

Neutral Citation No: [2019] NICA 13

Ref: STE10661

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 19/03/2019

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

IN THE MATTER OF AN APPLICATION BY MRS MARGARET McQUILLAN
FOR JUDICIAL REVIEW

McQuillan's (Margaret) Application

Before: Morgan LCJ, Stephens LJ and Sir Paul Girvan

Stephens LJ (delivering the judgment of the court to which each member has contributed)

The layout of this judgment

[1] We divide this judgment into distinct parts.

[2] **Part One** paragraphs [12] - [21] contains an introduction summarising the issues for determination and summarising my conclusions.

[3] **Part Two** paragraphs [22] - [78] sets out the institution responsible for legacy investigations and the various units within the PSNI set up to conduct those investigations. At paragraph [22] we identify the PSNI as the institution responsible for investigations into legacy cases. At paragraphs [23]-[78] we identify the units of the PSNI which have been, which is now and which may be responsible for investigation into legacy cases. In those paragraphs we also analyse features of one of those units which were present on 19 March 2009 when the Committee of Ministers closed its examination into the issue of independence. We do so in order to determine whether those features have been maintained.

[4] **Part Three** paragraphs [79] - [116] sets out the factual background to the death of the deceased including amongst other matters the investigations that have been carried out and the discovery of the military logs.

[5] **Part Four** paragraphs [117] - [127] sets out a summary of Maguire J's judgments dated 3 March 2017 and 13 April 2018.

[6] **Part Five** paragraphs [128] - [139] contains our consideration and determination of the appeal in relation to whether Article 2 ECHR applies.

[7] **Part Six** paragraphs [140] - [176] sets out the legal principles in relation to investigatory independence and considers decisions of the ECtHR and the Committee of Ministers.

[8] **Part Seven** paragraphs [177] - [192] sets out the reforms to policing in Northern Ireland in order to inform consideration of hierarchical and institutional independence of the PSNI.

[9] **Part Eight** paragraphs [193] - [202] contains our consideration and determination of the issues as to the hierarchical institutional and practical independence of the PSNI and of the LIB.

[10] **Part Nine** paragraphs [203] - [207] contains our consideration and determination of the other grounds of appeal.

[11] **Part Ten** paragraphs [208] - [215] contains our overall conclusions.

Part One: Introduction

[12] Maguire J delivered two judgments dated respectively 3 March 2017 ("the first judgment") and 13 April 2018 ("the second judgment"), in relation to a judicial review application by Margaret McQuillan seeking, amongst other matters, a declaration that the proposed *further* investigation of the death on 8 June 1972 on the Glen Road, Belfast, of her sister Mrs Jean Smyth, ("the deceased") by the Legacy Investigation Branch ("LIB") of the Police Service of Northern Ireland ("PSNI") conflicts with the requirements of Article 2 ECHR on the basis that the LIB lacks the requisite independence required to perform an Article 2 compliant investigation into the death. In relation to the *earlier* investigations there is no evidence that consideration had been given as to whether the death could have been attributed to members of the Army. Maguire J held that "the police posture in respect of the (earlier investigation had) been that it was thought that the deceased met her death as a result of a shot fired by IRA terrorists." The *further* investigation was prompted by the discovery in June 2014 in the National Archives at Kew in London of Military Logs which amongst other matters contained contemporaneous records of radio traffic on the army communication network for the period 8 June - 9 June 1972. Maguire J found that the information contained in those logs "might lend support to the view that a soldier or soldiers" in sanger KP19 on the Glen Road "was fired on by a person or persons unknown and that (a soldier) fired a 7.62mm round, claiming a hit" so that "the new evidence ... opens up other possibilities, especially the

possibility that the death may have been at the hands of a soldier under the control of the Ministry of Defence (“MOD”).”

[13] The first judgment proceeded on the basis of concessions (“the concessions”) made in September 2016 by the respondents, including the Chief Constable of the PSNI (“the Chief Constable”). The first concession was that, despite the death having occurred on 8 June 1972, some 28 years prior to the coming into force on 2 October 2000 of the Human Rights Act 1998 the military logs constituted new evidence coming to light within the principles set out by the ECtHR in *Brecknell v United Kingdom* [2008] 46 EHRR 957. This required the PSNI “to take further investigative measures” (see paragraph 71 of *Brecknell*). That concession was recorded in the first judgment at paragraph [54]. The second concession recorded by Maguire J at paragraphs [57] and [86] was that the further investigative measures were subject to the Article 2 procedural obligation that those responsible for carrying them out were required to be independent from those implicated in the events.

[14] By Order dated 3 March 2017 Maguire J having considered the question as to whether the LIB lacked the independence required declared that “the proposed investigation by the LIB of Mrs Smyth’s death conflicts with the requirements of Article 2 ECHR as the LIB lack the requisite independence required to perform an Article 2 (compliant) investigation in respect of this (death).”

[15] The Department of Justice and the Chief Constable, both of whom were respondents to the judicial review application, have appealed to this court. Two broad grounds were advanced. The first was advanced on behalf of both the Department and the Chief Constable. Despite the concessions made before Maguire J it was argued that an Article 2 investigatory requirement did not arise under the HRA 1998 and thus the investigation by the LIB did not attract the Article 2 procedural requirement of hierarchical, institutional or practical independence. This ground required an application to be made to this court for leave to withdraw the concessions made before Maguire J before the first judgment. The second broad ground of appeal advanced in the Notices of Appeal solely on behalf of the Chief Constable was that Maguire J had applied an incorrect legal test of “public confidence” and “public perception” in arriving at the decision that the LIB lacked independence rather than focussing upon the institutional, hierarchical and practical arrangements within the PSNI for investigations. Furthermore, even if the correct legal test had been applied the judge did not give any or sufficient consideration to the role which the current institutional structures for policing and the practical arrangements within LIB would play in assessing public confidence or perceptions.

[16] On 6 December 2017 this court heard submissions as to whether to allow the Chief Constable and the Department to withdraw the concessions. During those submissions Mr McGleenan Q.C. who appeared on behalf of the Chief Constable with Mr McLaughlin informed this court that “it remains the position of PSNI that they will conduct the review in this case, they will conduct the review into this death, and are intending to do (so) to Article 2 compliant standards.” This court

allowed the Chief Constable and the Department to withdraw the concessions and remitted the proceedings to Maguire J with liberty to the Applicant to amend her Order 53 statement given that in addition to relying on Article 2 ECHR as a part of domestic law by virtue of the HRA 1998 the Applicant might wish to rely on a legitimate expectation that the PSNI “review” would be Article 2 compliant or might wish to rely on common law rights as establishing a requirement for independent investigative measures. The Order 53 statement was amended with the following additional points being considered by Maguire J, namely (a) whether there was an obligation to ensure independence under the common law quite apart from Article 2; (b) whether the applicant has a legitimate expectation that any investigation or investigatory steps undertaken in relation to the death will be undertaken in a manner compatible with Article 2; and (c) whether the decision of the Chief Constable that the PSNI shall further investigate the death, irrespective of the issue of independence, is disproportionate or unreasonable.

[17] Maguire J having heard further submissions delivered the second judgment on 13 April 2018. The judge concluded that Article 2 was not engaged as a matter of domestic law, that the PSNI were not bound by any form of procedural legitimate expectation, that there is no parallel obligation to Article 2 existing at common law so that there is no breach of the common law and that the Chief Constable had not acted irrationally or unreasonably in the exercise of discretion concerning the future conduct of any investigation into the death. Finally as the declaration made on 3 March 2017 was based on the premise that Article 2 was engaged it was withdrawn.

[18] The Applicant then appealed to this court against the order made on foot of Maguire J’s second judgment. On the hearing of that appeal the appeals brought by the Department and the Chief Constable in relation to Maguire J’s first judgment were treated as cross-appeals within Order 59 Rule 6 of the Rules of the Court of Judicature (Northern Ireland) 1980.

[19] In this judgment and in order to avoid confusion given that all the parties have appealed and all of them are respondents, we will refer to them as the Applicant, the Chief Constable and the Department.

[20] Mr Hugh Southey QC and Ms Blinne Ní Ghrálaigh appeared on behalf of the Applicant, Mr Coll QC and Mr McAteer appeared on behalf of the Department and as we have indicated Mr McGleenan QC and Mr McLaughlin appeared on behalf of the Chief Constable. We are grateful to counsel for their assistance.

[21] Our determination of the issues on appeal can be summarised as follows:

- (a) As a matter of domestic law Article 2 ECHR applies to the future investigation of the death.

- (b) The Chief Constable has not demonstrated practical independence on the part of the LIB.
- (c) Maguire J was correct to conclude that the PSNI were not bound by any form of procedural legitimate expectation, that there was no parallel obligation to Article 2 existing at common law so that there is no breach of the common law and that the Chief Constable had not acted irrationally or unreasonably in the exercise of discretion concerning the future conduct of any investigation into the death.

Part Two: Institution and units responsible for legacy investigations

The institution responsible for investigating legacy cases

[22] These appeals involve consideration of the Article 2 independence of the PSNI which since the coming into force of the Policing (NI) Act 2000, has been the *institution* responsible for reviews of and where credible evidence exists the further investigations into legacy cases.

The evolution of the different legacy investigatory units within the PSNI

[23] The units of the PSNI which have been involved in investigations or reviews have been sequentially

- (i) the Serious Crimes Review Team (“SCRT”) from 2003 to circa 2005/2006,
- (ii) the Historical Enquiries Team (“HET”) from circa 2005/2006 to 2014 and
- (iii) the Legacy Investigation Branch (“LIB”) from 2015 to date.

The Stormont House Agreement of 23 December 2014 envisages the establishment of an Historical Investigation Unit (“HIU”) though its establishment is still awaited.

The present unit within the PSNI responsible for legacy investigations and the issue as to its independence

[24] These appeals involve consideration of the Article 2 independence of the LIB, a unit of the PSNI which is the present unit responsible for reviews of and where credible evidence exists further investigations into legacy cases.

[25] In order to consider the impact of decisions of the ECtHR and the Committee of Ministers it is necessary in particular to consider the HET and the evidence as to the arrangements that were in place to secure the practical independence of the investigators in the HET from “those implicated in the events” in broad terms from the RUC and the security forces and in cases involving collusion from the PSNI. It is also necessary to give details as to the LIB and the evidence as to what arrangements are in place to secure the practical independence of its investigators together with some details of the Stormont House agreement of 23 December 2014 which provided for the establishment of the HIU.

[26] There are not only decisions of the ECtHR but also decisions of the Committee of Ministers which have been given as the result of the supervision which arose out of the *McKerr* group of cases. On 4 May 2001 the ECtHR delivered

judgment in *Jordan v UK*, *Kelly v UK*, *McKerr v UK* and *Shanaghan v UK*. On 28 May 2002 it delivered judgment in *McShane v UK* and on 1 July 2003 it delivered judgment in *Finucane v UK* (“the *McKerr* group of cases”). Under Article 46, paragraph 2 ECHR the final judgment of the ECtHR in each case was transmitted to the Committee of Ministers to supervise its execution which supervision included the issue as to the independence of investigators. The UK government set in train a package of measures to remedy the identified breaches of the Article 2 procedural obligation which included as a part of the obligation of an effective investigation the requirement to secure the independence of the investigators. The package of measures was overseen by the Committee of Ministers.

[27] We will describe each of the units in the PSNI in turn together with arrangements to secure practical independence.

(a) *The Serious Crimes Review Team of the PSNI*

[28] The SCRT was established in 2003 as one of the measures designed to address the defects in previous police investigations. The government reported to the Committee of Ministers (as recorded in the 2005 interim resolution) that it had been discussing with the PSNI how this work might be expanded to process greater numbers of unresolved deaths and to do so in a way that commanded the confidence of the wider community. This led to the establishment of the HET.

(b) *The Historical Enquiries Team of the PSNI*

[29] The HET was established in September 2005 as a unit of the PSNI to investigate the 3,269 unsolved murders committed during the Troubles, specifically between 1968 and 1998. It commenced its work in 2006. Its establishment was one of the general measures proposed by the UK government to the Committee of Ministers. It was wound up in September 2014.

[30] Mostly the HET was made up of civilian staff (retired officers from other police forces) under the control of a Director who was accountable to the Chief Constable.

[31] The HET adopted three main objectives:

“1. To assist in bringing a measure of resolution to those families of victims whose deaths are attributable to ‘the Troubles’ between 1968 and the signing of the Belfast Agreement in April 1998;

2. To re-examine all deaths attributable to ‘the Troubles’ and *ensure that all investigative and evidential opportunities are subject to thorough and exhaustive*

examination in a manner that satisfies the Police Service of Northern Ireland's obligation of an effective investigation as outlined in Article 2, Code of Ethics for PSNI;

3. *To do so in a way that commands the confidence of the wider community*" (emphasis added).

[32] A number of arrangements were put in place at the time of the establishment of the HET or which evolved with experience to secure the practical independence of the investigators from those implicated in the events. In some circumstances those arrangements had to take into account that the PSNI "necessarily, ... inherited officers and resources" from the RUC so that the arrangements were designed in those circumstances to secure practical independence not only from the RUC but also from the PSNI. In other circumstances the arrangements had to take into account that the investigation was into the security forces. Again, in those circumstances the arrangements were designed to secure practical independence from the security forces.

[33] The Committee of Ministers examined the progress of the HET from its inception until 19 March 2009. On that date having been satisfied by the information provided to it the Committee of Ministers closed its examination into the issue of the independence of investigations into historical cases '*as the HET has the structure and capacities to finalise its work*'. In deciding the basis upon which this decision of the Committee of Ministers is to be taken into account under section 2(1) HRA 1998 it is necessary to consider what were the "structures and capacities" as at 19 March 2009. If the structures and capacities or their equivalent had remained in place it is likely that the decision of the Committee of Ministers of 19 March 2009 would be treated as persuasive on the issue of practical independence. This would not necessarily be the case if the structures and capacities have substantially altered.

[34] We set out the arrangements in relation to the HET which are relevant to its structures and capacities under separate headings analysing whether they have altered since 19 March 2009. In some instances there is an absence of evidence on behalf of the Chief Constable. This is a breach of an obligation to inform and breach of an obligation to demonstrate practical independence which is necessary to have the capacity to investigate in compliance with Article 2. The obligations to inform and to demonstrate practical independence which arise are also a function of police accountability in a democratic society, see paragraph [182].

