Neutral Citation Number: [2018] EWHC 56 (Admin)

Case No: CO/4092/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(sitting in Birmingham)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26.1.2018

Before:

THE RT HON LORD JUSTICE SIMON
and
THE HON MRS JUSTICE CARR

- -

Between:

THE QUEEN (on the application of JULIE HAMBLETON & OTHERS)	**Claimants**
- and -	
CORONER FOR THE BIRMINGHAM INQUESTS (1974)	**Defendant**
-and-	
(1) MICHAEL REILLY on behalf of DESMOND AND EUGENE REILLY	
(2) WEST MIDLANDS POLICE	
(3) BRIAN DAVIS on behalf of JANE DAVIS	
	Interested Parties

- -

Adam Straw (instructed by **KRW Law LLP**) for the **Claimants**
Peter Skelton QC and **Matthew Hill** (instructed by **Fieldfisher LLP**) for the **Defendant**

Hearing dates: 6 and 7 December 2017

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Approved Judgment

Lord Justice Simon:

Introduction

1. This is the judgment of the Court.

2. At around 8.20pm on 21 November 1974 two explosions took place in two public houses in Birmingham City Centre, the 'Mulberry Bush' and the 'Tavern in the Town' ('the Birmingham bombings'). 21 people were killed and some 220 injured, many of them seriously. A third bomb placed at a Barclays Bank branch on Hagley Road, Birmingham, was defused on the same evening. It was the worst peacetime atrocity in British history to that date. The Provisional IRA ('PIRA') is generally regarded as having been responsible for it.

3. This judicial review claim arises out of the inquests into the deaths from the Birmingham bombings, formally entitled the Birmingham Inquests (1974) ('the Inquests'). Each of the 10 Claimants is a relative of a person who died in the Birmingham bombings.

4. The Inquests were opened in late 1974 but were adjourned in 1975, pursuant to s.20 of the Coroners (Amendment) Act 1926, pending criminal proceedings in relation to the Birmingham bombings against Patrick Joseph Hill, Robert Gerald Hunter, Noel Richard McIlkenny, John Walker, Hugh Callaghan and William Power ('the Birmingham Six') among others. These criminal proceedings finally concluded in 1991 when the Birmingham Six were released after a successful appeal against conviction on 21 counts of murder. It was the third such appeal.

5. On the application of the families of some of the deceased, and after a number of hearings, the Senior Coroner in Birmingham ruled on 1 June 2016 that the Inquests should be resumed, under paragraph 8 of Schedule 1 of the Coroners and Justice Act 2009 ('the 2009 Act'). Sir Peter Thornton QC ('the Coroner') was appointed by the Lord Chief Justice as the coroner to conduct the Inquests. In early pre-inquest review hearings, he ruled that the Inquests would comply with the procedural requirements of Article 2 of the European Convention on Human Rights and Fundamental Freedoms and would be held with a jury.

6. Submissions as to the scope of the Inquests were made between 23 February and 29 June 2017. On 3 July 2017 the Coroner ruled, amongst other things, that investigation into the identity of the suspected perpetrators ('the Perpetrator Issue') would not be dealt with as part of the inquiry.

7. The Claimants challenge that decision, permission to do so having been granted by O'Farrell J on 16 October 2017. The matter has been heard on an expedited basis.

Relevant legislation

8. Before turning to the grounds of challenge, it is convenient to set out the relevant legislation.

9. Section 1 of the 2009 Act imposes a duty on coroners.

> 1. Duty to investigate certain deaths -

> (1) A senior coroner who is made aware that the body of a deceased person is within that coroner's area must as soon as is practicable conduct an investigation into the person's death if subsection (2) applies.
>
> (2) This subsection applies if the coroner has reason to suspect that -
>
> (a) the deceased died a violent or unnatural death;
>
> (b) the cause of death is unknown; or
>
> (c) the deceased died while in custody or otherwise in state detention.

