Neutral Citation Number: [2018] EWCA Civ 2081

Case No: C1/2018/0311

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
Lord Justice Simon and Mrs Justice Carr
CO/4092/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 September 2018

Before:

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
THE RT HON THE LORD BURNETT OF MALDON
THE RT HON LADY JUSTICE HALLETT
(VICE-PRESIDENT OF THE COURT OF APPEAL (CRIMINAL DIVISION))
and
THE RT HON LORD JUSTICE McCOMBE

- -

Between:

CORONER FOR THE BIRMINGHAM INQUESTS (1974)	**Appellant**
- and -	
JULIE HAMBLETON and others	**Respondents**
-and-	
THE CHIEF CONSTABLE OF WEST MIDLANDS POLICE	**Interested Party**

- -
- -

Peter Skelton QC, Matthew Hill and Gideon Barth (instructed by Fieldfisher LLP)
for the Appellant
Hugh Southey QC and Adam Straw (instructed by KRW Law) for the Respondents
Jeremy Johnson QC and Robert Cohen (instructed by West Midlands Police)
for the Interested Party

Hearing date: 17 July 2018

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Judgment Approved by the court for handing down (subject to editorial corrections)

The Lord Burnett of Maldon CJ, Lady Justice Hallett and Lord Justice McCombe:

Introduction and Procedural History

1. After more than four decades since the events in question, the Senior Coroner for Birmingham acceded to an application to reopen the inquests into the deaths of those murdered on 21 November 1974 in Birmingham when bombs exploded in two crowded public houses. The application was made on behalf of family members of some of those of died. His Honour Sir Peter Thornton QC, the former Chief Coroner ("the Coroner"), has been appointed to conduct the inquests. The issue in this appeal is whether his decision not to explore what has been dubbed the "Perpetrator Issue", that is to call evidence directed to identifying those who planned, planted, procured and authorised the bombs used on 21 November 1974, was lawful.

2. On 26 January 2018 the Divisional Court of the Queen's Bench Division of the High Court (Simon LJ and Carr J) quashed the decision of the Coroner. The High Court concluded that the Coroner had not posed the right question in reaching his decision. They identified the right question as:

> "…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".

   They considered that his conclusion did not answer that question; and also that "some (but not all) of the reasons he gave did not support that conclusion". The High Court quashed the decision and remitted the matter to the Coroner to remake the decision in the light of the judgment. However, the court refused to make a mandatory order requiring the Coroner to include the Perpetrator Issue within the scope of the inquest. That conclusion reflected the court's view that there was not only one permissible answer to the question they had posed. Moreover, the High Court refused to make a declaration that the Coroner's decision had been contrary to article 2 of the European Convention of Human Rights and Fundamental Freedoms ("the Convention") and, accordingly, contrary to section 6(1) of the Human Rights Act 1998, on the basis that the Convention required the issue to be explored at the inquests.

3. The Coroner appeals with permission of Irwin LJ. By a Respondents' Notice, the Respondents apply for permission to appeal from those parts of the order of the High Court refusing the mandatory order and declaration to which we have just referred. The Chief Constable of West Midlands Police is an interested party in these proceedings and has supported the position of the Coroner.

4. The inquests into the deaths of the 21 people killed in the bombings ("the deceased") had been opened in late 1974 but they were adjourned in 1975, pursuant to section 20 of the Coroners (Amendment) Act 1926. That was because criminal proceedings for murder against six defendants (who became known as "the Birmingham Six") had been commenced.

5. On 15 August 1975, in the Crown Court at Lancaster, after a trial before Bridge J and a jury, those defendants were convicted on 21 counts of murder. In those circumstances, there was then no suggestion that the inquests should resume. After a number of appellate proceedings in the Criminal Division of this Court, on 27 March 1991, the appeals of the

Birmingham Six against conviction were allowed and their convictions were quashed: *R v McIlkenny & others* [1992] 2 All ER 417. The grounds upon which the convictions were quashed were that scientific evidence relied upon by the prosecution was in doubt and that, in the absence of any explanation, police witnesses were at least guilty of deceiving the court: 431j to 432a.