(i) *Funding of the HET*

[35] In order to establish the HET, the Northern Ireland Office made £34m available to fund the project. This funding was ring-fenced so that it was separate from the main police grant. It was initially apportioned over a six-year period until 2010/2011. The provision of funding for the work of the HET in this way was an arrangement that assisted in demonstrating its independence from the PSNI. On

19 November 2008 the Secretariat provided a report to the Committee of Ministers (CM/Res/DH(2008)2 revised) noting amongst other matters that the Policing Board members, drawn from both communities, had questioned the allocation of funding to the HET and noting that in fact it has come from the PSNI budget rather than the additional funding originally indicated. On that basis prior to 19 March 2009 the Secretariat and through their report the Committee of Ministers were aware that funding now came through the PSNI budget. However on 19 March 2009 the Committee of Ministers noted that the HET funding cannot be used for other policing work and is allocated to each of the organisations involved in the HET project. The funding though coming through the PSNI budget was ring fenced.

[36] There is no evidence as to the present funding arrangements for the LIB including whether the funding is ring fenced. In the absence of evidence it cannot be concluded that the funding arrangements present on 19 March 2009 are presently available for the LIB.

(ii) *Reporting by the HET direct to the Chief Constable*

[37] The Chief Constable is the statutory authority charged with the investigation of crime in Northern Ireland. All investigations must report to him though usually through a line of command in the PSNI. However, the HET, a unit of the PSNI reported directly to the Chief Constable. There was not any other line of command between the HET and the Chief Constable. The practical impact of that was explained by Mr Dave Cox who was the head of the HET between its establishment in 2005 and 2013. He stated that this “does not mean the Chief Constable has time on his hands to make operational decisions. It means I report to him in terms of accountability.” It is apparent from this reply that there was a large degree of operational independence enjoyed by the HET by virtue of this command structure though legally operational control remained with the Chief Constable.

[38] That was the position on 19 March 2009 which changed in 2015 upon the establishment of the LIB which operated under the direction of the Assistant Chief Constable, Crimes Operation. It changed again in February 2016 when LIB was transferred from Crime Operations Department to the newly established Legacy and Justice Department within PSNI.

[39] The arrangement of direct reporting to the Chief Constable was present on 19 March 2009 but has not been present since 2015.

(iii) *Outside officers in command of the HET*

[40] Independence from the PSNI was also enhanced by the HET initially being commanded by two senior staff from outside the PSNI, but with experience of Northern Ireland issues gained from working on the Stevens Enquiries. That was the position on 19 March 2009 but changed on 30 September 2013. In HMIC’s 2015 report there was criticism of the erosion of that independence. It was stated at

paragraphs 2.3 and 2.4 that on 30 September 2013, a new senior command team for the HET was appointed. Those occupying the two most senior positions in the HET, who originally were not serving police officers, had been replaced by police officers from the PSNI. The HMIC report stated that the “appointment of serving police officers to the most senior posts quashed any remaining perception that the (HET) was independent of the (PSNI).”

[41] The arrangement of having PSNI legacy investigation commanded by two senior staff from outside the PSNI was present on 19 March 2009 but has not been present since 30 September 2013.

(iv) *The investigatory role of the HET*

[42] Between 2005 and 2010 the HET not only carried out reviews but also investigated. The 2007 interim report of the Committee of Ministers recorded that “if evidential opportunities were identified by HET during the Review process which could be realistically pursued, the investigation of the death will proceed and where there is credible evidence available, files will be forwarded to the Public Prosecution Service for consideration.” So the position prior to 2010 was that, it was general practice that the HET would review cases and, if any evidential opportunities existed, then HET would investigate. That was the position on 19 March 2009.

[43] This investigatory role was removed in 2010. A catalyst for this change was the recommendation by the Police Ombudsman for Northern Ireland (PONI) that the PSNI should re-investigate a series of murders, attempted murders and other serious crime which the PONI had code-named Operation Ballast. The then Chief Constable of the PSNI referred the cases to the HET, which set up a Complex Enquiry Team to deal with them. It was a complex investigation and, as it developed, it used a significant amount of the HET’s resources. Eventually, according to the lead senior investigating officer in charge of the operation, the HET was not able properly to resource the cases alongside its other work and in 2010 a decision was made by the then Chief Constable to transfer the operation to the PSNI. In addition and at the same time the then Chief Constable decided that all cases with potential evidential opportunities would be transferred to the PSNI for further investigation instead of being investigated ‘in-house’ by the HET.

[44] The Chief Constable in these proceedings has submitted that (a) the HET was involved in review and not investigation; and (b) the HET was never intended to discharge the State’s Article 2 investigative obligations. Both of those contentions do not withstand analysis. Between 2005 and 2010 the investigatory body was the HET so that the investigations in accordance with the Article 2 procedural obligation were being carried out in relation to this group of cases by the HET.

[45] We also make the point that the arrangements which had been put in place by the HET to secure its practical independence from the RUC and the security

forces and in certain cases from the PSNI were arrangements not only in aid of the review of cases by the HET but also the subsequent investigation of those cases by the HET. The impact of moving the investigations from the HET to the PSNI in 2010 was *potentially* to remove from the investigatory process those arrangements which secured the practical independence of the investigators. We say *potentially* because the Chief Constable and the Department have failed to demonstrate what arrangements were put in place post 2010 to secure practical independence of the investigators when after review a case was transferred to some other part of the PSNI for investigation.

[46] However, despite this change in 2010 there remained ambiguity in the HET as to the distinction between review and investigation. The HMIC in its report published on 3 July 2013 recommended that the HET's role and purpose needed to be clarified and that specific terms of reference should be published. The follow up HMIC report in 2015 noted that the HET accepted that, although it had actually been clearly defined as a review body since 2010, on occasion, it had undertaken some investigative work. The HMIC in its 2015 report also noted that in May 2014, the PSNI's service executive team ratified new terms of reference for the HET. Amongst other matters in those terms of reference in order to make it absolutely clear to staff that the HET's function was one of review, job titles within the team were changed so that, for instance, 'lead senior investigating officers' became 'review managers.'

[47] The arrangement that legacy investigations were carried out by HET was present on 19 March 2009 but has not been present since 2010. This resulted in the remarkable situation of having a White Team (see paragraphs [50-54]) carrying out *reviews* in England in relation to cases involving collusion with arrangements in place to secure the practical independence of that team from amongst others the PSNI but then when *investigations* were necessary for some other part of the PSNI to carry out those investigations with those arrangements to secure the practical independence of the investigators being absent.

(v) *Cross referencing by the HET*

[48] The 2007 interim report of the Committee of Ministers recorded that the whole HET process is underpinned by a developing analytical database which contains details relevant to each case and which can be used to identify both links between cases (intelligence or forensic/ballistic), gaps in intelligence or any other trends/evidential opportunities. The database facilitated the cross-referencing of material and the quest for evidential links and patterns which might not appear from review of individual cases alone. The data base was the mechanism adopted to facilitate the overarching examination of patterns and systems and links which by the nature of things might well not emerge when cases are reviewed separately in individual boxes.

[49] There is no evidence of ongoing work by LIB to maintain and update the cross referencing analytical data base. In the absence of evidence it is not possible to conclude that this feature which was present on 19 March 2019 is still present.

(vi) Different teams in the HET

[50] Originally, the HET was to have two teams which did not include a "White Team." The Secretariat's memorandum of October 2005 recorded that the HET would contain "two investigative units, one of which will be entitled the Special Cases Section and will be staffed by officers seconded from police forces outside Northern Ireland. This section will deal exclusively with cases in which independence from the PSNI is seen as a pre-requisite. The second unit, the General Enquiry Section, will be staffed by a mix of police officers and civilian staff recruited from both within the PSNI and externally." Accordingly from its establishment there was perceived to be a need for the arrangement of having a unit to be staffed by officers seconded from police forces outside Northern Ireland.

[51] On 14 November 2006 Mr Cox, the head of the HET, informed the Joint Committee on Justice, Equality, Defence and Women's Rights Sub-Committee on the Barron Report that "the HET is an evolutionary concept and we are ... working on establishing a third team which would probably be based in London. It would be largely analytically driven and examine the collusion issues." This led to the establishment between 2006 and 2007 of the White team.

[52] The operation of the White Team as envisaged in the materials provided to the Committee of Ministers prior to the publication of its 2007 Interim Report involved cases where there were allegations of collusion. It was stated that "cases in which there are allegations of State collusion are handled by the HET's White Team and Complex Inquiry Team, both of which are staffed by police officers from outside Northern Ireland. The teams will look for evidence of offences which might be characterised as 'collusion,' The teams will also examine any links which can be identified between cases. These types of cases are also referred to the Police Ombudsman, who will conduct a parallel investigation. The HET will focus on investigating the incident itself while the Ombudsman looks at the conduct of police officers. Where there is sufficient evidence of offences, as with any HET case, this will be submitted to the Public Prosecution Service for consideration and a decision on prosecution." It can be seen from this that there would be an investigation of each case conducted in-house by the HET's White Team and Complex Inquiry Team both of which comprised investigators recruited from outside Northern Ireland and who had no prior link with the RUC and/or the PSNI. Those investigators were to conduct their enquiries with the specific purpose of "looking for evidence of offences which might be characterised as 'collusion.'" In this way the system involved a specialised "collusion focussed" re-investigation conducted in-house by the HET White Team or the Complex Inquiry Team as well as referral to the PONI who would specifically investigate potential police misconduct. The White team not only reviewed but also investigated.

[53] The White Team was based in England so that it operated in a different geographical area than the rest of the HET and the PSNI. The White team was assigned to cases involving investigation of collusion.

[54] The arrangement of having PSNI legacy reviews and investigations structured with different teams including a White Team based in England was present on 19 March 2009 but has not been present since September 2014. There is no White Team. There is no team based in England. There are no seconded police officers from other forces or retired police officers from other forces presently serving in the LIB. There are no investigators based in England presently working for the LIB.

(vii) Intelligence as part of the HET reviews and investigations

[55] The Interim Report of the Committee of Ministers in 2007 recorded the information given by the UK government in relation to the HET which included that the initial review process (which might or might not lead on to investigations) should exploit any potential opportunities from intelligence that may have arisen since or which were not used at the time. In 2008 the Secretariat recorded that the HET “will not only view existing evidence but will also examine the potential of gathering new evidence” from amongst other matters “turning information/intelligence into evidence.”

[56] In its 2013 report the HMIC identified a concern that some of the staff within the current PSNI Intelligence Branch were former members of RUC Special Branch and that this could impact upon the actual perceived independence of the HET review process which in certain cases was dependent on obtaining complete access to intelligence held by the PSNI. The perceived independence of the investigation could be affected in circumstances where the investigators were dependent on intelligence being provided by the PSNI and where the management of intelligence is a fundamental element of the HET process. HMIC noted that until 2008, *an independent seconded police officer from outside Northern Ireland* dip-sampled intelligence files received from PSNI Intelligence Branch C3. His role was to review what the HET staff based at the PSNI had extracted from the C3 intelligence files and assess whether they had extracted all relevant material. If satisfied, the officer signed a certificate to the effect that the intelligence file had been examined and that all the relevant material had been correctly copied from the original intelligence logs. This process stopped in 2008 when the individual concerned left the HET. HMIC recommended re-instating that independent process.

[57] In October 2015 the Deputy Chief Constable indicated that the PSNI did not have the capacity or resources to create a vetted post for an individual to carry out verification checks on intelligence provided to the LIB by PSNI Intelligence Branch.

[58] Subsequently, the Chief Constable agreed to appoint a Detective Inspector to undertake this task it being anticipated that the role would entail more than simply “dip sampling” cases but would require the officer to conduct full intelligence verification in every case. In this way the officer would be involved in verifying that all PSNI intelligence systems have been checked and that all relevant intelligence has been provided to the LIB staff.

[59] In June 2016 a Detective Inspector was appointed to LIB to carry out intelligence verification for use in LIB reviews. The officer examined material across a number of PSNI electronic databases, paper files, records and intelligence research products. The officer would then record if they were satisfied that the product provided to the review or investigating officer was an accurate reflection of the intelligence held by PSNI C3 Intelligence Branch and other sources of intelligence. There was no evidence as to whether the Detective Inspector was *a seconded police officer from outside Northern Ireland*.

[60] The Detective Inspector transferred from his post on 22 May 2017 due to other organisational needs.

[61] The present position is that expressions of interest have been sought from Detective Inspectors in order to identify a suitable replacement though there was no evidence as to whether the expressions of interest being sought were from *police officers from outside Northern Ireland*. Once in post, the officer will be required to undertake developed vetting and carry out the role in the same manner. It is stated that after the appointment of the Detective Inspector intelligence verification of intelligence material provided for reviews and investigations conducted in the intervening months will be commenced retrospectively.

[62] The arrangement of having verification of intelligence was present until 2008. It was not present on 19 March 2009. The recommendation in the 2013 HMIC report was implemented for an 11 month period from June 2016 to May 2017 though there is no evidence as to whether *the officer was a seconded police officer from outside Northern Ireland*. There is an aspiration to comply with this recommendation of HMIC but there is no evidence as to the likelihood of this aspiration being fulfilled in the near future or as to whether the officer will be seconded from outside Northern Ireland.

(viii) Declarations as to conflicts of interest at case allocation stage

[63] The 2013 HMIC report identified another of the HET’s practice and procedure which it considered had the potential to impact upon the actual perceived independence of the HET review process. This arose from the process in which former officers of the RUC or PSNI made declarations and gave undertakings about

the cases in which they had a previous involvement. HMIC considered that a vetting process should be introduced to verify the accuracy of the declarations.

[64] The present position is that the standard operating procedures followed by both managers and staff of LIB in relation to conflicts of interest were developed by the HET following the report of HMIC. The procedures require members of staff to declare any possible conflict of interest at the case allocation stage with the matter to be drawn to the attention of managers in the event of doubt. A failure to declare a conflict of interest may also result in disciplinary action.

[65] The recommendations relating to verification of conflict of interest declarations has provided practical difficulties for the PSNI given the primary problem that there are no comprehensive and easily accessible records which reveal the identity of every officer who has been involved in every historic case. In an effort to attempt to meet this recommendation, the Deputy Chief Constable has instructed LIB to attempt to build a profile of its entire staff from independent researchers to determine which officers served with the RUC, RUC Reserves or military during the period 1969-1998. This process of creating an employment history and profile for all LIB staff means that the former service history of officers and staff attached to LIB will be considered during the verification of their conflict of interest/self-declaration when a case is allocated for review or investigation.

[66] A further support for the robustness of the self-declaration process is that LIB investigators are now subject to the PSNI Code of Ethics.

[67] The arrangement of having a vetting process to verify the accuracy of the declarations was not present on 19 March 2009. It emerged as a recommendation from the 2013 HMIC report and progress is being made to comply with that recommendation. We do not consider that this aspect undermines the weight to be attached to the decision of the Committee of Ministers dated 19 March 2009.

(c) Historical Investigations Unit (HIU)

[68] The establishment of the HIU was the subject of the Stormont House Agreement of 23 December 2014. The agreement did not specify a timeframe within which the new HIU was to be established. At the time the Chief Constable indicated that he expected it to be two years before the new unit was ready to start work. That was overly optimistic as the position some 4 years later is that it has not been established.