10. Section 5 of the 2009 Act provides, under the heading 'Purpose of Investigation':

> 5. Matters to be ascertained
>
> (1) The purpose of an investigation under this Part into a person's death is to ascertain -
>
> (a) who the deceased was;
>
> (b) how, when and where the deceased came by his or her death;
>
> (c) the particulars (if any) required by the 1953 Act to be registered concerning the death.
>
> (2) Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998 … the purpose mentioned in subsection (1)(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.
>
> (3) Neither the senior coroner conducting an investigation under this Part into a person's death nor the jury (if there is one) may express any opinion on any matter other than -
>
> (a) the questions mentioned in subsection (1)(a) and (b) (read with subsection (2) where applicable);
>
> (b) the particulars mentioned in subsection (1)(c).

11. Section 10 of the 2009 Act provides under the heading 'Outcome of investigation':

> 10. Determinations and findings to be made -
>
> (1) After hearing the evidence at an inquest into a death, the senior coroner (if there is no jury) or the jury (if there is one) must -

> (a) make a determination as to the questions mentioned in section 5(1)(a) and (b) (read with section 5(2) where applicable), and
>
> (b) if particulars are required by the 1953 Act to be registered concerning the death, make a finding as to those particulars.
>
> (2) A determination under subsection (1)(a) may not be framed in such a way as to appear to determine any question of -
>
> (a) criminal liability of the part of a named person, or
>
> (b) civil liability.

12. Section 11 of the 2009 Act identifies that Schedule 1 makes provision for the suspension and resumption of investigations where criminal charges may be brought or a public inquiry is pending.

13. Paragraph 8(5) of Schedule 1 to the 2009 Act provides:

> (5) In the case of an investigation resumed under this paragraph, a determination under section 10(1)(a) may not be inconsistent with the outcome of:
>
> (a) the proceedings in respect of the charge (or each charge) by reason of which the investigation was suspended;
>
> (b) any proceedings that, by reason of subparagraph (2), had to be concluded before the investigation could be resumed.

14. Section 6(1) of the Human Rights Act 1988 provides that it is unlawful for a public authority to act in a way which is incompatible with a right conferred by the European Convention on Human Rights ('the ECHR'). Article 2 of the ECHR provides materially:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The Coroner's Ruling on Scope

15. The Coroner gave a detailed written ruling. He emphasised at the outset that the question of scope would be a matter to be kept under review and could be revisited where appropriate later. He recognised the understandable desire of the families of the deceased, whose loved ones were the victims of mass killings for which no one had been brought to justice, for the Inquests to cover as much ground as possible. Nevertheless, the Inquests had to comply with the law, focus on the 4 statutory questions (under ss.5 and 10 of the 2009 Act) and be realistic about the availability of evidence 43 years after the event. The Inquests might not, but could not realistically,

achieve all that the families sought. It was not in the public interest for the Inquests to pursue unachievable, or indeed unlawful, objectives.

16. Having set out the procedural background and the law, the Coroner identified the four issues on scope before him:

    (1) Forewarning: whether West Midlands Police ('WMP') or other state agency had prior knowledge that a bomb attack would take place in Birmingham on or around 21 November 1974, and whether further steps could or should have been taken to prevent the bombings;

    (2) Agent/Informant: whether WMP or any other state agency were engaged in concealing the actions of agents or informants who were responsible for the bombings, or whether there was other state involvement or collusion to enable the Birmingham Bombings to take place;

    (3) Emergency Response: the response of the emergency services to the bombings, its adequacy or otherwise, and whether any failings caused or contributed to the deaths that resulted from the bombings;

    (4) The Perpetrator Issue: the identities of those who planned, planted, procured and authorised the bombs used on 21 November 1974.

17. The Coroner accepted that the Forewarning issue was within scope of the Inquests. He made no ruling on the Agent/Informant issue, since further inquiries on the issue were necessary. He ruled that, for the present, an over-arching investigation into the emergency response fell outside scope of the Inquests.

18. He then ruled that the Perpetrator Issue was outside scope, expressing himself at §86:

> In considering the exercise of my discretion on the question of scope I have therefore taken into account both the distinction between the roles of inquests and criminal proceedings and the statutory prohibitions in section 10(2) and paragraph 8(5) of Schedule 1. I have also looked at the particular circumstances of the instant case. Having done so, I conclude that the perpetrator issue should not be within scope in this case.