6. The application for the inquests to be resumed was made in the course of 2015 to the Senior Coroner of Birmingham, Louise Hunt. Three arguments were advanced to support the proposition that the inquests should be resumed:

> (a) there was evidence that the state had advance warning of the bombings and failed to take all reasonable steps to avoid loss of life and injury;
>
> (b) the West Midlands Police had engaged in a cover-up to protect the identity of an informer;
>
> (c) the emergency response to the bombings was seriously inadequate.

7. In her ruling on 1 June 2016, the Birmingham Coroner rejected the suggestion that there was any evidence of a cover-up and also that there could be any question that the response of the emergency services had any bearing on the deaths. She made clear that it was only in respect of the advance notice issue that she considered that there were grounds to reopen the inquests.

8. Pre-inquest review hearings were held before the present Coroner, the Appellant, on four occasions between November 2016 and June 2017. The Coroner agreed with what was common ground amongst all the interested persons before him that he was not restricted, in setting the scope of the inquests, by the conclusions of the Senior Coroner in directing their resumption. But part of the historical context was that extensive police inquiries had failed to produce evidence capable of supporting any new prosecution and the Director of Public Prosecutions had confirmed that position. At the second pre-inquest review hearing, on 23 February 2017, the Coroner had ruled that the inquests should proceed on the basis that an investigative duty under article 2 of the ECHR was engaged. That was because the issue of advance warning engaged the question of state responsibility for what occurred, albeit in a secondary way. In the ruling with which we are concerned the Coroner identified four potential issues within the scope of the inquests, including the Perpetrator Issue. They were:

> "1. Forewarning – whether West Midlands Police (WMP) or other state agency had prior knowledge that a bomb attack would take place on or around 21 November 1974, and whether further steps could or should have been taken to prevent the bombings that did occur.
>
> 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 bombings on 21 November 1974 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."

9. The Coroner decided that the Forewarning Issue would be "in scope". That necessarily followed from the decision to reopen the inquests. On the Agent/Informant Issue, he stated that he had directed further inquiries to be made and deferred a final decision. As for Emergency Response, to summarise only, he held that an "over-arching" investigation into the adequacy of the response would not be undertaken. Evidence in relation to each deceased individually would be considered and if credible evidence emerged that failings in the emergency response caused or contributed to a death, then further investigation would follow, and evidence might be adduced. In this way, it can be seen that the Coroner was willing to consider issues which had not underpinned the decision to order the resumption of the inquests.

10. Before considering the Coroner's decision to exclude the Perpetrator Issue from scope, we turn to the underlying statutory provisions which establish the purposes and boundaries of a coronial investigation.

The Legislation

11. Section 1 of the Coroners and Justice Act 2009 ("the 2009 Act") imposes a duty upon coroners to investigate certain deaths; it provides as follows:

> "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 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."

12. The "Purpose of the Investigation" is then set out in section 5 in these terms:

> "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).
>
> This is subject to paragraph 7 of Schedule 5."

Paragraph 7 of Schedule 5 is concerned with action to prevent other deaths.

13. As for the "Outcome of the Investigation", the requirements of the Coroner or jury are set out in section 10:

> "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 on the part of a named person, or
>
> (b) civil liability."

14. Schedule 1 to the 2009 Act, which by section 11 makes provision for cases in which inquests are suspended and then resumed after criminal proceedings, is also material. The relevant provision is to be found in paragraph 8(5) of that Schedule:

> "(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."

15. The statutory purpose of determining who the deceased was, how, where and when he or she came by his or her death, now found in section 5(1) of the 2009 Act, is of ancient lineage. Language to the same effect is found in section 4 of the Coroners Act 1887 and section 11(5) of the Coroners Act 1988. "How the deceased came by his death" means "by what means" rather than how the deceased died or in what broad circumstances: see general conclusion (2) at p 23 in the judgment of Sir Thomas Bingham MR in *R v North Humberside Coroner, ex parte Jamieson* [1995] QB 1.