[69] The agreement was that the HIU would be a new independent body to take forward investigations into outstanding Troubles-related deaths. The HIU was to be established as a body corporate, sponsored by the Department of Justice, with duties

to exercise its functions in a manner which was independent, fair and impartial, efficient and effective and secures public confidence. The body was to take forward outstanding cases from the HET process and the legacy work of PONI. The HIU was to consider all cases in respect of which HET and PONI have not completed their work, including HET cases which have already been identified as requiring re-examination. Families may apply to have other cases considered for criminal investigation by the HIU if there is new evidence, which was not previously before the HET, which is relevant to the identification and eventual prosecution of the perpetrator. As with existing criminal investigations, the decision to prosecute is a matter for the DPP and the HIU may consult his office on evidentiary issues in advance of submitting a file. In order to advance its work the HIU will have a power to designate HIU officers conducting criminal investigations as having the powers and privileges of a constable throughout Northern Ireland. In respect of the cases from PONI, the HIU would have equivalent powers to that body. HIU would be overseen by the Northern Ireland Policing Board. It was envisaged that around 150-200 investigators would be required and the HIU will be empowered to recruit such employees as appear to it to be appropriate, with the approval of the Department of Justice as to numbers, remuneration and other terms and conditions of service.

[70] In September 2015 the Northern Ireland Office published a policy paper entitled “Northern Ireland (Stormont House Agreement) Bill 2015” setting out what would be included in the Northern Ireland (Stormont House Agreement) Bill announced in the Queen’s Speech 2015.

[71] As we have indicated the establishment of the HIU has not to date occurred.

(d) The Legacy Investigation Branch of the PSNI

[72] On 18 September 2014 the Chief Constable met with the Performance Committee of the Policing Board and outlined that due to severe budgetary pressures, PSNI was considering drawing together its legacy operations under a single command, provisionally referred to as the ‘Legacy Branch’. This Branch would be fully integrated into the Crime Operations Department, accountable to the Chief Constable through the Assistant Chief Constable.

[73] The HET was wound up in September 2014.

[74] On 5 January 2015 the LIB was established as a unit within the PSNI operating under the direction of the Assistant Chief Constable, Crime Operations. The Chief Constable stated clearly that the PSNI supported the establishment of the HIU under the auspices of the Stormont House Agreement but recognised that until that unit was established he had the statutory responsibility for the legacy caseload. The LIB was therefore to be a temporary measure pending the establishment of the HIU.

Terms of reference for the LIB were drafted in May 2015 and were adopted by the PSNI on 20 May 2015.

[75] The LIB was assigned responsibility for conducting the “Bloody Sunday” investigation, the re-examination of “on the run” cases, together with the dual functions of reviewing and conducting investigations into murders committed prior to the establishment of Crime Operations Branch in 2004. This range of responsibilities therefore included the remaining case load from the HET together with other cases.

[76] In February 2016 LIB was transferred from Crime Operations Department to the newly established Legacy and Justice Department within PSNI.

[77] The number of staff in HET varied between 80 and 180 during the period 2006-2009. At establishment it was anticipated that LIB would have a total of 70 staff but its case load included not only some 900 cases not completed by the HET but also LIB became responsible for the Bloody Sunday enquiry, the Military Reaction Force enquiry, the Boston College tapes enquiry, on the runs enquiry and approximately 70 other murder enquiries, previously within the remit of PSNI C2 (Crime Operations Department). Detective Superintendent Jason Murphy deposed on 11 April 2016 that the number of staff involved in reviews and investigations in LIB was then 72. Detective Superintendent Harrison deposed on 5 December 2017 that the number was then 55. There was no explanation as to why the number of staff had reduced between April 2016 and December 2017 or how that corresponded to the workload of the LIB. It is also apparent that work within LIB is prioritised against competing workloads but it has not been possible on the evidence before us to consider what the impact has been on the workload caused by the reduction in the staffing levels and the consequential lack of prioritisation of cases. However, it is clear that the workload of the LIB has increased in comparison to the HET as Deputy Chief Constable Harris has deposed that the LIB “has a smaller number of staff than the HET and is required to service a larger case load”

[78] Of the 55 members of staff on 5 December 2017 27 have former service in the RUC. Two of those individuals have previously worked within RUC Special Branch or its successor within the PSNI, one of whom was a police officer and the other worked in a secretarial position. Within these 27 members of LIB staff with RUC service, 6 individuals work as LIB support staff and not as primary investigators or review officers.

Part Three: Factual background

[79] The circumstances in which the deceased died in short form are that on the night of 8 June 1972 she was a passenger in a car which was stationary on the Glen Road, Belfast, when she was fatally wounded by a bullet striking her head. These were terrible times with murderous paramilitary activity taking place on the Glen Road but the paramilitaries were not the only ones with weapons as the army were present including a unit of the army known as the Military Reaction Force (“MRF”). The RUC investigation at the time considered paramilitary use of firearms but did not consider use of firearms by the army. The same occurred when the PSNI through its HET came to investigate in 2006-2008. The discovery of the military logs gives rise to the possibility that the fatal shot was fired by a member of the army.

[80] We set out a more detailed account of the factual background in relation to the events of 8 June 1992 together with the subsequent investigations and how and when information became available which is taken from Maguire J’s comprehensive judgments.

(a) The immediate events surrounding the deceased’s death on 8 June 1972

[81] Maguire J emphasised, as do we, that the factual background of the immediate events is taken from statements which were given at the time. This does not mean that every detail necessarily is correct in every respect.

[82] On the night of 8 June 1972 the deceased, who was estranged from her husband, had been out for a drink with a boyfriend, John Carlin. At the time the deceased was living with her daughter at her parents’ house at Tardree Park, Belfast. Mr Carlin collected the deceased in his green Austin 1100 car and they went to a public house on the Glen Road called the Glenowen Inn. There they met up with some work colleagues from their common place of employment at the Bass Brewery on the Glen Road. At the end of the night, Mr Carlin offered one of their colleagues a lift home. This meant taking him to the Lenadoon estate. Mr Carlin then drove back to the Glen Road where he turned round using a bus terminus near to Oliver Plunkett School. This meant that the car, after the turn, was facing in a citywards direction. Throughout the deceased had been in the front passenger seat during the car’s journey. At a point, which may have been around 11.30 pm, Mr Carlin thought he heard a noise like a tyre bursting. He got out of the car to look around. It was dark. He then returned to the car. On doing so, he found the deceased lying in a prone position inside the car, having been shot.

[83] After this discovery, Mr Carlin flagged down a passing taxi. The driver of the taxi was a Mr Brown. With the help of others who arrived at the scene, the deceased was transferred to the taxi which then left the scene with her in it, intending, it would appear, to take her to the Royal Victoria Hospital (“RVH”). In the event, the taxi was driven to Andersonstown Police Station which was on the route to the

RVH. However, it is probable that by the time of the taxi's arrival at the police station, if not before, the deceased had already died.

[84] Meanwhile Mr Carlin left the scene at the Glen Road in his car and drove to the deceased's family home at Tardree Park. At this stage it would probably have been unclear to him whether the deceased was alive or not. When he arrived at Tardree Park, Mr Carlin spoke with Mr Campbell, the deceased's father, and they left in Mr Carlin's car to go to the RVH. They travelled there directly as they were unaware that the taxi had stopped at Andersonstown Police Station.

[85] It appears that the taxi, together with the deceased's body, remained at Andersonstown Police Station for some time.

[86] Having driven to the police station, Mr Brown, who at the time of the transfer of the deceased to his taxi could see that she had a severe injury to her head, once he knew the deceased was dead, left to take his wife, who had been with him, to the RVH for treatment, as she was in shock. There Mr Brown met up with Mr Carlin and Mr Campbell who had travelled to the hospital from Tardree Park. Mr Brown explained to them that he believed the deceased was probably already dead when she had been transferred to his taxi at the scene.

(b) The initial police investigation in the aftermath of the deceased's death

[87] Following the death of the deceased a police investigation, conducted by members of the Royal Ulster Constabulary ("the RUC"), began. In the course of this, statements were taken from Mr Carlin, Mr Brown (the taxi driver), Mr Campbell (the deceased's father), Mr Desmond Smyth (the deceased's estranged husband) who identified the body, and a number of police witnesses.

[88] In the statements which are available there are a number from Scenes of Crime officers ("SOCOs"). One of these was Constable Robert Taylor. He examined Mr Carlin's car at 01.30 am on the following day (9 June 1972). At this time it was at the RVH. He found the rear off-side window to be smashed. On the edge of the remaining glass, about one third of a circumference of a hole 8 mm in diameter, was showing. This, he believed, was an entrance hole caused by a high velocity bullet travelling from the rear off-side of the vehicle towards the quarter light of the front nearside passenger's window. The quarter light on the front passenger's door was also shattered. Constable Taylor found blood under the seat.

[89] Constable Taylor on the same day at 03.00 am examined Mr Brown's taxi which was at Andersonstown Police Station. The deceased's body was present on the floor between the driver's partition and the passenger's seat. She was lying across the floor with both legs bent. There was a large hole on the right side of her face.

[90] Constable Taylor also attended, on the same day, a post mortem of the body carried out by Dr Carson, Assistant State Pathologist. It appears that this post mortem report is not presently available.

[91] After the incident another constable also examined Mr Carlin's car. The date of examination is unclear. By this time the vehicle had been taken to Springfield Road Police Station. The officer was able to collect a number of bullet fragments from the door pillar separating the front passenger's seat door and the front windscreen. The officer noted that the front passenger door fan light was shattered but intact. Other bullet fragments were found in the front of the front passenger seat. He noted that no exit holes were found in the car. The officer recorded that he had "formed the opinion that the deceased was killed by a bullet which entered the car through the rear window in the door behind the driver's door and travelling at an angle towards the front passenger seat, struck the deceased in the head, shattering on impact". He added:

"Nothing else of significance was noted other than the fact that no other holes or bullet strike marks were found on the outside or inside of the car."

[92] Constable Taylor when examining the vehicles was accompanied by a police photographer, Constable Sinclair, who was also present at the post mortem. Within the papers before Maguire J and before this court there are a number of photographs of the Austin 1100 car which Maguire J stated, in what they show, tend to support the view that the description of the damage depicted in the statements of the SOCOs is broadly accurate, though Maguire J added that this is contested by the applicant and other family members.

(c) The inquest on 9 November 1972

[93] An inquest was held into the death of the deceased on 9 November 1972. An open verdict was recorded. The statements to which reference has already been made, appear to have formed the evidence before the inquest, though Maguire J stated that it is possible that there were further statements which the court has not seen.

(d) The Belfast Telegraph article of 22 October 1973

[94] Maguire J recounted that the next notable event was the publication of an article in the Belfast Telegraph newspaper of 22 October 1973. This article related to the death of the deceased and was headed "Was Jean Smyth Shot by Mistake?" The article refers to the deceased being killed by a single shot. After she was struck, the author referred to "a crowd of youths gathering around the car." The deceased, the article goes on, was placed in a taxi. It was said that the deceased was either dead when she was put in the taxi or died very soon afterwards. There is a suggestion that a youth at the scene shouted that it was the UVF which had been shooting.

This, the journalist remarked, was unlikely. A still further suggestion was in the following terms:

“There is another theory and it concerns the controversial Military Reaction Force (“MRF”). It appears to hold more water, especially when some later events are taken into account.”

[95] The article then goes on to describe an incident a fortnight after the deceased’s killing at or about the same general location. During this incident four men were shot and seriously injured. They were shot, the article explains, by an Army sergeant who later faced charges in respect of the incident. In June 1973, he was, however, acquitted of the charges. The article went on: “[the sergeant] claimed in court that he had seen a man with binoculars, another with a pistol and a third with what he took to be a M1 carbine. There were several shots and [the sergeant] returned fire with a Thompson sub-machine gun in three bursts, discharging about ten shots.”

[96] In the course of his trial, the sergeant had explained his duties in the Army. He said he commanded one of the squads in the Army’s undercover MRF and that it was their duty to carry out observations in circumstances where it was difficult for uniformed troops to travel freely. Andersonstown was one of those areas. He said there were about 40 men in the MRF in June 1972 and that he had 15 in his squad.

[97] Later the article went on to say that the sergeant had revealed that the MRF had been in operation in the area around the time of the deceased’s death.

[98] The author went on to refer to the deceased’s death being shrouded in mystery. It was likely that she had been shot by mistake. It was stated:

“It would appear that a unit of the Provisional IRA fired on the car thinking it was carrying Army personnel.”

[99] Reference was also made to their being “no reports at the time of the Army being in the area.”

(e) The 1975 Intelligence Report

[100] In 1975 it appears that the police received what is described as “an intelligence report” which touched upon the death. Its source is unclear but what was put forward in it was that two named members of the Provisional IRA were responsible for the deceased’s death. Those persons were supposedly conducting vigilante patrols in the area when “shots were fired from a car on the Glen Road. When the two men arrived at the bus terminus an 1100 car turned into the terminus. One of the men fired at the car killing the woman occupant.” The male from the car

allegedly ran off. After the shooting, the two men, it was suggested, stopped a taxi and ordered the driver to take the woman to hospital.

[101] Maguire J stated that there was no sign that this report led to any further action on the part of the police.

(f) The involvement of the Historical Enquiries Team between 2006 - 2008

[102] Maguire J stated that the Historical Enquiries Team ("HET") was founded in 2005 with the function of reviewing deaths arising from the conflict in Northern Ireland which had occurred in the period 1968-1998.

[103] It carried out a review of the death of the deceased. This spanned a period from 2006-2008. Their work culminated in the publication to the family on 21 July 2008 of a Review Summary Report ("RSR"). It would appear that this RSR was principally based on the materials to which Maguire J had referred which had derived from the inquest file, together with open source material and the intelligence report.

[104] The original police investigation was described in the report as "relatively basic" but it was noted that it "must be judged in the context of the times." In particular, "police enquiries, which would be commonplace by today's standards, were not always possible, and resources devoted to incidents were substantially less than would be the case today."

[105] The report records that there is no record of anyone being arrested or interviewed in connection with the death.

[106] The RSR referred to 25 exhibits to which the team had had access but there were no photographic albums available in the case papers. This was commented upon as it was the family's belief that "the car was bullet ridden." Notwithstanding this, the team indicated that the case papers and the examination by SOCOs suggested that only one round had been fired.

[107] In considering the question of future lines of enquiry, the team recorded that it had not proved possible to identify the type of weapon used in the attack and that no new forensic opportunities had been identified. It is also recorded that there was no intelligence prior to the incident which would have prevented the death.

[108] Overall, the death was described as a random killing.

[109] In respect of the open source material, it is clear that the team had seen entry 398 in respect of the death in a publication entitled "Lost Lives" which entry referred to the MRF and had also seen the Belfast Telegraph article. There was, however, no reference in the report to the theory that the MRF might have been involved. The

report does, however, quote what had been said in the Belfast Telegraph article about the Provisional IRA firing on the car thinking it was carrying Army personnel.