19. The reasons that led to and justified this conclusion were set out in parts of the ruling which preceded and followed this passage. It is only necessary for present purposes to summarise them:

    (1) Although a jury may conclude that the deceased was unlawfully killed it may not say by whom. The identity of the perpetrator is a matter for the police and the prosecuting authority (§76).

    (2) The verdict of the jury may not be inconsistent with the outcome of the proceedings in respect of which the Inquests were suspended, see paragraph 8(5) Schedule 1 to the 2009 Act. It followed that the Inquest verdicts could not be inconsistent with the acquittals of the Birmingham Six (§§84-85).

(3) To permit the perpetrators to be within the scope would be seen to be taking on the role of 'a proxy criminal trial', which, if it identified the perpetrators, would contravene the prohibition in s.10(2)(a) and, in the case of the Birmingham Six, the additional prohibition in paragraph 8(5) of Schedule 1 (§§87-8). It would also offend against the statement of principle set out in the judgment of Sir Thomas Bingham MR in *R v. HM Coroner for North Humberside and Scunthorpe, Ex p. Jamieson* [1995] QB 1 at 24(5):

> … the verdict may not appear to determine any question of criminal liability on the part of a named person.

(4) It would not be fair or logical for named individuals, whether the Birmingham Six or others, to be paraded through the evidence in the hope that they might be identified as perpetrators (§88).

(5) There would be practical difficulties: the sheer size and complexity of any investigation into the criminal responsibility of individuals 43 years after the event, in circumstances where years of police investigations, enquiries and reviews had yielded no clear result. The approach would inevitably be piecemeal and incomplete, relying primarily on books and the press in which various individuals had been named (§89).

(6) The inquest process, without the resources of a police force, was incapable of carrying out the task (§89).

(7) Such an investigation would be disproportionate to answering the four statutory questions: who the deceased were, how, when and where they came by their death (§89).

(8) The jury would not be able to say that an individual was involved in the planning, planting, procuring or authorizing of the bombing without breaching the statutory prohibitions (§90).

(9) The article 2 procedural duty does not require the state to investigate who perpetrated the bombings in circumstances where the state, through police investigations has already undertaken extensive investigations into the crimes (§91).

20. We will return later to this last point, in the context of the third ground of challenge and article 2.

The first and second grounds of challenge

21. Mr Straw submitted that in reaching his decision to exclude an investigation into the Perpetrator Issue, the Coroner misdirected himself. The question that arose under s.5(1)(b) and (2) of the 2009 Act was whether the factual issue of the identity of the bombers (and those that assisted them) was sufficiently closely connected to the deaths to form part of the circumstances of the deaths. Instead of answering this question, the Coroner approached the Perpetrator Issue on the basis that it was a matter for his discretion; and in any event omitted relevant considerations, and took into account irrelevant considerations, in exercising his discretion.

22. Mr Skelton QC submitted that it was for the Coroner to identify the central issues in the case and then to decide in the exercise of his discretion how best to elicit the jury's conclusion on those issues. On this basis, it was open to the Coroner to confine the inquiry into the cause of death so as to exclude identification of the individual perpetrators.

23. Before considering these arguments in more detail, we would note seven preliminary points.

24. First, in an inquest to which article 2 of the ECHR applies the requirement in s.5(1)(b) of the 2009 Act to investigate 'how' the deceased came by his or her death is to be read as, 'by what means and in what circumstances' the deceased came by his or her death, see s.5(2) of the 2009 Act.

25. Second, the ambit of an investigation to achieve this end involves a judgement by a coroner rather than the exercise of a discretion in the conventional public law sense. If authority were required for this proposition it is to be found in passages in two decisions cited to us.

26. In *R v. Inner West London Coroner ex p. Dallaglio and another* [1994] 4 All ER 139 at 164j, Sir Thomas Bingham MR expressed the point as follows:

> It is for the coroner conducting an inquest to decide, on the facts of a given case, at what point the chain of causation becomes too remote to form a proper part of his investigation.