16. In *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, the House of Lords considered the scope of the procedural obligation under article 2 of the Convention and whether, in a case where that procedural obligation was in play, the narrow meaning of "how" in section 11(5) of the Coroners Act 1988 is required to be read more broadly, using section 3 of the Human Rights Act 1998. In giving the considered opinion of the Committee, Lord Bingham of Cornhill explained at [3] the nature of the procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that the state may have been implicated. In *Middleton* the deceased killed himself in prison but in circumstances where it was suggested that he was known to be a suicide risk and the prison authorities failed to place him on suicide watch. In cases of alleged state responsibility, the jury's brief conclusion on "the central issue is required", see [16] and [20]. At [31] Lord Bingham explained that in some article 2 cases, a short form verdict would be sufficient, but in others the strict *Jamieson* approach would not satisfy article 2. At [35] he said:

> "Only one change is in our opinion needed: to interpret "how" in section 11(5)(b)(ii) of the Act … in the broader sense previously rejected, namely as meaning not simply "by what means" but "by what means and in what circumstances"."

17. At [45] the application of that expanded approach in the context of a prison suicide was considered. A short and simple conclusion was formulated which would satisfy this part of the article 2 obligation: "The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him from doing so."

18. Section 5(2) of the 2009 Act makes provision to ensure that the outcome of an inquest satisfies the Convention. It is concerned with the procedural obligation implicit in article 2 of the Convention. Section 5(2) of the 2009 Act is the statutory confirmation of the

Middleton approach. "Where necessary" to satisfy article 2 the "how" question is answered in the more expansive way contemplated in *Middleton*. In the resumed inquests of those who died in the Birmingham pub bombings, were the evidence to support a conclusion that the authorities failed to act appropriately to avoid loss of life in the light of any knowledge they possessed, a similarly brief factual conclusion would be open to the jury.

The Coroner's Ruling

19. It will be necessary to say more about the meaning of the term "scope" of an inquest a little later. However, at the outset the Coroner stated that the purpose of his ruling on "scope" was:

> "…to identify the key topics which will be considered in the inquests which will be held…into these tragic deaths".

He stressed that the determination that he was then making would be kept under review. He noted expressly that many of the families of the deceased consider that they suffer a continuing injustice, as no one had been brought to justice for the crimes committed. For that reason, they wanted the inquests to cover as much ground as possible. In paragraphs [4] and [5] of the ruling, the Coroner said:

> "4. I hope that the inquests will provide many answers about the events of 21 November 1974 and those who died. But I must state firmly and clearly at the outset that the inquests must (a) comply with the law, both statute and case law, (b) focus upon the four statutory questions of who died, how, when and where they came by their death (section 5 and 10 of the Coroners and Justice Act 2009), and (c) be realistic about the availability of relevant evidence 43 years on.
>
> 5. It is for these reasons that the inquests may not achieve, and could not realistically achieve, all that the families seek. That may be disappointing and frustrating. I understand that. But, even where no inquests have been held before and where no person has been brought to justice, it is not in the public interest for these investigations and inquests to pursue unachievable, or indeed unlawful, objectives."

20. In two important paragraphs [18] and [19] of the ruling, the Coroner said:

> 18. The word 'scope' has no special meaning of its own. By 'scope' all that is generally meant is a list of the topics upon which the coroner, in the coroner's discretion, will call relevant evidence so as to be able to answer the four key statutory questions: Who died? How, when and where did they come by their death?
>
> 19. These questions and the answers to them, known as the determination, are provided by statute in Sections 5 and 10 of the Coroners and Justice Act 2009. They are the four central

> questions in every inquest. When decided the answers to them are recorded by the coroner or the jury, if there is one, in the statutory Record of Inquest."

21. The Coroner then explained that it was "also well known and understood that in making a decision on scope the coroner has a broad discretion". He referred to two passages from decided cases. The first was from *Jamieson* at 26. He had in mind what Sir Thomas Bingham MR said in the last of 14 general conclusions about the nature and purposes of inquests:

> "14. It is the duty of the coroner as the public official responsible for the conduct of inquests, whether he is sitting with a jury or without, to ensure that the relevant facts are fully, fairly and fearlessly investigated. He is bound to recognise the acute public concern rightly aroused where deaths occur in custody. He must ensure that the relevant facts are exposed to public scrutiny, particularly if there is evidence of foul play, abuse or inhumanity. He fails in his duty if his investigation is superficial, slipshod or perfunctory. But the responsibility is his. He must set the bounds of the inquiry. He must rule on the procedure to be followed. His decisions, like those of any other judicial officer, must be respected unless and until they are varied or overruled."