[110] In the report, which was discussed with family members, it was stated that the team had considered the possibility of re-interviewing Mr Carlin whose address had been traced. The team decided against this. However, as a result of dialogue with family members, this decision was reconsidered.

(g) The re-interview of Mr Carlin on 10 September 2008

[111] Mr Carlin was re-interviewed on 10 September 2008 by which time he was in poor health. The re-interview took place at his home in Andersonstown. Mr Carlin read his earlier statement with a magnifying glass. He then agreed that his statement was correct and was a true account of what had occurred that night. His description of the incident, provided orally, was said to be virtually identical to his original statement.

(h) The Panorama programme on 21 November 2013

[112] On 21 November 2013 an edition of the BBC's current affairs programme, Panorama, was broadcast featuring the activities of the MRF in Northern Ireland in the early 1970s. The activities of the MRF as an undercover military unit operating in Northern Ireland had been known about at the time, as the Belfast Telegraph article exemplified. But what was less known was the extent of its operations and the details of its methods. According to this programme, the MRF operated over a period of some 14 months mostly in Belfast. It would certainly have been operating at the time of the deceased's death and in the area where it occurred. Panorama claimed that some members of the unit operated outside the law and fired at and killed unarmed civilians. To a degree, interviews broadcast with former MRF members lent support to this view, and the programme therefore attracted significant public attention.

[113] The case of the deceased's death is not referred to in the broadcast and Maguire J suspected that at the date of its showing only a person with a very detailed knowledge of the circumstances of the deceased's death would have made a connection with the theme pursued by Panorama.

(i) The discovery of military logs in 2014 and during these proceedings together with the possibilities that are raised

[114] Maguire J set out the significant entries from the military logs which were found by a researcher on 13 June 2014 in the National Archives in a file entitled "Commander's Diary, Headquarters, Northern Ireland, June 1972" and which were given to the Applicant on 3 October 2014. The logs took the form of recording radio traffic. He also set out entries from further military logs which emerged as a result of the judicial review challenge. We do not consider it necessary to set out those

entries given that Maguire J considered there was plainly some support in the logs for a number of possible interpretations. Maguire J was punctilious in emphasising, as do we, that it is not the purpose of these proceedings to decide which of the interpretations is to be preferred but rather all that was or is to be considered in these proceedings are the possibilities opened up by the logs. Maguire J set out 4 possibilities/interpretations as follows:

[43] Firstly, the logs provide a measure of support for the previously expressed view of family members that there was more than one shot fired at the car. For example, there is reference to the car being “machine gunned” and there are at least two references to a “burst” of automatic fire in the context of a woman being hit.

[44] Secondly, the logs disclose an incident involving “KP19.” This, the court understands, is a code for a sanger located near an electricity sub-station further along the Glen Road going countrywards. At the time this sanger was manned by a soldier or soldiers. The ... entries ... might lend support to the view that a soldier or soldiers in the sanger was/were fired on by a person or persons unknown and that he fired a 7.62 mm round, claiming a hit.

[45] Thirdly, the log contained a reference to the MRF travelling west along the Glen Road. The time is given as 0140 hours. This, in itself, might be viewed as pointing against the suggestion that the MRF may have been involved in the death of the deceased. But there is some room for doubt especially as the time might relate simply to the time of a later communication. The content of this entry would not be consistent with the incident involving the deceased as it hitherto had been understood, as it refers to an exchange of fire between gunmen hiding behind a hedge and MRF members. It is, therefore possible, that the entry relates to a separate and later incident in or about the same or a similar location in the early hours of 9 June 1972. It is of interest, however, that the MRF is identified as operating in the area and at this general location. The description given of the incident involving the MRF, it may be noted, abrades with what is known about the causality of the deceased’s death based on the SOCO examinations. The MRF appeared to have fired towards the target in front of them as they would have seen it i.e. looking countrywards which would be in conflict with the trajectory described by the SOCOs.

[46] Fourthly, in one of the logs there are three men described as placing the deceased in a taxi and the driver being told to drive to the hospital. This might be capable of being viewed as not discordant with the intelligence received in 1975 which had also referred to three men performing vigilante patrolling.”

[115] Maguire J recounted that the logs found in 2014 were provided by the Applicant’s solicitors to the police in October 2014. It was asserted in the accompanying letter that the deceased’s death was attributable to the MRF.

(j) Events since the discovery of the military logs

[116] Maguire J recounted that since October 2014 it appears that the PSNI has considered the material provided to it. An officer reviewed the logs but it was not considered that they supported the view that the MRF was involved. However the view was taken that the possibility of military involvement in the deceased’s death did exist as a result of the reference to an incident at the KP19 sanger. A decision was made by the PSNI in December 2015 that the death should be further reviewed within the LIB which by this time had taken over the functions hitherto performed by the HET. Maguire J also recounted that the current position of the PSNI in respect of the death of the deceased is that if, in the course of a review, LIB identify any indication that wrongdoing or a criminal offence may have been committed by a police officer, whether from the RUC or PSNI, the case will be immediately referred to the Police Ombudsman for Northern Ireland in order to carry out any investigation which it considers to be appropriate. Otherwise, the PSNI will carry out any investigation required.

Part Four: Maguire J's judgments

The first judgment

[117] At paragraph [3] Maguire J identified the issue as being that:

“the *PSNI* ought not themselves investigate the case further on the basis that, as a force, it is not to be viewed as independent of those whose actions would be under investigation. Rather any further investigation should be carried out by a wholly impartial, objective and autonomous agency without links to the MOD” (emphasis added).

At paragraph [4] Maguire J returned to the issue as being:

“whether or not it would be unlawful at this time for the *PSNI* to perform the function of investigator, as is its intention to do so” (emphasis added).

We would observe that the issue was defined by reference to the *PSNI*'s involvement rather than the involvement of the *PSNI*'s LIB so that the relief which was sought was “a declaration that it would be unlawful for the *PSNI* further to deal with the investigation of the case.” However, in the event the conclusion of Maguire J was limited to the LIB. Having identified the issue and the relief sought Maguire J set out the applicable law by reference to *Brecknell* in the context of the parties' acceptance that Article 2 had been revived with the consequence that the authorities were under an obligation to investigate which investigation had to be independent.

[118] The judge considered the issue as to what was required to meet the criterion of independence by reference to *R (Mousa) v Secretary of State for Defence* [2012] HRLR 6, *Jordan v United Kingdom* [2003] 37 EHRR 2 and *R (Amin) v Secretary of State for the Home Department* [2004] 1 AC 635 stating that it was not necessary to prove that some element or person actually lacked independence and that a function of independence was “the need to ensure public confidence and in this context, perception was important.” Maguire J set out the applicant's case, together with the submission that “a fair minded and impartial observer would have to conclude that the continued investigation of the death should not be carried out by the *PSNI* via LIB.” The judge recorded the applicant's criticism of the original police investigation and of the investigation by HET together with a critique as to how the HET operated. The judge also set out the respondent's case which was that “the present position in which the LIB is charged with (further) investigating breaches neither the requirement of a lack of hierarchical or institutional connection nor the requirement of practical independence” and that in “this regard it was asserted that the *PSNI* is independent of the military in every sense.” The judge noted that the respondent

placed a heavy reliance on decisions of the Committee of Ministers and of the ECtHR.

[119] The judge concluded at paragraph [105] that:

“The *LIB at this time* lacks the necessary element of independence to enable it to pursue the issue of further investigations into the death of the deceased” (emphasis added).

It can be seen that the conclusion was limited to the LIB and did not include the PSNI and it was stated to be a conclusion reached “*at this time*” therefore allowing for a different conclusion at some other time or in some other circumstances. The judge did not expressly state whether the conclusion was based on a lack of hierarchical, institutional or practical independence.

[120] The judge then proceeded to give reasons for his conclusion. In relation to the initial investigation by the RUC the judge considered that on any view it was perfunctory and why this was so was a difficult question to answer. The judge went on to state that some of the possible explanations were not benign such as a lack of appetite on the part of those charged with the task to investigate or that common interests between different branches of the security forces dictated that it might have been unwise to scrutinise the events of that night/morning too closely or critically. The judge went on to state that with the benefit which the military logs now provided it is obvious that this was a case where the investigation should have focussed, *inter alia*, on the scenario that the deceased may have died as a result of a shot fired from a military source. In those circumstances Maguire J considered that a fair-minded and informed observer would conclude that there was a real possibility that the initial investigation by the RUC was carried out superficially and ineffectively by reason of (at least) unconscious bias. A reasonable perception would be that the initial investigation lacked the hallmark of independence.

[121] The judge then considered the 2006-2008 investigation by HET finding that it did not look at the possibility that soldiers could have been involved in the deceased’s death. Again, the judge considered that the question as to why it did it not do so gave rise to a range of possibilities both benign and otherwise. The explanations which were not benign included “an absence of enthusiasm to introduce the possibility that the death might have been attributable to a source other than a terrorist one.” The judge considered that the fair-minded and informed observer would consider that there was a real possibility that the HET investigation was carried out in the way in which it was by reason of (at least) unconscious bias without the hallmark of independence.

[122] The judge considered that a fair-minded and informed observer would have regard to the past history of the case in assessing the possibilities today. He also took into account the concerns expressed by the HMIC “in areas such as the

provision of intelligence information to the investigator and the vetting of relevant staff to a sufficiently high standard”

[123] In the event having reached the conclusion at paragraph [105] he granted a declaration that “the proposed investigation by the LIB of Mrs Smyth’s death conflicts with the requirements of Article 2 ECHR as the LIB lack the requisite independence required to perform an Article 2 (compliant) investigation in respect of this (death).”

The second judgment

[124] Maguire J addressed the application of Article 2 in domestic law by reference to his detailed and comprehensive judgment in *Re McGuigan’s Application* and *Re McKenna’s Application* [2017] NIQB 96. At paragraph [43] of his judgment dated 13 April 2018 the judge held that “ultimately ... the decision in *McKerr* [2004] 1 WLR 807 remained the governing domestic law authority” so that “as the date of the death long predates the commencement of the Human Rights Act, it will follow that Article 2 will have no application to any future investigation of the death, as a matter of domestic law.”

[125] In relation to the case based on a legitimate expectation the judge concluded that in so far as it was based on a letter sent before and a skeleton argument submitted in relation to the initial hearing the applicant’s contention amounted simply to an impermissible attempt to restore the effect of the concessions via a backdoor route. The judge also concluded that in so far as it was based on what Mr McGleenan had informed the Court of Appeal that he was not persuaded that counsel had any intention about what he said to provide the applicant with a commitment that irrespective of the true scope of the PSNI’s legal obligations PSNI would voluntarily comply with Article 2.

[126] In relation to the question as to whether there was a common law obligation to ensure an independent investigation into the deceased’s death the judge held that there was no legal obligation at common law which operates parallel to Article 2 and which brings with it the requirement of independence as that doctrine has been interpreted as a feature of the Convention. In arriving at that conclusion he relied upon *Keyu* [2015] UKSC 69 at paragraphs [117]-[122].

[127] The judge also considered a further question. That was assuming that Article 2 had no application to the issue of the further investigation of the deceased’s death whether or not it could be said that the position of the Chief Constable, in so far as he has declined to voluntarily adopt Article 2 requirements, can be said to be irrational or unreasonable.

Part Five: Application of Article 2 ECHR

[128] The issues in relation to the application of Article 2 ECHR are (a) whether the military logs constituted new evidence coming to light within the principles set out in *Brecknell v United Kingdom* (2008) 46 EHRR 42 so as to give rise to an obligation “to take further investigative measures” and (b) whether the Applicant can maintain an action in the domestic courts under the HRA when it was not in force at the time of her sister’s death on 8 June 1972 some 28 years before its commencement on 2 October 2000. Those issues as to application are not to be conflated with the exact nature of the Article 2 obligation which may well be influenced by the passage of time.

[129] The impact of the passage of time on the nature of the Article 2 obligation was considered by the ECtHR in *Brecknell*. At paragraphs [71] and [72] the ECtHR built in the allowance that should be made for the passage of time and provided for a significant degree of discretionary judgement to be exercised by an independent police investigation:

“71...The steps that it will be reasonable to take will vary considerably with the facts of the situation. The lapse of time will, inevitably, be an obstacle as regards, for example, the location of witnesses and the ability of witnesses to recall events reliably. Such an investigation may in some cases, reasonably, be restricted to verifying the credibility of the source, or of the purported new evidence. The Court would further underline that, in light of the primary purpose of any renewed investigative efforts, the authorities are entitled to take into account the prospects of success of any prosecution. The importance of the right under Art.2 does not justify the lodging, willy-nilly, of proceedings. As it has had occasion to hold previously, the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals and they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would not in fact have produced concrete results.

72 The extent to which the requirements of effectiveness, independence, promptness and expedition, accessibility to the family and sufficient public scrutiny apply will again depend on the particular circumstances of the case,

and may well be influenced by the passage of time as stated above. Where the assertion or new evidence tends to indicate police or security force collusion in an unlawful death, the criterion of independence will, generally, remain unchanged.”

[130] The first issue as to the application of Article 2 is straightforward though that is not to understate the considerable hurdle for anyone seeking to establish that the detachable procedural obligation has been revived. In *Brecknell* the Grand Chamber at paragraph [71] of its decision said

“... the court takes the view that where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures ...”

It is common case and we consider that the additional materials consisting of the military logs constitute plausible and credible pieces of evidence meeting the *Brecknell* test for further investigative steps.

[131] In relation to the second issue and in the circumstances of this case there has to be a genuine connection between the death as the triggering event and the entry into force on 2 October 2000 of the HRA. In *the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7 Lord Kerr delivering the judgment of the Supreme Court stated at paragraph [111] that the “plain and inescapable fact is that this court in *McCaughey* unequivocally adopted the decision in *Šilih* as indicating the principled approach in domestic law to the question of genuine connection.” At paragraph [108] Lord Kerr stated that “nothing in *Janowiec* detracts from the proposition in *Šilih* that the decision as to whether there is a genuine connection involves a multi-factorial exercise and the weight to be attached to each factor will vary according to the circumstances of the case.”

[132] One of the factors in the multi-factorial exercise which can be of importance is the lapse of time between the triggering event which is the death and 2 October 2000, which is the date of the entry into force of the HRA. The lapse of time must remain reasonably short if it is to comply with the genuine connection standard. However, the weight to be attached to this factor will vary according to the circumstances of the case so that the issue becomes generally what weight the passage of time should carry in a *Brecknell* case and specifically what weight it should carry on the facts of this particular case. We consider as a matter of principle that generally it should carry little if any weight given that the passage of time is accommodated in a *Brecknell* case when determining the nature of the Article 2 obligation.

