25, at paras [26]-[27]. Whilst review for abrogation of a constitutional right or value without clear statutory authority may in some instances provide a basis for judicial review (see, for instance, Fordham, *Judicial Review Handbook* (7th edition, 2000, Hart) at P60), in most cases the rule of law should be viewed as an underpinning or organising concept given expression *through* the grounds of judicial review which have been developed by the common law.

What should the court now do?

[122] There are two further issues raised by the arguments in this case. First – even if it is recognised that the only ongoing process (now simply the PONI investigation) cannot itself bring compliance with article 2 – is it open to the Secretary of State to await the outcome of that process and to, at *that* stage, make a final determination as to whether or not to hold a public inquiry? The respondent emphasised that his decision which was impugned in this case is not to hold a public inquiry *at this time*.

He has not finally shut the door on such an inquiry being ordered. Even if the PONI process cannot result in full article 2 compliance, it might move matters forward or narrow the issues (the respondent might argue). I would hold that it is not open to the respondent to adopt this 'wait and see' line. That is because, in light of the additional delay which is inevitable in this approach, it breaches the article 2 requirement of reasonable expedition and, in so doing, also inevitably increases the risk of rendering an article 2 compliant investigation unfeasible.

[123] In any event, consideration of this issue is now academic because I was informed by Mr McLaughlin in the course of the hearing, on behalf of the Secretary of State, that he had changed his position. He does not now propose to await the outcome of the PONI processes but intends to reconsider the matter at the end of these proceedings.

[124] In light of my conclusions, the second issue, and one of fundamental importance from the perspective of the applicant, is what the court should do about the situation. She seeks an order compelling the Secretary of State to establish a public inquiry. In reality, that is the only way in which an article 2 compliant investigation can now occur, she submits, which will remedy the shortcomings identified by the Supreme Court. There may well be force in that submission. However, I have concluded that it would not be appropriate to grant a mandatory order compelling the establishment of a public inquiry for a number of reasons. As a matter of first principle, it is right that the respondent be given an opportunity to consider the matter first, with the benefit of the judgment of the court, provided that this opportunity is not permitted to give rise to significant additional delay. Leaving that aside, however, there are weighty considerations weighing against the grant of any such order:

(a) Significantly, the Supreme Court declined to make an order in these terms. It could have done so. Rather, it emphasised that it is for *the state* to decide what form of investigation is required in order to meet the requirements of article 2 (see para [11] above). It seems unlikely that there will be other ways in which that could still be achieved other than by the establishment of an inquiry under the 2005 Act (unless some new or ad hoc process was to be established by legislation). Nonetheless, I consider it significant that even though the Supreme Court's disposal may be thought to have been such as to give a strong steer towards the establishment of a public inquiry, it did not consider it appropriate to order the respondent to do so. The reasons for that may have included some of the following considerations.

(b) Public inquiries are, almost inevitably, extremely time-consuming and expensive. That is not a criticism, but simply a reflection of the importance and complexity of the matters into which they are usually designed to inquire. Previous public inquiries in relation to contentious Troubles-related incidents in Northern Ireland have certainly shown this to be the case. The High Court, in the exercise of its supervisory jurisdiction, is constitutionally reticent about mandating the expenditure by the executive of significant amounts of public

funding, particularly when such funds are limited and there are competing demands upon them.

(c) Not only is that the case as a matter of general principle, but so too is it the case within the field of legacy investigations in this jurisdiction. *Re McEvoy's Application* [2022] NIKB 10 (at para [52]) is a recent example of Humphreys J declining to order a more limited investigation in light of concerns about the commitment of resources necessary to comply with the order of the court giving rise to undue priority to the applicant's case or unfairly diverting limited resources from other equally deserving cases.

(d) Ms Doherty was unable to point to any authority in which the High Court had previously required, by way of a mandatory order, that a public inquiry be established. *Re Gallagher's Application* [2021] NIQB 85 (at para [311]) is an example of Horner J expressly declining to make such an order on the basis that he did not consider it right for the court to be prescriptive. In principle such an order would be within the court's power; but it would be highly unusual; indeed, truly exceptional.