Secondly, he referred to the judgment of Simon Brown LJ in *R v Inner West London Coroner, ex parte Dallaglio* [1994] 4 All ER 139, 155 where, after reference to the passage from the judgment in *Jamieson*, just quoted, he said:

> "… The inquiry is almost bound to stretch wider than strictly required for the purposes of a verdict. How much wider is pre-eminently a matter for the coroner whose rulings upon the question will only exceptionally be susceptible to judicial review."

22. Additionally, he referred to the analysis found in the Chief Coroner's Law Sheet No. 5 at paragraphs [3] to [8].

23. As for the Perpetrator Issue, the width of the inquiry being canvassed was summarised by the Coroner, from the submissions made to him by counsel, in paragraph [63]-[67] of the ruling:

> "63. As she clarified at the May hearing, Ms Williams submits that the Birmingham 6 trial should in effect be revisited on an extensive basis. She submits that the jury at the inquests should assess whether each of the six (whether alive or no longer alive) were guilty or innocent, that the evidence relating to the Court of Appeal issues of the records made of alleged confessions given while in police custody and scientific evidence purportedly showing the handling of explosive materials should be considered afresh, that all possible suspects including the Birmingham 6 and others should be assessed through evidence

> for guilt or innocence, and that any person in this category could be 'named and shamed' in the media whether innocent or guilty.
>
> 64. She submits that in relation to the Birmingham 6 it is irrelevant that their convictions were quashed by the Court of Appeal. The inquests, she says, can review their innocence or guilt. The prohibition on a determination not being 'inconsistent' with the outcome of the proceedings [in the Birmingham 6 appeal]' does not apply: see para.8(5) of Schedule 1 to the 2009 Act, below.
>
> 65. She says that the Birmingham 6, or any others who may be guilty, are not entitled to any special protection in the inquest process, save that 'possibly' they could apply and obtain anonymity orders or 'possibly' Contempt of Court Act orders. Mr McGowan suggested that ciphers could be used, although I believe that his clients want names to be named. In any event he accepted that individuals would inevitably be named in evidence.
>
> 66. Ms Williams explained that the only limitation on this wide-ranging form of investigation by the coroner and the jury would be that the jury would not be able to name any guilty person in their conclusions: see section 10(2)(a) of the 2009 Act, below. She submits that the jury would be able to hear evidence about the identity of perpetrators (in open court), they could make findings for themselves having identified guilty perpetrators, but they are prevented by law from naming them in their conclusions.
>
> 67. In summary she submits (in para.42) that the identity of the perpetrators is 'part of the "circumstances" that led to the fatalities' and is of the greatest public importance particularly since no one has been charged with offences relating to the bombings, except in the case of the Birmingham 6 which led to 'discredited convictions'. She submits that there is credible evidence, mostly from journalists, of the true identities and evidence should be called accordingly."

24. The Coroner explained that his decision on the Perpetrator Issue had been made "without hesitation". He made it in the exercise of the discretion which he perceived that he had. He repeated the importance of the statutory questions and said that the scope of the inquest, "however widely drawn" had to be directed to providing, where possible, evidence to enable the jury to answer those questions. He concluded that there was a marked distinction between an inquest and a criminal investigation. While the latter sought the identification of those suspected of the crime and to bring them to justice, an inquest seeks to answer the statutory questions.

25. The Coroner pointed to the prohibition in section 10(2) of the 2009 Act, preventing any determination at an inquest from appearing to determine criminal liability on the part of

any named person. The reason for the prohibition was to be found in the fourth of Sir Thomas Bingham's 14 conclusions in *Jamieson* as follows:

> "4. This prohibition in the Rules is fortified by considerations of fairness. Our law accords a defendant accused of crime or a party alleged to have committed a civil wrong certain safeguards rightly regarded as essential to the fairness of the proceedings, among them a clear statement in writing of the alleged wrongdoing, a right to call any relevant and admissible evidence and a right to address factual submissions to the tribunal of fact. These rights are not granted, and the last is expressly denied by the Rules, to a party whose conduct may be impugned by evidence given at an inquest."