[133] Another part of the consideration of this factor is what is meant by reasonably short. We consider that a period of 10 years or less between the triggering event (the death of the applicant's sister) and the critical date (the coming into force of the HRA) is not an immutable requirement, see paragraph [108] of *Finucane*. The guidance that a reasonably short lapse of time should not *normally* exceed 10 years (emphasis added) permits of a longer period. Furthermore we consider that whilst a genuine connection can be met on the basis of time the length of time is not the only factor to be considered and weighed.

[134] At paragraph [163] of *Šilih* the ECtHR stated that

“there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed by art.2 to come into effect. *Thus a significant proportion of the procedural steps required by this provision ... will have been or ought to have been carried out after the critical date.*” (emphasis added).

As is apparent from the second sentence as emphasised if a significant proportion of the procedural steps required ought to have been carried out after the critical date (the coming into force of the HRA) then that also is a factor to be evaluated in the multi-factorial exercise and may be decisive as in the case of an inquest, see *McCaughey*. The emphasised passage in *Šilih* was expressly endorsed by Lord Kerr at paragraph [97] of *Finucane*.

[135] As we have indicated as a matter of general principle we consider that little if any weight should be attached to the passage of time in a *Brecknell* case. However, it is also necessary to consider specifically what if any weight it should attract in the circumstances of this case. The period of time is 28 years which is substantially greater than the period of 10 years. However, that period is to be seen in the context that there was no investigation of military involvement in the death and that the reasons for the lack of such an investigation were either total incompetence or to adopt Maguire J's phrase the reasons were “not benign.” The non-benign reasons potentially including state authorities deliberately turning a blind eye so as to allow a member of the military who may have caused the death to escape justice. The incompetent reasons being informed by knowledge of the obvious presence of armed members of the military and of the MRF in the vicinity and the obvious existence of military records. We consider that what is *reasonably* short depends on context. The purpose of a temporal time limit is to draw a line but not necessarily to draw a line in the circumstances where potentially those on behalf of the State have obstructed an investigation. In this case there is a serious issue as to whether the RUC positively obstructed the investigation so that the delay has been caused by those responsible for the investigation. We consider that given the degree of earlier incompetence and the potential for positive obstruction of the earlier investigation the temporal connection should be kept strictly in context.

[136] There has been no investigation of military involvement in the death which means that *insignificant* procedural steps have been taken. There is now to be such an investigation. We consider that such an investigation falls full square within the emphasised part of paragraph [163] of *Šilih* in that *a significant proportion of the procedural steps required by this provision ... will have been or ought to have been carried out after the critical date* which for domestic purposes is 2 October 2000. On that basis we consider that the genuine connection test has been met and that the Article 2 procedural obligation applies in this case.

[137] The Article 2 procedural obligation is detachable. Where an inquest is proceeding after 2 October 2000 into a death which occurred prior to that date it must comply with Article 2. Lord Neuberger recognised in *Keyu* that the same must apply to an inquiry. In our view the same must also be true for a police investigation. There is no principled distinction. On that basis if new evidence within *Brecknell* gives rise to further investigative measures after 2 October 2000 then unless there are quite exceptional circumstance it will meet the *Šilih* genuine connection test there being no reason for distinguishing between an inquest as in *McCaughey*, an inquiry as in *Keyu* or further police investigations in accordance with *Brecknell*.

[138] In conclusion this case involves the obligation to carry out an investigation into whether a possible cause of the shooting dead of Ms Smyth was a shot discharged by a soldier. There has been no previous investigation into that issue. The material giving rise to the concern about the previous investigation has come about recently. We consider that the *Šilih* test is met in this case and generally will be met in each case which satisfies the *Brecknell* test.

Obligation to investigate under section 32 of the Police (NI) Act 2000

[139] Section 32(1) of the Police (NI) Act 2000 provides that “It shall be the general duty of police officers (a) to protect life and property; (b) to preserve order; (c) to prevent the commission of offences; (d) where an offence has been committed, to take measures to bring the offender to justice.” This general duty is subject to the accountability provisions in the Act with a central role being played by the Policing Board and the ultimate power to require the Chief Constable to resign. We do not consider that it enables the courts to impose Article 2 compliant standards on or to micro manage investigations.

Part Six: Legal principles as to investigatory independence

(a) The obligation to take into account the decisions of the ECtHR and the Committee of Ministers

[140] Section 2 (1) of the HRA 1998 provides that a “court ... determining a question which has arisen in connection with a Convention right must take into account any—(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, ... or (d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.”

[141] The obligation to take into account the decisions of the ECtHR, as opposed to the Committee of Ministers, was considered by the Supreme Court in *R (On the Application of Chester)* [2014] AC 271. We take the following principles from that case namely:

(a) To take into account a decision of the ECtHR does not mean that a court is bound to follow a decision as a matter of absolute obligation.

(b) The interpretation of the Convention by the ECtHR takes effect in the law of Northern Ireland only by a decision of the courts of Northern Ireland and the Supreme Court.

(c) A decision of the ECtHR is more than an opinion about the meaning of the Convention. It is an adjudication by the Tribunal which the UK has by treaty agreed should give definitive rulings on the subject. The courts are therefore bound to treat them as the authoritative expositions of the Convention which the Convention intends them to be, unless it is apparent that it has misunderstood or overlooked some significant feature of English law or practice which may, when properly examined, lead to the decision being reviewed by the Strasbourg Court.

(d) The requirement to “take into account” the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg Court. There will however be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process.

(e) “Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or

misunderstand some argument or point of principle, I consider that it would be wrong for this court not to follow that line.”

So there has to be a reasoned approach to the decisions of the ECtHR which will not be summarily applied but where there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle it would be wrong for this court not to follow that line.

[142] The obligation to take into account the decisions of the Committee of Ministers, was considered by the Supreme Court *in the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7 particularly at paragraphs [142] – [147]. We consider that it is equally clear that to take into account a decision of the Committee of Ministers does not mean that a court is bound to follow the decision. It is also clear that in considering a decision of the Committee of Ministers part of the context is that the decisions are not adjudications by an independent court but are decisions by politicians, see paragraph [145] of *Finucane*. As stated at paragraph [147] of *Finucane* this is not to say that a “decision of the Committee of Ministers can or should be ignored.” Rather it must be considered, but “the context and circumstances in which the decision was reached and the change in circumstances which have occurred since that time cannot be left out of account.”

(b) Relevant principles that are clearly established by judgments of the ECtHR in relation to an independent Article 2 compliant investigation

[143] There is a clear and constant line of decisions in relation to the general necessity for an effective Article 2 compliant investigation to be independent. That clear and constant line of decisions is not inconsistent with some fundamental substantive or procedural aspect of our law.

[144] That clear and constant line of authority is based on the proposition that Article 2 ECHR read in conjunction with Article 1 requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The central purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility, see paragraph 111 of *McKerr v UK* (2002) 34 EHRR 20. This procedural obligation involves an “effective” investigation. “For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events” (emphasis added) see paragraph 112 of *McKerr*. At paragraph 106 of its judgment in *Jordan v UK* (2003) 37 EHRR 2 and at paragraph 112 of *McKerr* the ECtHR stated that this “means not only a lack of hierarchical or institutional connection but also a practical independence.”

[145] The requirement of a lack of hierarchical or institutional connection together with practical independence has been persistently stated by the ECtHR in a number of cases including cases from this jurisdiction, see for example *Edwards v UK* (2002) 35 EHRR 487 at paragraph 70; *McShane v UK* [2002] ECHR 43290/48 at paragraph 95; *Shanagan v UK* [2001] ECHR 37715/97 at paragraph 89; *Finucane v UK* [2003] ECHR 29178/95 at paragraph 68. In *Ramsahai v Netherlands* (2008) 46 EHRR 43 at paragraph 325 the ECtHR (Grand Chamber) stated that “for the investigation to be “effective” in this sense it may *generally* be regarded as necessary for the persons responsible for it and carrying it out to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence” (emphasis added). However at paragraph 112 of the judgment of the ECtHR (Grand Chamber) in *Nachova & Others v Bulgaria* (2006) 42 EHRR 43 the requirement for independence was stated in somewhat different terms so that for “an investigation into alleged unlawful killing by state agents to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice.”

[146] We consider that what is essential is “structure.” The investigation has to be “structured” in such a way that the state authorities are able to demonstrate that it is an independent investigation which is a constituent part of an effective investigation. We do not discern the ECtHR as dictating that there should be a complete hierarchical or institutional disconnection as there are ways in which a state can inject independence into the structure of hierarchies and institutions. We consider that this has been recognised by the ECtHR in *Brecknell*. At one level the PSNI might be said to be institutionally connected to the RUC as it was the successor to the RUC and it inherited officers and resources from the RUC. However that is to overlook the fundamental and wide-sweeping reforms brought about by the Belfast Agreement of 10 April 1998. Those reforms whilst not achieving a complete institutional disconnection between the PSNI and the RUC were sufficient to achieve institutional independence. That was the impact of the decision of the ECtHR in *Brecknell* where the question of an institutional connection between the PSNI and the RUC was considered by the ECtHR after the reforms of policing. In its judgment at paragraph 76 the ECtHR stated that it was “satisfied that the PSNI was institutionally distinct from its predecessor even if, necessarily, it inherited officers and resources.” We recognise that each case is fact specific requiring the application of clearly established principles to the particular facts of each case. However it is clear that on the basis of the reforms which had taken place and on the evidence then available the ECtHR was satisfied that those reforms had achieved institutional independence. That is a judgment which has to be taken into account under Section 2 (1) of the HRA 1998 and we consider that it is authoritative. For a court not to treat the decision in *Brecknell* as authoritative it would be required to carry out a factual analysis as to what if anything has changed since the date of the decision in relation to institutional connection between the PSNI and the RUC and if there has been any change the significance of that change in relation to the overall conclusion.

[147] Mr McGleenan also drew our attention to another part of paragraph 76 of the ECtHR's judgment in *Brecknell* where it was observed that "the applicant has not expressed any doubts about the independence of the teams which took over from 2004 (the SCRT and HET)." We consider that whilst the ECtHR expressed no concerns about the practical independence of the investigation being carried on by the SCRT or the HET that this was not a positive decision after adjudication as to practical independence as the issue had not been raised. Therefore either it should not be taken into account under Section 2(1) of the HRA 1998 or it should attract little weight.

[148] We also consider that there are ways of injecting practical independence into an investigation. In the same way that the ECtHR has recognised in *Brecknell* that there are ways of injecting independence at an institutional level it has also held that there are arrangements which can be made to secure practical independence.

[149] Arrangements for achieving practical independence were considered by the ECtHR in *Hackett v UK* [2005], Unreported 34698/04. The arrangements injected into the investigation in that case were that the investigating officer in the PSNI had no connection with the original investigation together with the appointment of an officer from an external force. In that case the victim, Dermott Hackett, was killed by loyalist paramilitaries on 23 May 1987. Shortly afterwards, Michael Stone, when arrested following his attack on mourners in Milltown cemetery, admitted carrying out the murder. He then retracted his confession, but was found guilty on 3 March 1989. In July 2003 he published a book again denying his involvement, but making allegations that he had colluded with the RUC/Military prior to the Milltown murders. Following the publication of the book, the solicitors for the victim's widow wrote to amongst others, the Chief Constable asking what steps were being taken in light of Stone's allegations. On 11 August 2003 the Chief Constable directed a Detective Inspector of the PSNI, with no connection with the original investigation, to examine the book and any other relevant material that existed in relation to the death of Dermot Hackett. Steps were also taken to have a senior detective from outside Northern Ireland examine the collected material and carry out such further enquiries and examine such further materials as he felt appropriate. The officer was to report to the Chief Constable on the findings and make recommendations as to any issues requiring re-examination. Accordingly both a PSNI officer and an officer from outside the region had been appointed by the Chief Constable. Amongst other matters the widow of the victim argued that the PSNI investigation lacked the requisite degree of independence from those implicated in the events (the former RUC and the security forces) and that the outside officer's review was also not sufficiently independent from those responsible. The ECtHR declared the complaint inadmissible, holding:

"The Court finds no reason to doubt the independence of the officer appointed from outside the PSNI. It has not been substantiated that the method of appointment or the fact that he reports to the PSNI deprives him of the

necessary ability to report objectively and without being influenced by any officers implicated in the events.”

This case involved allegations of collusion between a convicted and notorious terrorist and both the RUC and the security forces which allegations were to be investigated by the PSNI. We consider that this case is not only important in demonstrating what arrangements can be injected into an investigation to secure its practical independence but also that there was no finding by the ECtHR of any hierarchical or institutional connection as between the PSNI and the RUC or as between the PSNI and the security services. Again we recognise that each case is fact specific but it is clear that on the facts of that case there was not only a lack of hierarchical or institutional connection but also that there was the component of practical independence both from the RUC and from the security forces.

[150] Another feature of the decision of the ECtHR in *Hackett* is the statement that

“the Court considers that it is premature to impugn the response of the authorities to the allegations of Michael Stone. It is not possible *at this stage* to anticipate the outcome of the proceedings or to assume that the applicant will not be duly informed of any conclusions reached or that the decisions taken will not conform with the authorities' obligations” (emphasis added).

The ECtHR considered that in relation to certain of the criticisms made by victim's widow it was appropriate to wait to see the final outcome.

(c) Relationship between the ECtHR jurisprudence and the *Porter v Magill* test

[151] In *Porter v Magill* [2002] 2 A.C. 357 at paragraphs [57], [59], [103], [131] and [161] the House of Lords defined the test for determining an issue of apparent bias as:

“Whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Tribunal was biased.”

The attributes of a fair-minded and informed observer have been considered in a number of authorities including *Jones -v- DAS Legal Expenses Insurance* [2004] IRLR 218 at paragraph [28], *Belize Bank Limited v Attorney General of Belize & others* [2011] UKPC at paragraph [68], *Gillies -v- Secretary of State for Work and Pensions* [2006] 1 WLR 751 at paragraph [17], *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416 at paragraphs [1] to [3] and *Prince Jeffri & others v The State of Brunei* [2007] UKPC 62. From *Porter v Magill* and from these authorities it is clear that the test is a two stage test. First the observer must be informed by ascertaining all the relevant facts which have a bearing on the suggestion either one

way or the other that the decision-maker has the appearance of bias. Second the observer must be fair-minded so that question becomes whether all those facts would lead to an objective conclusion that there was a real possibility that the decision-maker is biased.

[152] The decisions of the ECtHR in the area of independence of Article 2 compliant effective investigations have not been based on the test in *Porter v Magill* though we consider that the underlying aim of both tests is the same.