27. To similar effect were his observations in the House of Lords decision: *Jordan v. The Lord Chancellor and another* [2007] 2 AC 226 at 256H.

> The coroner must decide how widely the inquiry should range to elicit facts pertinent to the circumstances of the death and responsibility for it. This may be a difficult decision, and the enquiry may … range more widely than the verdict or findings.

28. Third, although it is a matter of judgement for the coroner, involving fact-sensitive issues, the exercise of the judgement on the scope of an inquest is not confined by what can be recorded in the verdict and findings, although those limitations may be relevant.

29. Fourth, since the decision involves a judgement rather than the exercise of a discretion, a successful challenge to the decision can be made on the basis that it is wrong, rather than on the more demanding basis that it is irrational or disproportionate.

30. Fifth, nevertheless, where a challenge is made, the Court will give appropriate respect to the views of a coroner on the proper scope of an inquest. This is because the Court recognises that a coroner has an expertise in the conduct of inquests; has an understanding of what can realistically be achieved in a coronial investigation; and because the decision may be difficult and finely balanced.

31. Sixth, when it comes to considering a coroner's ruling on scope, the Court will approach it on the basis that the persons who are most concerned will know the background; that the ruling will reflect arguments which are understood by interested persons; and that the ruling is a summary of facts, reasoning and conclusion, rather than a document that must be subjected to a close critical analysis that is more appropriate to the construction of a commercial contract or the interpretations of a taxing statute.

32. Seventh, although there is reference in *Dallaglio* to the 'chain of causation', we do not understand the Master of the Rolls to have been suggesting a test of causation as it is understood in the law of contract and tort; but rather to be envisaging a point at which the investigation will become too remote from the circumstances of the death. An inquest must have practical limits which will be circumscribed by considerations of reasonableness and proportionality. For example, an enquiry into the circumstances of a death caused in an affray involving three people is likely to involve different considerations to an enquiry where the death is caused in the course of a riot involving many hundreds of participants.

Conclusions on grounds 1 and 2

33. The first question is whether the Coroner posed the right question on the scope of the Inquests: whether the factual issue of the identity of the bombers (and those that assisted them) was sufficiently closely connected to the deaths to form part of the circumstances of the death. In our view, he did not. Furthermore, the two short conclusory sentences in §86 did not answer this question; and, we would add, some (but not all) of the reasons he gave did not support that conclusion.

34. In these circumstances, we will quash the decision and remit the matter to the Coroner so that he can make the decision in the light of this judgment.

35. It is because we recognise that the decision on scope is not straightforward that we offer the following guidance on factors which may bear on the Coroner's decision, and which we do by reference to the matters set out above at [19] above.

    (1) The fact that the jury is precluded by s.10(2)(b) from making a determination which is framed in a way that determines any question of criminal liability of a named person, and the fact that the primary responsibility for detecting and prosecuting individuals for crimes vests with the police and prosecuting authority, are not (at least without more) reasons for excluding the identification of perpetrators from the scope of the Inquests. However, the implicit inhibition in s.5(3) and the explicit prohibition in s.10(2)(a) highlight the difference between the proper ambit of an inquest on the one hand, and the role of police investigations and prosecutions in criminal trials on the other.

    (2) Mr Straw argued that it should be open to the jury to consider whether one or more of the Birmingham Six were the perpetrators of the Birmingham bombings, while maintaining that this would not be inconsistent with the outcome of the proceedings in respect of which the Inquests were suspended, see paragraph 8(5) of Schedule 1 to the 2009 Act. We see considerable difficulties with this submission both in terms of the statutory provisions and in terms of fairness (with which we deal below). It seems to us that it would be

wholly inconsistent with the principle of finality in legal proceedings that those who have been acquitted of a homicide offence should then be the subject of a full enquiry as to whether they were in fact guilty, provided that no findings were in fact made.