26. The Coroner then recorded a submission by Ms Williams QC, somewhat similar to a branch of the argument advanced by Mr Southey QC for the Respondents before us:

> "78. Ms Williams argues that the prohibition in section 10(2)(a) is limited to the jury's conclusion and provides no restriction on the scope of the investigation or evidence called at the inquest on the identity of a possible perpetrator. Had Parliament intended to prohibit the identity of perpetrators from evidence, she submits, the statute would have said so. ..."

The Coroner rejected that submission in these terms:

> "… I do not agree. Sir Thomas Bingham's words above describe the opposite, particularly in the phrase 'to a party whose conduct may be impugned by evidence given at an inquest'. They clearly envisage that the prohibition may be a relevant factor to be considered in the exercise of the coroner's discretion on the scope of an investigation."

27. The Coroner recognised that an examination of relevant facts may be wide and may touch on criminal liability, as follows:

> "81. The prohibition does not, however, exclude an examination of relevant facts, as Sir Thomas Bingham explained in *Jamieson* at p24 at (5):
>
> > Plainly the coroner and the jury may explore facts bearing on criminal and civil liability. But the verdict may not appear to determine any question of criminal liability on the part of a named person nor any question of civil liability."

28. Importantly, however, the Coroner pointed out immediately after his citation of this passage that:

> "82. Facts may therefore be explored in order to explain, for example, whether a person was lawfully or unlawfully killed or whether they were unlawfully killed or died accidentally (or by

> misadventure). But the identity of perpetrators is not a question that an inquest is charged with answering. Indeed, it may be prohibited from expressing its view on this matter when, as in this case, the outcome, in one form or another, of the jury's conclusion must be unlawful killing."

He proceeded to note the further prohibition in paragraph 8(5) of Schedule 1 to the Act by which the inquest determination may not be inconsistent with the outcome of anterior criminal proceedings.

29. The Coroner's further conclusions were expressed in paragraphs [87] and [89]:

> "87. To permit the identity of perpetrators to be within scope, would be seen to be taking on the role, as one counsel put it, of a proxy criminal trial. If this were to result in a determination identifying those responsible for the attacks that would in my judgment be unlawful. It would contravene both the prohibition in section 10(2)(a) and in the case of the Birmingham 6 the additional prohibition in paragraph 8(5). It would also offend against the decision and explanation of Sir Thomas Bingham in *Jamieson* above."

In paragraph [89], he continued:

> "89. There are also practical difficulties which make the submissions on behalf of the families untenable. One cannot ignore the sheer size and complexity were the inquests to commence an investigation into the guilt of any named individuals. Years of police investigations, inquiries and reviews have yielded no clear result. It would be invidious for the inquests to attempt to do so now, 43 years on, with a fresh search. The approach would inevitably be piecemeal and incomplete, mostly reliant upon persons named in books and the press, mostly by journalists. It would be a task entirely unsuited to the inquest process and its limited resources; the Coroner's team does not have the resource of an independent police force. It would be disproportionate to the real goal in hand, which is important enough, namely to answer the four statutory questions."

30. Finally, in this ruling, the Coroner addressed article 2 of the Convention:

> "91. For these purposes it makes no difference that these are Article 2 inquests. As [counsel to the inquests] submitted (at para.59), the Article 2 procedural duty does not require the state to investigate who perpetrated these bombings through inquests. The state, through the West Midlands Police and the Devon and Cornwall police, has initiated and undertaken extensive criminal investigations into these crimes. The failure to obtain convictions to date does not render those investigations valueless

> in this context or point to any 'gap' that must or could be filled by these inquests in order to discharge that procedural duty."

31. The Coroner was here referring to the wider obligation on the State to investigate homicides as part of its duty to have in place and enforce laws which will, to the greatest extent reasonably practicable, protect life, which was summarised in paragraph [2] of *Middleton.* It forms part of the substantive obligation imposed upon States party to the Convention by article 2 and is distinct from the procedural obligation which attaches to suspected state responsibility for a death.

32. We have taken a little time to set out the main features of this ruling because in our judgment the Coroner's ruling on this matter was correct, essentially for the reasons that he gave. We add what we do below, in deference to the judgment of the High Court and the careful arguments presented to us by Mr Southey QC for the Respondents.