[153] The aims of the Strasbourg test were identified in *Ramsahai v Netherlands* at paragraph 325 by the ECtHR as being “nothing less than public confidence in the State’s monopoly on the use of force.” Accordingly the general necessity of a lack of hierarchical or institutional connection and also the presence of a practical independence is to maintain public confidence. There has to be public confidence; that is objective confidence that the investigation will be effective so as to secure the accountability in practice as well as in theory of the State agents implicated in the events. Equally there has to be objective confidence in the effective implementation of the domestic laws which protect the right to life. These are all aims to be achieved by the general necessity of independence in an Article 2 compliant investigation.

[154] The aim of the *Porter v Magill* test was identified by Lord Steyn in *Lawal v Northern Spirit* [2003] UKHL 35 by reference to public confidence and public perception as being at the core of the test for apparent bias. The objective is the “confidence which must be inspired by the courts in a democratic society ... public perception of the possibility of unconscious bias is the key”

[155] We also consider that the *Porter v Magill* test relies on Strasbourg jurisprudence for which see *Porter v Magill* at paragraph [104] and *Hauschildt v Denmark* 12 EHRR 266 at 279, paragraph 48.

[156] We consider that the aim of both tests is the maintenance of public confidence. Both tests require a determination and consideration of the facts which give rise to the potential of a real possibility of lack of independence. Both tests are objective so that a party’s fears are initially important but the final test is objective. Lord Hope stated at paragraph [104] of *Porter v Magill* that “what is decisive is whether any fears expressed by the complainant are objectively justified. The complainant's fears are clearly relevant at the initial stage when the court has to decide whether the complaint is one that should be investigated. But they lose their importance once the stage is reached of looking at the matter objectively.” So the aim of both tests is public confidence by which is meant objective confidence.

[157] The Strasbourg test is a lack of hierarchical or institutional connection together with practical independence. We consider that Maguire J was not precluded from applying the *Porter v Magill* test as an aid to the Strasbourg test as there are sufficient significant similarities between the tests provided that it is clearly identified which aspect of the Strasbourg test is being considered. The *Porter v*

Magill test requires the observer to be informed and the information which is relevant will differ when consideration is being given to the different aspects of the Strasbourg test. The outcome will also be different in that a lack of practical independence is more readily rectified and will not necessarily have implications for other investigations. Furthermore the *Porter v Magill* test has to be adapted to comply with Section 2(1) HRA 1998 so that decisions of the ECtHR and the Committee of Ministers under Article 46 of the Convention are taken into account.

(d) Relevant decisions of the Committee of Ministers taken under Article 46 ECHR

[158] On 6 June 2007 the Committee of Ministers adopted Interim Resolution CM/Res/DH(2007)73. It was noted that several issues remained outstanding including “the lack of independence of police investigators investigating an incident from those implicated in the incident.” On that basis the Committee was expressly considering the independence of investigations and it noted “the improved safeguards for the independence of police investigations”. The Committee went on to note “with interest the establishment in late 2005 of the (HET) which has same task as the Serious Crimes Review Team (“SCRT”), namely “the task of providing a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist, and, if evidential opportunities are identified, to proceed with the investigation of the crime.” The Committee welcomed “the progress achieved as regards the establishment of appropriate institutions for the purpose of conducting effective police investigations” and invited “the authorities to continue to keep the Committee informed as regards the progress made in the investigation of historical cases and in particular to provide information concerning concrete results obtained in this context both by the HET and by the Police Ombudsman.”

[159] That decision of the Committee of Ministers did not question the hierarchical or institutional connection between the RUC and the PSNI or between the PSNI and the security forces but rather it noted the improved safeguards and welcomed the progress achieved. The decision must be taken into account under section 2(1) HRA 1998.

[160] On 19 November 2008 the Secretariat provided a report to the Committee of Ministers (CM/Res/DH(2008)2 revised). In that report the Secretariat stated that the “HET is part of a process (which includes the Public Prosecution Services) aiming to achieve as Article 2 compliant an investigation as possible, whilst recognising there are certain inevitable limitations, namely the HET’s focus on the review of historical cases which means they cannot satisfy the promptness requirement of Article 2.” It stated that “to provide reassurances about operational independence, the HET reports directly to the Chief Constable. It is largely staffed by retired senior police officers from Scotland, Wales and England. There is also a number of serving police officers seconded from other police forces across the UK. A number of retired Royal Ulster Constabulary (RUC) officers, as well as several serving PSNI officers work

with the HET. These latter officers work in a separate team and only on cases where families have raised no concerns about the independence of the investigation. The officers are required to declare any past interest in a case and no officer will work on a case in which they have previously been involved.”

[161] We consider that the Secretariat expressed no adverse comment on the hierarchical or institutional connection between the PSNI and the RUC or between the PSNI and the security forces nor did it express any adverse comment on the situation in which the HET reported directly to the Chief Constable. Furthermore, the Secretariat noted the arrangements that had been put in place to secure independence such as police officers seconded from other police forces across the UK and a requirement to declare any past interest in a case.

[162] The Secretariat went on to consider cases in which there are allegations of state collusion which are handled by the HET’s White Team and Complex Inquiry Team, both of which were staffed by police officers from outside Northern Ireland. The Secretariat recorded that the “teams will look for evidence of offences which might be characterised as “collusion”” and that the “teams will also examine any links which can be identified between cases.” The Secretariat stated that these “types of cases are also referred to the Police Ombudsman who will conduct a parallel investigation. The HET will focus on investigating the incident itself while the Ombudsman looks at the conduct of police officers. Where there is sufficient evidence of offences, as with any HET case, this will be submitted to the Public Prosecution Service for consideration and a decision on prosecution.”

[163] The Secretariat was also aware that the work of the HET had been analysed, at its request, by an external academic, whose initial research identified strengths and weaknesses in the HET approach. This was considered to be a useful diagnostic. A number of problems were identified in the working of the HET. These included that “approximately 25% of the HET staff previously worked for the RUC, Special Branch or the Ministry of Defence. The continuing churn of investigators who originate in Scotland, Wales and England has impeded the effective operation of the HET, contributing to the delay in closing files. Problems are being experienced recruiting qualified investigators to replace those who leave. Policing Board members, from both communities, have questioned the allocation of funding to the HET, noting that in fact it has come from the PSNI budget rather than the additional funding originally indicated. Certain of the reports delivered to families have been poorly prepared. It is also noteworthy that it was the work of an NGO which prompted the recall of reviews of killings by soldiers in the period up to 1973. (In response to these comments, the United Kingdom authorities had noted that the report compiled by the external academic, Dr Patricia Lundy, remains in draft form and has not yet been finalised. The work carried out by Dr Lundy was limited to the setting up of the HET and many of the issues identified in the report have been addressed. There are some areas where the HET accept that the report makes some useful points, and it is considering how these might be incorporated into its work. However, the small scope and narrow focus of the report mean that the UK

authorities do not accept that the report on its own is an appropriate means by which to judge the work of the HET.)”

[164] The Secretariat’s assessment was that:

“Despite these setbacks, the Secretariat is of the opinion that HET can be considered as a useful model for bringing a “measure of resolution”, to those affected in long lasting conflict. Such institutions could be viewed as playing an important role in satisfying the state’s continuing obligation to conduct effective investigations into violations of Article 2 of the Convention.”

The Secretariat went on to state that in “the light of the foregoing and bearing in mind the Committee of Ministers emphasis on the need for rapid progress in the investigation into all past cases ... the Secretariat proposes that the Committee of Ministers might consider strongly encouraging the HET to finalise its work rapidly and that it might decide to close its examination of this measure as *the HET has the structure and means capable of allowing it to finalise its work*” (emphasis added).

[165] Again we consider that the Secretariat expressed no adverse comment on the hierarchical or institutional connection between the PSNI and the RUC or between the PSNI and the security forces. Furthermore the Secretariat was sufficiently satisfied with the arrangements to secure practical independence so as to recommend to the Committee of Ministers that it close its examination of the independence of the investigators.

[166] On 19 March 2009 by Interim Resolution CM/ResDH(2009)44 the Committee of Ministers decided to accept the recommendation of the Secretariat to close its examination of the independence of the investigators as “the HET has the structure and capacities to allow it to finalise its work.” In so deciding it:

(a) recalled the establishment of the (HET) in late 2005 as the successor to the Serious Crime Review Team (SCRT), which has the task of providing a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist, and, if evidential opportunities are identified, to proceed with the investigation of the crime;

(b) noted that the HET process is taking longer than originally anticipated as a result of its high caseload and that 63% of the cases before it still remain open;

(c) acknowledged that, despite these setbacks, the HET can be viewed as a useful model for bringing a “measure of resolution” to those affected in long-lasting conflicts;

(d) took note of the structural arrangements and organisation of the HET which is staffed by retired police officers from Scotland, Wales and England; serving police officers seconded from police forces across the United Kingdom and a number of retired Royal Ulster Constabulary;

(e) noted that the HET funding cannot be used for other policing work and is allocated to each of the organisations involved in the HET project;

(f) welcomed that the HET's well-structured organisational scheme allows its different teams to concentrate on different aspects of a case depending on its complexity and the engagement of the family concerned;

(g) noted that the HET meets with the families, informs them of its findings and provides a copy of the Summary Report and that the families can seek further clarifications of any outstanding issues after receiving the Summary Report;

(h) welcomed the good working relations established between the HET and the Police Ombudsman of Northern Ireland and noted with satisfaction that these institutions have adopted a Memorandum of Understanding in relation to the investigation of historical cases; and

(i) noted in this context that the HET has transferred a total of 87 cases to the Police Ombudsman for its examination and that the Police Ombudsman may decide to publish the results of the investigations into these cases when his investigations have concluded, if he considers this appropriate;

It can be seen that the Committee of Ministers was aware of the structural arrangements and organisation of the HET and through the report of the Secretariat of the issues raised by Dr Lundy. The decision of the Committee of Ministers that the HET had the structure and capacities to allow it to finalise its work was made with knowledge of those concerns.

[167] We consider that the decisions of the Committee of Ministers on and prior to 19 March 2009 in so far as they do not call into question the hierarchical or institutional connection between the PSNI and the RUC or the security forces should not only be taken into account but are persuasive.

[168] We consider that the decisions of the Committee of Ministers on and prior to 19 March 2009 as to the practical independence of the HET are to be taken into account primarily as illustrating the arrangements that could secure practical

independence and the differences that now exist between what were the structures and capacities on 19 March 2009 and what are the structures and capacities now in existence. The most fundamental and glaring of which is that the HET no longer exists and the HIU has not been established. Overall we consider that the changes since 19 March 2009 substantially reduce the weight to be attached to the decision of the Committee of Ministers though we emphasise that the decision as to whether an investigation has the capacity to fulfil the procedural requirement of independence is fact specific in each case.

[169] The Committee of Ministers subsequently became aware that (a) the HET had closed down, (b) of the work of the LIB and (c) the plans for a HIU. Concerns were expressed by the Committee at their meeting on 19-21 September 2017 (CM/Del/Dec (2017)1294/H46-38) about the failure of the parties to bring forward the Stormont House agreement for the creation of the HIU but the Committee expressed no adverse comment on the independence of the LIB or of the PSNI in hierarchical, institutional or practical terms. However, we consider that the lack of any adverse comment as to practical independence has to be seen in the context that it had already decided to cease that aspect of its investigation.

(e) Consequences of a failure to carry out an effective investigation under domestic law

[170] If an ineffective investigation is carried out there will be consequences for all concerned. The family members can initiate judicial review proceedings seeking to compel the PSNI to carry out an Article 2 compliant investigation. They can also make a complaint to the PONI. The investigators if in breach of the Code of Ethics of the PSNI could be subject to disciplinary proceedings. The Chief Constable either personally or through his officers would have an obligation to ensure professional effective and efficient policing and to ensure professional integrity and are accountable to the Policing Board if they fail to do so.

(f) Time at which the question of the independence of an investigation should be challenged by judicial review

[171] As we have indicated the ECtHR in *Hackett* considered that in relation to certain of the criticisms made by the victim's widow it was appropriate to await the final outcome of the investigation. The approach adopted by the ECtHR in *Hackett* was the approach adopted in this jurisdiction in *Re Kelly's Application for Judicial Review* [2004] NIQB 72 by Kerr LCJ in relation to the independence of an investigation. In arriving at the decision in *Kelly* Kerr LCJ also took into account a number of decisions of the ECtHR.

[172] *Re Kelly's Application for Judicial Review* involved an application by Teresa Kelly for judicial review of the decision of the PSNI not to appoint an external police force to conduct a fresh investigation into the death of Patrick Kelly, the

applicant's husband, who was murdered in July 1974. The applicant claimed that the investigation should be conducted by a police force that is wholly independent of PSNI because, she said, there was security force collusion in the murder of her husband. The PSNI submitted that the new investigation team was sufficiently independent as it was headed by a senior police officer seconded from an English police force, Detective Superintendent Hunter. This senior officer was assisted by an inquiry team drawn from officers of the PSNI; none of these officers was in the service of the RUC, the former police force of Northern Ireland, at the time of Mr Kelly's murder; none of the officers engaged in the new inquiry served during the 1970s or 1980s in the area where Mr Kelly was murdered; and none had a close connection with the area. Kerr LCJ set out the shortcomings of the original investigation highlighted by the Applicant and then considered the impact of the judgment of the ECtHR in *Shanaghan v United Kingdom* (Application No. 37715/97) stating that what was "clear from later passages in the judgment that the (ECtHR) concentrated on the actual investigation and the manner in which it was in fact carried out, in order to determine whether there had been a breach of Article 2 - see, in particular, paragraphs 103 and 104 of the judgment." Kerr LCJ concluded that:

"It seems to me clear that such an examination would also be required in the present case before one could conclude that the actual investigation was not sufficiently independent. Until the investigation has been conducted and one has an opportunity to gauge whether the detective superintendent has demonstrated sufficient zeal in pursuing relevant lines of inquiry it is impossible to say that it will not be independent. It certainly has the capacity to be so if the investigation is conducted rigorously and fairly."

Kerr LCJ went on to state that a "similar fact based approach was adopted by ECtHR in the related cases of *McKerr v United Kingdom* (Application no. 28883/95) (paragraphs 127 and 128); *Jordan v United Kingdom* (Application no. 24746/94) (paragraph 120); and *Kelly and others v United Kingdom* (Application no. 30054/96) (paragraph 114). In each of these cases the court examined the actual investigation procedures and the connection between, on the one hand, the police officers or other members of the security forces who were under suspicion of being involved in the killing or of colluding with the killers and, on the other hand, those charged with the investigation. This was, of course, a *post hoc* examination of the investigations and in each case the court found that the procedural requirements of Article 2 were not satisfied. Ultimately, a decision on whether the inquiry that is currently taking place will satisfy the procedural requirements of Article 2 must depend on an evaluation of all the circumstances of the actual investigation, not least the outcome that it produces. At present, however, I am of the clear view that, as constituted, the investigation has the *capacity* to fulfil those procedural requirements. Whether it does so must await its completion."