(3) To some extent we have dealt with the Coroner's concern that to permit the identity of the perpetrators to be within the scope of the Inquests might be seen to be taking on the role of 'a proxy criminal trial' which might result in a contravention of the prohibition in s.10(2)(a) and in the case of the Birmingham Six, the additional prohibition in paragraph 8(5). We accept Mr Straw's submission that the prohibition in s.10(2)(a) is confined to determinations of the questions in s.5(1) and (2). Although inquests should not become proxy criminal trials without the protections afforded to defendants, there may be inquests in which the identity of those involved in violent deaths may properly be within the scope of the inquest. Mr Straw gave the example of armed response police officers shooting a suspect.

(4) As already indicated, issues of fairness and proportionality will be relevant. We recognise that fairness in the process may involve fairness to those who have a profound and abiding interest as relatives of the deceased as well as to those who may be implicated in a homicide. Mr Straw submitted that the coronial process can ensure fairness: the right to be treated as an interested party under s.47(2)(f) of the 2009 Act, the privilege against self-incrimination and the criminal standard of proof required for a conclusion of unlawful killing, see for example *R (Anderson) v. HM Coroner for North London* [2004] EWHC 2720 at [21] (Admin). In our view, these points do not entirely answer the question of fairness. The law does not recognise any time limits for the prosecution of defendants. However, it recognises the difficulties that witnesses may have in accurately recollecting events after a long passage of time; as it does the potential unreliability of hearsay and double-hearsay evidence from 'confidential sources' described in books and the press, whose provenance and reliability may be very difficult, if not impossible, to establish and which cannot easily be tested. Such considerations may go to the reasonableness and proportionality of the potential scope of an inquest.

(5) We have already dealt with some of the practical difficulties. In our view the size and complexity of an investigation into the criminal responsibility of individuals, 43 years after the event, in circumstances where police investigations and reviews have failed to identify the perpetrators, is a relevant factor. However, it is not an overwhelming factor and the position may change if new information comes forward.

(6) Mr Straw submitted that the availability of coronial resources was an irrelevant factor where there had been failure by the State to bring the perpetrators of mass murder to justice. As a statement of abstract principle, we agree. If the identity of the perpetrators is properly regarded as being within the scope of the Inquest, then we would not expect limitations on financial resources to inhibit the inquiry. However, the fact that significant police resources have been deployed without leading to the identification of the perpetrators is a potentially relevant factor in deciding where the line is to be drawn.

(7) Although we have approached it in a different way to the Coroner, it is our view that proportionality is a material consideration.

(8) We do not agree that the jury would be unable to identify an individual involved in the planning, planting, procuring or authorizing of the bombing without breaching the statutory prohibitions. The statutory regime would circumscribe certain aspects of an enquiry into potential perpetrators but s.10(2) applies to the conclusion not the investigation. A jury can plainly explore facts bearing on criminal and civil liability.

36. In our view, the Coroner was right to say that he would keep the issue of scope under review and revisit it later if appropriate. Nor should he feel under an obligation to give an immediate further decision on scope. He may wish to update himself on any WMP report. He may wish to invite short further written observations on the Perpetrator Issue, although we doubt whether he will feel the need to invite any further oral submissions unless there is significant new material that bears on the issue.

Ground 3: article 2

37. Before considering the arguments on article 2, it is convenient to outline the history of investigations, court proceedings and operation arising from the Birmingham bombings. The history is both an important part of the background to the Coroner's decision and material to consideration of the article 2 issue.

38. The information comes from the report of Assistant Chief Constable Gareth Cann of WMP, dated 7 August 2017, which the Claimants have been shown.

39. Following the receipt of information which eventually led to the quashing of the convictions of the Birmingham Six in March 1991, two parallel police investigations were begun.

40. The first, 'Operation Aston' was carried out by Devon & Cornwall Police ('D&CP') between July 1990 and April 1991. This investigation was directed, among other questions, to whether WMP suspected others at the time of involvement in the Birmingham bombings and, if so, the results of efforts to trace and interview them. The final report on this question (dated January 1991) was to the effect that WMP had suspected others, apart from the Birmingham Six, and that at least 10 people were interviewed, including 3 who stood trial at the same time (albeit not on charges of murder).