The Judgment of the High Court

33. The High Court considered that the Coroner should have asked and answered the question "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" but did not do so. In reaching that conclusion the Court accepted the formulation of the question advanced on behalf of the families of the deceased. It rejected the submission on behalf of the Coroner that it was for him to identify the central issues and then for him to decide how best to elicit the jury's conclusions on those issues. In giving the judgment of the Court, Simon LJ set out seven "preliminary points" which led to the acceptance of that formulation:

> "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."

34. The court recognised "that the decision on scope was not straightforward" and offered points of guidance for the Coroner in remaking the decision pursuant to the Court's order. We summarise those points because they illuminate further the Court's decision.

35. The first two points acknowledged the problems posed by the families' approach to what they argued should be within the scope of the inquests. Those problems derived from the statutory prohibitions against any determination of criminal liability on the part of a named person and any determination inconsistent with the verdicts in the antecedent criminal proceedings.

36. The third point was directed to the Coroner's concerns about conducting a "proxy criminal trial". As to this the court said at [35(3)]:

> "… 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."

37. The fourth point was directed to "fairness and proportionality". As to this the court said at [35(4)]:

> "… 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."

38. The fifth point acknowledged the practical difficulties, in the potential size and complexity of an investigation of the width proposed, after the passing of 43 years, where a number of police investigations had failed to identify the perpetrators. However, the Court found this not to be "an overwhelming factor" and that the position might change if new information came forward.

39. In the sixth point, the Court noted the submission of Mr Straw, for the present respondents, that resources were irrelevant. The Court said that they would not regard financial resources as inhibiting an investigation of the Perpetrator Issue, if properly within the scope of the enquiry. They then said:

> "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".

40. In their seventh point, the Court said again that proportionality was a material consideration. In the final point, the eighth, the Court said this, at [35(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."

41. The Court then dealt with the Respondents' claims based upon article 2 of the Convention and, as we have said, rejected the claims that were made to a mandatory order that the Perpetrator Issue be included in the inquiry and to a declaration that the Coroner's ruling constituted a breach of article 2 and section 6 of the Human Rights Act 1998.

42. In dismissing these claims the High Court recognised that the procedural requirement of article 2 did not require the investigation of the identity of the persons responsible for the atrocity and that, in our system, it was the role of the police to investigate crime. There is no immutable rule that the failure of a police investigation to identify a perpetrator requires an inquest to take on that role. The Court referred to passages from *Jordan v United Kingdom* (2003) 37 EHRR 2, at [107] in the Strasbourg Court and to Lord Bingham's opinion at [20] in *Middleton.*

43. On this aspect of the case Simon LJ said:

> "57. It is clear that [West Midlands Police] failed in their original investigation and that this resulted in a gross miscarriage of justice. The question is whether that historic failure renders [West Midlands Police] 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 [West Midlands Police] are now entirely different.
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> 58. Mr Straw's alternative argument was that the objectionable feature of [West Midlands Police'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 [West Midlands Police] 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."

The Appeal and the Application for Permission to bring a Cross-Appeal

The submissions in outline

44. On behalf of the Coroner, Mr Skelton QC submits that the High Court was incorrect in its approach to the Coroner's role in defining the scope of an inquest. While Mr Skelton acknowledged in his skeleton argument that "a coroner's decision on the scope of an inquest involves an exercise of both judgment and discretion" and that, "a coroner's decision that article 2 does not require the investigation of a particular fact or issue is an exercise of judgment in respect of a question of law", the coroner also has a discretion in respect of additional matters of scope, challengeable only on standard *Wednesbury* grounds. He argues that there could be no sustainable challenge to the Coroner's decision on the issue in this case on such grounds, however the Coroner chose to express himself in his ruling as to the test to be applied.

45. Mr Southey QC for the Respondents submits that the High Court's approach was correct in saying that the Coroner did not have a broad discretion in deciding whether to exclude or include the Perpetrator Issue within the inquests' scope. His central submission, as he described it in oral argument, is that it is impossible to answer the question "how the deceased came by their deaths" without exploring the Perpetrator Issue, even though (as he accepts) the jury could not name anyone they concluded was responsible. He supports the question accepted as being relevant by the High Court. If the factual issue in question is within the circumstances of the deaths, the Coroner is obliged to investigate it. He submits that a coroner has a duty to investigate the perpetrator issue in every case of suspected homicide.