[173] We respectfully agree with the approach in *Kelly* of awaiting the outcome of the investigation provided it has the *capacity* to fulfil the procedural requirement of independence. However, we emphasise that the “*capacity*” of an investigation has to take into account not only the presently envisaged arrangements but also any new arrangements that could or might be put in place as the investigation proceeds. An investigatory process is not a static process and an investigator’s awareness of emerging issues may lead to the adoption of a further arrangement out of the many possible arrangements available to secure the practical independence of the investigation. The approach in *Kelly* allows an assessment of the practical independence of the investigation informed by the outcome and an ability to assess the degree of rigour and fairness in the investigation. All factors which could point either towards or against practical independence.

[174] We not only consider that this is the approach adopted in both *Kelly* and by the ECtHR but it is also an approach which avoids the dangers of satellite litigation. This court has highlighted those dangers in relation to inquests in *McLuckie’s Application* [2011] NICA 34 at paragraph 26 and in *Re C & Ors* [2012] NICA 47. The issue of satellite litigation was also considered in *McCaughey’s (Brigid) Application* [2012] NIQB 20, *O’Connor & Broderick’s Application* [2005] NIQB 40, *Howard’s Application* [2011] NIQB 125, *Brigid Hughes’ Application* [2018] NIQB 30 at paragraphs 25-26 and *McDonnell’s (Elizabeth) Application* [2015] NICA 72 at paragraph 15. As a general proposition we consider that the disadvantages of satellite litigation in the area of inquests can be read across to the area of police investigations so that in the area of challenges to the practical independence of a police investigation there should be a strong presumption against a judicial review application before the conclusion of the investigation. We accept that there can be exceptions to this general rule for instance, in circumstances where there is a compelling case that the arrangements that are presently envisaged and any sensible alteration to them as the investigation proceeds, will obviously lead to a requirement for a fresh investigation. We consider that absent some exceptional circumstance of that nature leave should not be granted to issue judicial review proceedings in relation to the arrangements for the practical independence of a police investigation until the conclusion of that investigation.

[175] We also indicate that this does not mean that details touching on the practical independence of an envisaged investigation should not be given by the Chief Constable to the victim or to the victim’s family. The Belfast Agreement contained a statement of belief on the part of the participants of amongst other matters that the Police Service should be “fair and impartial” and “accountable, both under the law for his actions and to the community that it serves.” Accountability includes the explanatory and co-operative sense of communicating in order to maintain trust. Those beliefs and the explanatory aspect of accountability require that the Chief Constable when requested to do so informs the victim, or as here the family of the victim, as to the practical arrangements to secure the independence of an Article 2 (or Article 3) police investigation in order to demonstrate that it has the capacity to fulfil the procedural requirement of independence. The prompt provision of such

information is not only an aspect of the new era of policing but also is a requirement to enable the victim or the victim's family to determine whether the practical arrangements are so fundamentally and obviously flawed that there is a compelling case that if the investigation was left to conclude that there would be a requirement for a fresh investigation. We consider that as much detail as possible should be given consistent with the investigatory process itself and also for instance in an appropriate case not compromising the Article 2 rights of the investigators.

(g) Summary of our conclusions as to the legal principles in relation to independence

[176] We summarise the applicable legal principles in relation to determining prior to the conclusion of an investigation, whether the investigatory arrangements are "independent from those implicated in the events" as follows:

- (a) The requirement is of a lack of hierarchical or institutional connection together with practical independence.
- (b) There is no requirement of a complete hierarchical or institutional disconnection as there are ways in which a state can inject independence into the structure of hierarchies or institutions.
- (c) The decision of the ECtHR in *Brecknell* and the decision of the Committee of Ministers in the *McKerr* Group of Cases has to be taken into account under Section 2(1) HRA 1998 and in doing so a factual analysis should be undertaken as to what, if anything, has changed since the date of the decision in relation to institutional connection between the PSNI and the RUC and if there has been any change the significance of that change in relation to the overall conclusion. A similar factual analysis should be undertaken in relation to the decisions of the Committee of Ministers, which decisions in the *McKerr* Group of cases did not raise any institutional connection between the PSNI and the RUC and which closed the investigation in relation to the practical independence of the investigators.
- (d) A decision in relation to the independence of the investigators made prior to the conclusion of the investigation should be restricted to a decision as to whether the investigation has the capacity to fulfil the procedural requirement of independence. Capacity should be widely interpreted to include not only the presently envisaged arrangements but also any new arrangements that could or might be put in place as the investigation proceeds.
- (e) The Chief Constable has an obligation to inform the families (Article 2) or the victim (Article 3) as to the practical arrangements to secure independence of an Article 2 or Article 3 police investigation in order

to demonstrate that it has the capacity to fulfil the procedural requirement of independence.

- (f) In the area of challenges to the practical independence of a police investigation there should be a strong presumption against a judicial review application before the conclusion of the investigation though there can be exceptions for instance in circumstances where there is a compelling case that the arrangements that are presently envisaged and any sensible alteration to them as the investigation proceeds will obviously lead to a requirement for a fresh investigation.
- (g) The Strasbourg test of a lack of hierarchical or institutional connection and practical independence has sufficient similarities to the *Porter v Magill* test to allow that test to be used as an aid to the Strasbourg test provided that it is clearly identified which aspect of the Strasbourg test is being considered as different factual issues will arise in relation to hierarchical or institutional connection and in relation to practical independence.

Part Seven: Police reforms since 10 April 1998 and oversight of the PSNI

[177] In order to consider the question as to whether there is a hierarchical or institutional connection between the PSNI and either the RUC or the security forces it is necessary to consider not only whether there is a complete hierarchical or institutional disconnection but also to consider the ways in which the state has injected independence into the PSNI so as to make it institutionally distinct from the RUC. That involves a consideration of the substantial reforms of policing in Northern Ireland since the Belfast Agreement dated 10 April 1998 which includes oversight by a number of bodies. We set out a brief chronology of key events together with the impact of those reforms and the nature of the oversight.

[178] The Belfast Agreement dated 10 April 1998 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland followed intense negotiations involving the political parties in Northern Ireland and both of those Governments. Part 8 of the Agreement contained an important statement of belief on the part of the participants and one which must underpin the approach to legacy investigations:-

“The participants believe it essential that policing structures and arrangements are such that the police service is *professional, effective and efficient, fair and impartial, free from partisan political control; accountable, both under the law for its actions and to the community it serves; representative of the society it polices, and operates within a coherent and co-operative criminal justice system, which conforms with human rights norms.* The participants also believe that those structures and arrangements must be capable of maintaining law and order including responding effectively to crime and to any terrorist threat and to public order problems. A police service which cannot do so will fail to win public confidence and acceptance. They believe that any such structures and arrangements should be capable of delivering a policing service, in constructive and inclusive partnerships with the community at all levels, and with the maximum delegation of authority and responsibility, consistent with the foregoing principles. *These arrangements should be based on principles of protection of human rights and professional integrity and should be unambiguously accepted and actively supported by the entire community*” (emphasis added).

Those beliefs were to be given practical effect in that the Agreement provided for the establishment of an independent Commission to examine and make recommendations for reform of the police in Northern Ireland. The parties to the Agreement expressly recognised the need for reform and a police force which attracted public support and confidence. The Belfast Agreement stated that:

“...they believe that the agreement provides the opportunity for a new beginning to policing in Northern Ireland with a police service capable of attracting and sustaining support from the community as a whole ...”

The Commission was to advise upon new structures for policing. The Agreement states that:

“...the participants also believe that those structures and arrangements must be capable of maintaining law and order including responding effectively to crime and to any terrorist threat and to public order problems. A police service which cannot do so will fail to win public confidence and acceptance...”

It can be seen that the need for institutional reforms in order to ensure public confidence in policing was recognised in the Belfast Agreement, which agreement attracted not only the support of both governments but also the support of the overwhelming majority of people in Northern Ireland. It is a fundamental agreement central to the political settlement in Northern Ireland.

[179] In July 1998 the United Kingdom parliament passed the Police (NI) Act 1998 which in Part VII provided for the establishment of the independent office of the Police Ombudsman for Northern Ireland (“PONI”). That office was established to investigate both complaints and allegations of criminal wrongdoing against police officers. These provisions were commenced on 6 November 2000.

[180] The Commission provided for in the Belfast Agreement was set up under the chairmanship of former Hong Kong Governor, Chris Patten to look at all areas of policing and to make recommendations for change. In September 1999 the report of the Patten Commission was published under the title “A New Beginning - Policing in Northern Ireland.”

[181] The Patten Report made wide ranging recommendations for reform to achieve the objectives set out in the Belfast Agreement. At paragraph 4.6 there was a recommendation in relation to the underlying philosophy of policing. The recommendation was of:

“a comprehensive programme of action to focus policing in Northern Ireland on a human rights-based approach. We make a number of specific recommendations below, but the achievement of such an approach goes beyond a series of specific actions. It is more a matter of the philosophy of policing, and should inspire everything that a police service does. It should be seen as the core of this report” (emphasis added).

In that section the Report recommended a new oath, a new code of ethics, training (updated as required) in the fundamental principles and standards of human rights, that the practical implications for policing, awareness of human rights issues and respect for human rights in the performance of duty should be an important element in the appraisal of individuals in the police service and that the performance of the police service as a whole in respect of human rights, as in other respects, should be monitored closely by the Policing Board.

[182] Accountability of the police was addressed in paragraphs 5.2 and 5.3 of the Report in the following terms:

“5.2 In a democracy, policing, in order to be effective, must be based on consent across the community. The community recognizes the legitimacy of the policing task, confers authority on police personnel in carrying out their role in policing and actively supports them. Consent is not unconditional, but depends on proper accountability, and the police should be accountable in two senses – the “subordinate or obedient” sense and the “explanatory and cooperative” sense.

5.3 In the subordinate sense, police are employed by the community to provide a service and the community should have the means to ensure that it gets the service it needs and that its money is spent wisely. Police are also subordinate to the law, just as other citizens are subordinate to the law, and there should be robust arrangements to ensure that this is so, and seen to be so. In the explanatory and cooperative sense, public and police must communicate with each other and work in partnership, both to maintain trust between them and to ensure effective policing, because policing is not a task for the police alone” (emphasis added).

[183] As one element of accountability the Report recommended an entirely new Policing Board be created to replace the Police Authority with the statutory primary function being to hold the Chief Constable and the police service publicly to account.

It was recommended “that the Board should have 19 members, 10 of whom should be Assembly members drawn from the parties that comprise the new Northern Ireland Executive, selected on the d’Hondt system, who should not at the same time hold ministerial office in the Executive.” In this way a majority elected membership would be achieved which was seen as essential to building on the consensual constitutional arrangements of the Belfast Agreement, and breaking with the existing identification of the Police Authority with the Secretary of State (and therefore with the disputed state itself). It was recommended that the remaining 9 independent members be selected from a range of different fields – including business, trade unions, voluntary organizations, community groups and the legal profession – with the aim of finding a group of individuals representative of the community as a whole, with the expertise both to set policing priorities and to probe and scrutinize different areas of police performance, from management of resources to the safeguarding of human rights. The Report stated that the Board should be empowered and equipped to scrutinise the performance of the police effectively. The recommendations as to the powers of the Board included that it:

“should have responsibility for appointing all chief officers and civilian equivalents and for determining the length of their contracts. All appointments should be subject to approval by the Secretary of State (and successor after devolution) and the Chief Constable should be consulted in relation to the appointment of subordinate chief officers and civilian equivalents. The Board should have the power to call upon the Chief Constable to retire in the interests of efficiency and effectiveness subject to the approval of the Secretary of State (and successor) and to the right to make representations as at present. Similarly, the Board should have the same power in relation to other chief officers and civilian equivalents exercisable subject to the approval of the Secretary of State (and successor) and to the same right to make representations and after consultation with the Chief Constable. The Secretary of State should have power to require the Policing Board to call upon the Chief Constable to retire on the same grounds but this power should be exercisable only after consultation with the Board and subject to the same right to make representations already referred to. Additionally, after devolution the relevant Northern Ireland minister should have power to call for the retirement of the Chief Constable on the same grounds but this should be subject to the agreement of the Policing Board and the approval of the Secretary of State with an equivalent right to make representations. The Board should be the disciplinary authority for chief officers and civilian equivalents.”

The Board was seen in the Report to be an institution of central importance, setting the objectives for policing, monitoring police performance, initiating inquiries as necessary and exercising real authority over the police service. Amongst other matters it was recommended that the Board should be responsible for adopting an Annual Policing Plan, developed by the Chief Constable, through a process of discussion with the Board, on the basis of objectives and priorities set by the Board, and within the agreed 3 to 5 year strategy.

[184] The Report considered the question of operational independence of the Chief Constable stating that however “it may be defined, it is not acceptable that scrutiny of the police should be impeded by the assertion, valid or otherwise, that the current legislation empowering such scrutiny is limited to matters outside the scope of operational independence.” The Report went on to state that “long consideration has led us to the view that the term “operational independence” is itself a large part of the problem. In a democratic society, all public officials must be fully accountable to the institutions of that society for the due performance of their functions, and a chief of police cannot be an exception. No public official, including a chief of police, can be said to be “independent”. Indeed, given the extraordinary powers conferred on the police, it is essential that their exercise is subject to the closest and most effective scrutiny possible. The arguments involved in support of “operational independence” – that it minimises the risk of political influence and that it properly imposes on the Chief Constable the burden of taking decisions on matters about which only he or she has all the facts and expertise needed – are powerful arguments, but they support a case not for “independence” but for “responsibility”. We strongly prefer the term “operational responsibility” to the term “operational independence.”” The report recommended that the Board should have the power to require the Chief Constable to report on any issue pertaining to the performance of his functions or those of the police service. The obligation to report should extend to explaining operational decisions.

[185] A further central recommendation of the Report (which was accepted by the government and Parliament) was to retain the existing force, but to introduce wholesale institutional reform of the structures and mechanisms for accountability. The recommendations encompassed a change of name, new 50/50 recruitment policies, financial independence for the Chief Constable, and retirement provisions for serving officers. It not only recommended the creation of the Policing Board, but also oversight arrangements involving the Secretary of State and outside bodies such as Her Majesty’s Inspectorate of Constabularies (“HMIC”).

[186] On 19 January 2000 the Secretary of State Peter Mandelson responded on behalf of the government to the Patten Report making a statement to Parliament with a commitment to implementation of its recommendations.