41. The second investigation was an investigation by WMP under the name 'Operation Review' or 'Birmingham 74 enquiry'. It was a criminal investigation into the perpetrators of the Birmingham bombings and followed the successful appeal of the Birmingham Six. It culminated in a joint press release from the Chief Constable of WMP (Ronald Hadfield) and the Director of Public Prosecutions (Barbara Mills QC) on 22 April 1994. In summary, it concluded that: (a) there was insufficient evidence for bringing further criminal proceedings, (b) the enquiries carried out were to the satisfaction of the DPP, and (c) the DPP was unable to suggest any further reasonable lines of enquiry.

42. Despite this apparent impasse, in May 2012 WMP began new enquiries, under the operational name, 'Operation Castors', in the light of new information which appeared in an article in the 22 April 2012 edition of the Sunday Mercury, a local newspaper. The information indicated that Patrick Hill (one of the Birmingham Six) had named three individuals as being involved in the bombings. These were the same individuals who had been named in an earlier report by Granada Television.

43. In the event, Mr Hill was unwilling to meet officers of WMP other than on terms that were beyond the remit of Operation Castors. Chris Mullin, who had been spoken to in 1978 and 1993, and who had given assurances of confidentiality to his sources, indicated that he still felt bound by those assurances. ITV, as the successor of Granada Television, indicated that it did not hold any relevant material.

44. Following further enquiries and reviews of the material seized at the time of the original police enquiries, the Chief Constable of WMP announced in April 2014 that there would be no new investigation into the Birmingham bombings; but that the case was not closed and it was always possible that new significant evidence would come to light. Assistant Chief Constable Cann's evidence is that, although the permanent staff assigned to Operation Castors has been reduced, additional officers have been assigned to deal with particular enquiries raised by the Coroner. These included investigating the claims by a former member of the PIRA, who had written a book about his time as intelligence chief in which he claimed that there had been a debrief by the PIRA after the Birmingham Bombings. There are currently up to 10 members of staff working on Operation Castors.

45. Mr Straw submitted that the decision not to investigate who was responsible for the Birmingham bombings was incompatible with the state's procedural obligation under article 2 of the ECHR. Having acknowledged that the Inquests were to be article 2 compliant, and in the absence of any other mechanism where by the investigative obligation would be discharged, he argued that the Coroner had no discretion to decline to perform the obligation. Whatever form the state's investigation took, certain minimum standards have to be met.

46. First, as the ECtHR made clear in *Jordan v. United Kingdom* (use of lethal force by RUC officer) (2003) 37 E.H.R.R 2 at §107:

> … the investigation must be capable of leading to … the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish … the person or persons responsible will *risk* falling foul of this standard. [*Emphasis added*].

47. In this context, Mr Straw also relied on a passage in the opinion of Lord Bingham in *R (Middleton) v. West Somerset Coroner* [2004] 2 AC 182 at [20].

> The European Court has repeatedly recognised that there are many different ways in which a state may discharge its procedural obligation to investigate under article 2. In England and Wales an inquest is the means by which the state ordinarily discharges that obligation, save where a criminal prosecution intervenes ... To meet the procedural requirement of article 2 an inquest ought *ordinarily* to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case. [*Emphasis added*].

48. Secondly, he submitted that article 2 requires practical independence between the investigator and those whose actions are under scrutiny. He relies on the decision in *Ramsahai v. Netherlands* (2008) 46 E.H.R.R §§333-341, where the ECtHR found that a police force did not have sufficient independence to conduct an investigation into misconduct by its own members.

49. Mr Skelton submitted that the relevant obligation of the State under article 2 has been satisfied by the previous criminal investigations that have taken place over the course of the last 43 years. The State is obliged to seek to identify and prosecute the perpetrators, but only in so far as this is now a reasonable, lawful and practical proposition. The adequacy of the State's response falls to be assessed in the round, looking at all the previous police investigations. The Claimants have failed to establish that WMP were insufficiently independent to discharge the investigatory duty, or that the article 2 requirements for public scrutiny and family involvement have not been met. In any event, the Inquests are not the proper mechanism for rectifying any shortcoming. WMP have not closed the case and are still actively taking steps to investigate.