(e) Even if such an order was to be made, it would not be for the court to seek to dictate the terms of reference for any public inquiry. That is a matter for the Minister establishing the inquiry. At the same time, an order requiring the establishment of a public inquiry without spelling out the terms of reference required may simply give rise to further contention and litigation.

[125] On that last point, I would also say this. In the course of argument in this case both sides (at least initially) seemed to proceed on the basis that the only option was a public inquiry addressing all aspects of Mr Finucane's murder and possible state involvement, from start to finish. That is, of course, one option; and one which might, for a variety of reasons, have much to commend it if an inquiry was to be established. However, that may not be the only option. A more tightly confined public inquiry, with the appropriate powers to conduct an article 2 compliant investigation in this case but designed to 'fill the gaps' in areas where the previous powers had not proven adequate, could also be contemplated. (The issue of the agent handler who was unavailable to the de Silva review may provide one obvious example. Her attendance could be compelled, or any medical basis for non-attendance which was advanced on her behalf could be objectively probed). That is something which may be worthy of reflection in any further consideration of how the state's article 2 obligations could or should be met in this case. The inquiry team would be entitled to seek to build on the significant investigative foundations which are already in place and need not seek to reinvent the wheel. A more limited inquiry would have the benefit of being able to be concluded more quickly and at less expense than an inquiry looking at everything afresh, which might unnecessarily duplicate investigative work which has already been undertaken. I entirely accept, however, that the feasibility of compartmentalising a public inquiry's work in this way may be problematic, particularly if it is to enjoy and demonstrate the necessary independence to maintain confidence in its work,

which might require that the inquiry itself should determine to what extent it could and should narrow its investigations.

Overall conclusion

[126] For the reasons given above:

(1) I allow the applicant's application for judicial review.

(2) I will make a declaration in the following terms:

> "At the date of this judgment, there has still not been an article 2 compliant inquiry into the death of Patrick Finucane."

(3) I will quash the Secretary of State's decision of 30 November 2020 on the grounds of error of law and breach of article 2 (on the basis that it represented a breach of the reasonable expedition requirement to await the outcome of both the PSNI and PONI investigations, when their completion was so far off and they could not secure article 2 compliance, so that further steps would be required once they had been completed).

(4) I further declare that it was unlawful for the respondent to fail to reconsider his decision at the point when he learned that the PSNI review process had concluded in May 2021.

(5) I intend to make a further order requiring the respondent to reconsider the Government's response to the Supreme Court's declaration of 27 February 2019. He has already committed to doing so; but I propose that the order should also require him to communicate a further decision in this regard to the applicant within a specified timeframe (on which I will hear the parties), unless a satisfactory equivalent undertaking to the court is provided. This *not* for the purpose of ongoing supervision by this court in these proceedings of any fresh decision; but merely a means of ensuring that a fresh decision is taken and communicated to the applicant without undue delay.

(6) I will give the parties an opportunity to make brief submissions, should they wish, on the question of damages. Although the United Kingdom remains in a state of breach of the reasonable expedition requirement under article 2, damages have already been awarded in respect of the respondent's delay up to 30 November 2020. My provisional view is that, in terms of the delay arising thereafter (particularly by virtue of the respondent's failure to reconsider the matter when the PSNI review process came to nothing), the findings in this judgment represent just satisfaction in the circumstances.

[127] In my view, in light of the significant delay there has been from the time of Mr Finucane's death until now – and perhaps more importantly in the present context from the time of the ECtHR's decision and, latterly, the grant of the Supreme Court's declaration – the applicant is entitled to expect a clear indication of how, if at all, the Secretary of State now proposes to proceed. Although I do not endorse the applicant's suspicion of bad faith, I can quite understand her concern that, in substance, the respondent's decision which was impugned in these proceedings has simply amounted to a postponement of a difficult choice in favour of buying further time. If the Secretary of State wishes to make a new case that an article 2 compliant investigation is no longer feasible or would now be futile, he should do so. If, as I understand to be the position at present, he does not make any such case but is nonetheless not prepared to establish a public inquiry or some other mechanism in order to remedy the article 2 deficiencies identified by the Supreme Court, notwithstanding that that will result in continuing breach of article 2, he should state that clearly and give his reasons.

[128] I will also hear the parties on the issue of the costs.