[187] In 2000 the Secretary of State published the first implementation plan setting out the government response to each of the recommendations in the report and how

they will be implemented. It was stated that the implementation plan was about creating a new beginning to policing in Northern Ireland setting out a comprehensive and long-term programme of action, to deliver far-reaching and permanent change in policing structures and arrangements. The key changes outlined in the plan included:

- (a) A comprehensive programme of action to focus policing in Northern Ireland on a human rights based approach;
- (b) The creation of new police accountability institutions - including a new Policing Board, District Policing Partnerships, the enhancement of the office of Police Ombudsman and new oversight arrangements for covert law enforcement;
- (c) Special measures to change the composition of the police service and make it more representative of the community it serves;
- (d) The appointment of a new police recruitment agency and lay involvement in the police recruitment process;
- (e) A new Training, Education and Development Strategy for the police service, covering both recruits and serving officers, and a new purpose-built Police College;
- (f) A new name and badge for the police service;
- (g) Arrangements for closer co-operation between the police in Northern Ireland and other police services across the British Isles - including An Garda Síochána in the Republic of Ireland.

[188] In November 2000 parliament passed the Police (NI) Act 2000 which implemented many of the major reforms recommended by the Patten report. This did not include the dissolution of the RUC but rather retention of it subject to new oversight arrangements and a new name. Section 1(1) of the Act provides:

“The body of constables known as the Royal Ulster Constabulary shall continue in being as the Police Service of Northern Ireland (incorporating the Royal Ulster Constabulary).”

As a result of this legislation the PSNI underwent major personnel changes, which included a significant early retirement package for many eligible officers and new gender based recruitment objectives, including statutory requirements for 50/50 recruiting among the catholic and protestant communities. The PSNI also has statutory obligations to prepare action plans relating to the recruitment of female officers. Section 32 Police (NI) Act 2000 imposes specific statutory duties upon

officers in the exercise of their functions, including an obligation to take measures to bring offenders to justice (Section 32(1)(d)). Section 31A Police (NI) Act 2000, requires that a core principle of policing in Northern Ireland must be that officers exercise their functions with the aims “..... (a) of securing the support of the local community, and (b) of acting in co-operation with the local community.” The new policing structures have the support of all democratic political parties in Northern Ireland. The former Special Branch was dissolved. Primary responsibility for national security functions in Northern Ireland has now passed to the Security Service. The reforms were set in train by the Belfast Agreement between the two governments; they were informed by the Patten Report and were democratically endorsed.

[189] On 4 November 2001 a new Northern Ireland Policing Board was established, comprising both political representatives and independent members. As recommended in the Patten Report the Board has a statutory function of monitoring performance and holding the Chief Constable to account for the discharge of his functions. It also has powers to require the provision of information and to conduct inquiries. It takes its powers from the Police (Northern Ireland) Act 2000 as amended by the Police (Northern Ireland) Act 2003.

[190] In August 2001 the Secretary of State published an update to the implementation plan.

[191] On 12 April 2010 the Department of Justice a government department in the Northern Ireland Executive was established and policing and justice matters were devolved to the Northern Ireland Assembly. The Department of Justice (formerly the Secretary of State) has powers which include setting long terms objectives for the police, determining the annual police grant and inviting HMIC to investigate and report on the performance of the police on any particular part of its operations. So one of the accountability mechanisms for the PSNI is the combined role of the Justice Minister and the HMIC to examine and report on any aspect of the PSNI’s conduct or practices. Another accountability mechanism for the police is that the Minister of Justice is accountable to the Northern Ireland Assembly.

[192] These reforms were the factual background to the decision of the ECtHR in *Brecknell* that there was a lack of institutional connection between the PSNI and the RUC. As we have indicated the decision in *Brecknell* is to be taken into account and is authoritative.

Part Eight: Whether PSNI and/or LIB independent

[193] As we have indicated any finding in relation to lack of Article 2 independence should be a finding specifically directed to the categories of hierarchical or institutional connection or practical independence.

[194] We consider that there is not a complete institutional disconnection between the PSNI and the RUC as under Section 1(I) of the Police (Northern Ireland) Act 2000 the body of constables known as the RUC continues in being as the PSNI. However, there have been such wide-ranging reforms injecting independence into the PSNI that the ECtHR concluded in *Brecknell* that it was institutionally distinct from the RUC. If Maguire J had decided that there was an institutional connection between the PSNI and the RUC (and for reasons which we will explain we do not consider that he so decided) then this court in considering an appeal from such a decision must take into account the decision of the ECtHR in *Brecknell* based on all the reforms that we have set out. It would then be incumbent on this court to consider what if anything has changed in relation to the institutional connection between the PSNI and the RUC since the decision in *Brecknell*. In view of what we discern to be the limited nature of Maguire J's decision it is not necessary for this court to do this.

[195] There is no hierarchical or institutional connection between the PSNI and the military or security forces. However, this is not to underestimate the obligation to achieve practical independence between the PSNI and the military or security forces, though this can be achieved by suitable arrangements.

[196] There is a hierarchical connection between the Chief Constable and the PSNI and as we have indicated on some limited occasions it is necessary to achieve practical independence not only from the RUC and the military but also from the PSNI. There are methods such as the "White Team" for achieving such practical independence but this leaves a potential hierarchical connection in that the Chief Constable would still be responsible for the investigation. However, again there are methods of achieving sufficient hierarchical disconnection particularly given the oversight of the Chief Constable by the Policing Board. Moreover the decision of the Committee of Ministers did not raise any concerns about a hierarchical connection based on the role of the Chief Constable.

[197] Maguire J's conclusion at paragraph [105] was that "the LIB at this time lacks the necessary element of independence to enable it to pursue the issue of further investigations into the death of the deceased." In that paragraph the judge did not define whether this was due to an institutional connection between the PSNI and the RUC or between the PSNI and the LIB or between the PSNI and the MOD. Also the judge did not define whether the lack of the necessary element of independence was a lack of practical independence. We note that at paragraph [123] the judge states that "the PSNI would not be perceived as passing the test for independence for this purpose." It might be suggested that this was a finding of an institutional

connection. However, we do not consider that this was the conclusion of the judge. The conclusion at paragraph [105] refers specifically to the LIB and it does so in a time limited way. The fact that the independence of the LIB could change over time means that the judge considered that further practical arrangements could be put in place to secure the practical independence of an LIB investigation. Furthermore, the declaration granted by Maguire J on 3 March 2017 was to the effect that “the proposed investigation by the LIB” conflicted with “the requirements of Article 2 ECHR as the LIB (lacked) the requisite independence required to perform an Article 2 (compliant) investigation in respect of this (death).” We consider that the judge’s conclusion was based at this time on a lack of practical independence of the LIB informed by past investigatory failures including that conducted by the HET in 2006-2008 which gave rise “to a real possibility of bias” when taken in conjunction with the lack of proper arrangements for the provision of intelligence information to the investigator and the vetting of relevant staff to a sufficiently high standard.

[198] Maguire J held that it would be “inconceivable that a fair-minded and informed observer would not have regard to the past history of the case in assessing the possibilities today.” We agree that past investigatory failures should be taken into account in deciding the separate questions as to whether there is a lack of hierarchical or institutional connection and whether there is practical independence. The judge’s findings as to the past investigatory failures were impeccable. It would have been obvious in 1972 that members of the army were on the Glen Road at the time of the deceased’s death and their activity should have been but was not investigated by the RUC. The open source material available to the HET investigators in 2006-2008 should have led to an investigation of potential MOD involvement in the death of the deceased. It did not do so.

[199] Maguire J concluded that there was a real possibility of bias in both the RUC investigation and the HET investigation. That real possibility of bias requires clear practical arrangements being put in place so as to secure the capacity of the investigation to be independent. It is a feature of this case that the Chief Constable has not set out the practical arrangements which he proposes to put in place to carry out any further review or if credible evidence exists any further investigation. This is an obvious case calling for arrangements such as those in *Hackett* or *Kelly* so that a senior police officer from another police force would be responsible for the investigation reporting to the Chief Constable who is accountable to the Policing Board. Absent any statement by or on behalf of the Chief Constable as to what arrangements will be put in place the only conclusion available is that the further review or investigation by the LIB has not been demonstrated to have the *capacity* to satisfy the Article 2 requirement of practical independence.

[200] As we have indicated any finding of a lack of independence should be directed to the categories of hierarchical, institutional or practical independence. We have also indicated that prior to the conclusion of an investigation any finding should address only the *capacity* for the investigation to be Article 2 compliant. Maguire J concluded that at this time the LIB lacks the necessary element of

independence. That is a conclusion with which we agree subject to the qualification that at this time the Chief Constable has not demonstrated *practical independence* on the part of LIB so that it has the *capacity* to carry out an investigation into the death of the deceased.

[201] A failure by the Chief Constable to inform as to the arrangements for an investigation has another impact in this appeal. A ground of appeal by the Chief Constable is that Maguire J did not focus on amongst other matters the practical arrangements within the PSNI for this investigation. However, the Chief Constable has not condescended to particularise the arrangements within the LIB for this investigation. So he has not permitted the focus to be on those arrangements.

[202] We do not leave the discussion of this aspect of these appeals without drawing one matter to the attention of the Chief Constable. Maguire J held at paragraph [121] that in this case the HET “now would be viewed as having carried out its role in a manner which was marred by a real possibility of bias.” The Patten report identified proper accountability of the police in two senses one of which was the explanatory and co-operative sense, meaning that the public and the police must communicate with each other. Section 31A of the Police (NI) Act 2000 enshrines the core principle of securing the support of the local community and of acting in co-operation with the local community. On this appeal there was not nor could there be any sensible challenge to Maguire J’s finding of “a real possibility of bias.” We should not have to make it expressly clear but we do that this was a most serious finding by Maguire J. As far as we are aware the Chief Constable or those PSNI officers acting on his behalf have not proffered any expression of regret to the applicant or to her family and again so far as we are aware the Chief Constable has not directed or carried any investigation into the failures of the 2006-2008 HET process and as to whether the reasons for the failure were or were not benign. We consider that the lack of an investigation and the lack of any dialogue with the applicant would be a failure of accountability in the explanatory and co-operative sense and would not be in accordance with the core principles in Section 31A.

Part Nine: Other grounds of appeal

(a) Procedural legitimate expectation

[203] The statement by Mr McGleenan in court on 6 December 2017 was made in the context that the Chief Constable wished to withdraw the concessions with the aim of achieving the objective that there could be no adjudication by a court as to whether the further investigatory measures were conducted independently. It would be surprising if in seeking to achieve that objective Mr McGleenan gave a clear and unambiguous promise that the Chief Constable was committed to adjudication by a court as to the independence of the future investigatory measures by virtue of the doctrine of legitimate expectation. Rather we consider that properly construed in its context Mr McGleenan was stating that the Chief Constable “believed” that the further investigatory measures would comply with Article 2 standards but without any capacity for a court to adjudicate on that issue. The statement was of an intention that the Chief Constable would carry out investigatory measures to what he believed were Article 2 compliant standards. It was not a statement that if the investigatory measures were found not to be Article 2 compliant that the Chief Constable intended to undertake further investigatory measures. Mr McGleenan was doing no more than saying that the Chief Constable was going to structure the further investigatory measures in accordance with the Chief Constable’s subjective view of what was required.

(b) Common law

[204] The applicant submitted that in addition to the obligation to conduct an independent investigation under Article 2 ECHR the respondents are also under a parallel obligation under the common law to ensure such an investigation. In *McKerr* the appellant argued that there was a separate overriding common law right corresponding to the procedural right implicit in Article 2 of the Convention. Lord Nicholls stated that the effect of counsel's submission, if accepted, would be that the court would create an overriding common law obligation on the state, corresponding to article 2 of the Convention, in an area of the law for which Parliament has long legislated. The courts had always been slow to develop the common law by entering or re-entering a field regulated by legislation. He concluded that that was not an appropriate role for the common law and noted in particular that Parliament had decided in the 1998 Act not to give the legislation retroactive effect. That view was supported by Lord Hoffmann, Lord Rodger and Lord Brown.

[205] The Supreme Court considered the issue in *Keyu*. At paragraph [117] Lord Neuberger and Lord Hughes considered that it would be quite inappropriate for the courts to take on to themselves through the guise of developing the common law a further duty to hold an enquiry where Parliament had expressly provided for investigations into deaths. That included the relevant Coroners legislation, the

Inquiries Act 2005 and the incorporation of Article 2 in the 1998 Act. That view was supported at paragraph [151] by Lord Mance.

[206] Lord Kerr at paragraph [270] postulated the possibility that a duty to investigate might arise by virtue of customary international law which would find expression in the common law while Baroness Hale considered it unnecessary to address the issue in that case.

[207] We consider that the weight of judicial opinion at present firmly points towards the proposition that it is inappropriate for the courts to develop a duty at common law in this area having regard to the extensive legislative provisions dealing with investigations and inquiries into deaths. We do not consider that the observations of Treacy J in *Barnard's Application* [2017] NIQB 82 finding it surprising that no such obligation had become established can overcome the majority views of both the House of Lords and the Supreme Court as expressed above.

Part Ten: Overall conclusions

[208] The military logs constituted new evidence coming to light within the principles set out in *Brecknell* and Article 2 ECHR applies to the further investigation. We allow the Applicant's appeal against that part of Maguire J's second judgment.

[209] The further investigative measures are subject to the Article 2 procedural obligation so that those responsible for carrying them out are required to be independent from those implicated in the events.

[210] As the Article 2 procedural obligation has been revived there is an obligation on the Chief Constable to proceed promptly. That obligation of promptness includes the obligation to put in place suitable arrangements for practical independence and those arrangements should be transparent.

[211] We consider that Maguire J was not precluded from utilising the *Porter v Magill* test when considering the independence of LIB though it should be directed to a consideration of the hierarchical, institutional or practical independence of the institution concerned and also at this stage when the outcome of the investigation is awaited, it should also focus on whether the investigators have the *capacity* to be practically independent not whether they are in fact practically independent.

[212] Maguire J did not decide that the PSNI or the LIB was hierarchically or institutionally connected to the RUC or to the military.

[213] Maguire J concluded that there was a lack of practical independence on the part of the LIB. In relation to the Chief Constable's and the Department's appeal from that part of Maguire J's first judgment rather than finding that there was a lack of practical independence on the part of the LIB we conclude that at this time the Chief Constable has not demonstrated *practical independence* on the part of LIB so that it has the *capacity* to carry out an investigation into the death of the deceased.

[214] We dismiss the applicant's appeal from those parts of Maguire J's second judgment which held that the PSNI were not bound by any form of procedural legitimate expectation, that there was no parallel obligation to Article 2 existing at common law so that there is no breach of the common law and that the Chief Constable had not acted irrationally or unreasonably in the exercise of discretion concerning the future conduct of any investigation into the death.

[215] We grant declarations that (a) the Chief Constable is obliged to conduct the further investigations into the death of Mrs Jean Smyth in a way which satisfies the State's procedural obligation under Article 2 ECHR and (b) the Chief Constable is bound to promptly take steps to secure the practical independence of the investigators so that they have the capacity to carry out an Article 2 compliant effective investigation into the death of Mrs Jean Smyth.