Conclusion on ground 3

50. A State may clearly discharge its procedural obligation under article 2 in different ways. The fact-finding and accountability components of the investigative obligation may be shared between authorities, including coronial and criminal authorities, provided they are procedurally effective in totality, see for example, *Erikson v. Italy* [2000] EHRR CD152. Sections 10 and 11 and Schedule 1 to the 2009 Act indicate how inquest investigations may need to interact with criminal investigations.

51. Where the State is alleged to be involved in a homicide, compliance with article 2 will require an investigation initiated by the State that is (a) independent, (b) effective and (c) prompt and proceeds with reasonable expedition, (d) is subject to a sufficient degree of public scrutiny to ensure accountability and (e) involves the next of kin to an appropriate extent, see *Jordan* (above) at [106]-[109] and *R (Amin) v. Home Secretary* [2004] 1 AC 653, Lord Bingham at [25].

52. In the present case, there are allegations of state involvement in the Birmingham bombings, see issues (1) and (2) in [4] above; but these issues are expressly within the scope of the Inquests.

53. In our view neither the domestic nor the ECtHR authorities lead to the conclusion that the procedural requirement under article 2 requires the Inquests to investigate the identity of the persons responsible for the Birmingham bombings. That is the role of the police who continue to investigate this issue in so far as they are able to do so. The

use of the words 'risk' in *Jordan* and 'ordinarily' in *Amin* (see above at [46] and [47]) make it clear that there is no immutable rule that the failure of a police investigation to identify the perpetrator of a homicide requires an inquest to take on that role.

54. The obligation on the State is to seek to enforce the criminal law so far as is reasonably possible. In *Öneryildiz v. Turkey* [2005] 41 EHRR 20 (at [96]) the Court stated:

> … the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of, or collusion in, unlawful acts. The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2…, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations to the right to life are not undermined.

55. What is reasonably possible depends on the facts of the case.

56. Mr Straw submitted that WMP are unable to carry out this role since they would be investigating themselves. Although he was able to glean some support for this submission from the case of *Ramsahai v. Netherlands* (see above) we do not accept the conclusion which he submitted resulted from it.

57. It is clear that WMP failed in their original investigation and that this resulted in a gross miscarriage of justice. The question is whether that historic failure renders WMP incapable of carrying out the State's investigatory duties to identify the perpetrators of the Birmingham bombings and bring them to justice. We have seen nothing in the material before us to indicate that this is so, and the contents of Assistant Chief Constable Cann's report suggests otherwise. In the time that has passed since the original investigation, there have been many changes in how crimes are investigated and the personnel in WMP are now entirely different.

58. Mr Straw's alternative argument was that the objectionable feature of WMP's involvement was a matter of appearance. Although the analysis of apparent bias applies to a court or tribunal, rather than a police force, he argued that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that WMP were incapable of carrying out the investigation. We would reject that submission. The observer is to be taken as both fair-minded and informed of the relevant facts. Although the identification of the perpetrators has so far been unsuccessful it has not been through apparent want of resources, effort or expertise.

59. It follows that the claim that the Inquests must investigate the perpetrators of the Birmingham bombings as part of the State's obligation under article 2 fails.

Conclusion

60. The Claimants sought the following relief:

(1) An order quashing the Coroner's decision under s.31(1)(a) of the Senior Courts Act 1981;

(2) A mandatory order under s. 31(1)(a) of that Act, requiring the Coroner to include the Perpetrator Issue within scope;

(3) A declaration under s.31(1)(b) of that Act, that the Coroner's decision was contrary to Article 2 and s. 6(1) of the Human Rights Act 1998.

61. Subject to hearing further submissions as to the form of any order, we are minded to (1) quash the Coroner's decision which excluded the Perpetrator Issue and remit the case so as to enable him to reconsider the decision in the light of this judgment, (2) refuse to make any mandatory order, and (3) refuse to make any declaration under s.31(1)(b) of the 1981 Act.