Discussion

46. A coroner's investigation, whether it culminates in an inquest or not, is an inquisitorial process for which the coroner is entirely responsible. There are no parties to an inquest. The rules allow various people to participate as interested persons. There are no pleadings in cases whose facts might engage civil liability; and no indictment in cases where criminal responsibility is suspected or clear. The inquest is not an adversarial proceeding. A coroner is a judicial officer working within a statutory framework. His responsibility is to discharge the statutory duty imposed upon him, with a jury in appropriate cases, by conducting an investigation and inquest in accordance with the 2009 Act. The purpose of the inquest is set out in section 5. The purpose of the inquest is to answer the four statutory questions: (i) who the deceased was; and (ii) how, (iii) when and (iv) where he or she came by his or her death. In inquests governed by article 2, the purpose is to include ascertaining the circumstances in which the death occurred where that is necessary to satisfy article 2 ECHR. In many cases an extended conclusion will not be necessary, as was acknowledged in *Middleton.* But, as we have noted, in these inquests, if state failings to act on prior knowledge are established by the evidence, a short conclusion to that effect would be called for.

47. It has become commonplace in advance of inquests for coroners to rule on their scope, including whether possible state responsibility requires an article 2 compliant inquest. That latter aspect will involve a question of law, albeit in circumstances which may be evolving during the course of an investigation and even at an inquest itself. If article 2 is engaged in this way it remains for the coroner to decide what evidence to call at the inquest,

to determine what the central issues for determination are and, if there is a jury, the way in which to elicit their conclusion on those central issues: see [30], [31] and [36] in *Middleton.*

48. A decision on scope represents a coroner's view about what is necessary, desirable and proportionate by way of investigation to enable the statutory functions to be discharged. These are not hard-edged questions. The decision on scope, just as a decision on which witnesses to call, and the breadth of evidence adduced, is for the coroner. A court exercising supervisory jurisdiction can interfere with such a decision only if it is infected with a public law failing. It has long been the case that a court exercising supervisory jurisdiction will be slow to disturb a decision of this sort (see Simon Brown LJ in *Dallaglio* at [155] cited in [21] above) and will do so only on what is described in omnibus terms as *Wednesbury* grounds. That envisages the supervisory jurisdiction of the High Court being exercised when the decision of the coroner can be demonstrated to disable him from performing his statutory function, when the decision is one which no reasonable coroner could have come to on the basis of the information available, involves a material error of law or on a number of other well-established public law failings.

49. The dichotomy between judgement and discretion identified by the High Court, does not, with respect, assist in determining whether the Coroner erred in law in deciding not to investigate the Perpetrator Issue. It is a false dichotomy in these circumstances which does not find support in authority. The court is not liberated from the ordinary constraints of judicial review on the basis that it considers that the coroner was "wrong".

50. The authorities speak in terms of a discretion to set the bounds of an inquest. The Chief Coroner's Law Sheet No. 5 sets out references to cases where that principle has been stated. It is sufficient to note the observations of Lord Mance at [208] in *R v Secretary of State for Defence, ex parte Smith* [2011] 1 AC 1 that "[e]veryone agrees that coroners have a considerable discretion as to the scope of their inquiry"; and of Hallett LJ in *R (Sreedharan) v HM Coroner for the County of Greater Manchester* [2013] EWCA Civ 181, at [48] that "the Coroner has a broad discretion as to the nature and extent of the inquiry". The principle was recently restated in *R (Maguire) v Assistant Coroner for West Yorkshire (Eastern Area)* [2018] EWCA Civ 6, at [3] where the context was whether to call certain witnesses:

> "Under the Coroners Act 1988 and its predecessors, a coroner was required to examine such witnesses as appeared 'expedient', see section 11(2). The formulation is different in Schedule 5 to the 2009 Act which simply empowers a coroner by notice to require a person to attend to give evidence or to produce evidence. But the change has not affected the basis upon which a coroner's decision to decline to call or seek evidence may be challenged. The decision about which witnesses to call to give evidence at an inquest may be challenged in judicial review proceedings on traditional public law grounds. The context of any challenge will be that the coroner has a duty to conduct a thorough inquiry within the scope he has determined to enable the statutory purposes to be satisfied. There may be cases in which it can be shown that, absent an identified line of inquiry or examination of a particular available witness, the procedural obligation under article 2 cannot be satisfied. But in the generality of cases the issue will be whether the failure to

> investigate something or obtain evidence, including by calling a witness, was *Wednesbury* unreasonable. In *McDonnell v HM Assistant Coroner for West London* [2016] EWHC 3078 at [28] Beatson LJ summarised the position:
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> > "It is clear that, as Lord Lane CJ stated in *R v South London Coroner, ex parte Thompson* (1982) 126 SJ 625 and Sir Thomas Bingham stated in *Jamieson's* case at 24 F-G, this type of inquest is a fact finding exercise not a method of apportioning guilt. It is also clear that decisions by a coroner as to the scope of enquiry and as to which witnesses to call are a matter of judgment which may only be challenged on the ground that they are *Wednesbury* unreasonable, i.e. irrational: see *R v Inner West London Coroner, ex p. Dallagio* [1994] 4 All ER 139 and *R (Mack) v HM Coroner for Birmingham and Solihull* [2011] EWCA Civ 712 at [9]."
>
> In *Mack* at [9] Toulson LJ had emphasised the wide area of judgment that a coroner enjoyed in deciding who to call to give evidence."

51. The central reason why the High Court quashed the decision of the Coroner was because it considered that he failed to ask himself the question identified in the judgment of Simon LJ (set out in [2] and [33] above). We are unable to agree that the question formulated by the High Court was the one which the Coroner should have asked himself. It does not arise from the purposes of an inquest identified in section 5 of the 2009 Act. The Coroner was correct to consider the question of scope in the context of providing evidence to enable the jury to answer the four statutory questions. The scope of an inquest is not determined by looking at the broad circumstances of what occurred and requiring all matters touching those circumstances to be explored.

52. It should not be thought that because the jury may need to explain the circumstances in which the deceased came by their deaths (if state responsibility is established) that it is necessary to explore all the broader circumstances of the deaths, which are not touched by the procedural obligation under article 2.

53. In some of the argument before us there was a tendency to look at the Perpetrator Issue as one which might arise in all cases of suspected or known homicide and look for a hard-edged determination of whether it would ever be appropriate for an inquest to hear evidence about the identity of the person or persons thought responsible. In the arguments recorded by the Coroner (see [26] above) there appears to have been an underlying concern that if he excluded the Perpetrator Issue as a subject of distinct inquiry, he would be suggesting that it would never be appropriate for a jury to hear evidence that spoke of who was responsible for a homicide. He correctly explained that was not the case. This is not a black and white issue which applies in every inquest. The question in the resumed Birmingham inquests is whether the Coroner should independently investigate and call evidence which seeks to answer the question of who organised and planted the bombs, when the jury are disabled from reaching a conclusion on that matter and in the light of the antecedent investigations. The contextual background includes multiple police investigations directed at that very question and a comprehensive recent report. They have been unable to answer that question. There will be many inquests where the identity of

the person or persons responsible for a death are known and not in any doubt, indeed such people may be interested persons in an inquest. Most inquests involving alleged state responsibility will fall into that category. The issue in a case where lethal force was used by a state agent will usually be whether the force used was lawful or unlawful. In cases concerned with missed opportunities to prevent a death, the conduct of known individuals will usually be under scrutiny, as well as the systems within which they operated. In cases where there is little doubt that a killing was unlawful there may be evidence of how the deceased came by his or her death which implicates identified individuals. That, however, is different from an inquest which follows a comprehensive police investigation which has been unable satisfactorily to identify those responsible with a view to prosecution and it is being suggested that the inquest should independently conduct a fresh criminal investigation.

54. It is as well to bear in mind the difference between the procedural obligation to investigate deaths for which the state may bear responsibility, and the substantive obligation on the state to have in place an effective system for enforcing the law. That necessarily includes a need to have in place a system which investigates suspected homicides. The distinction is reflected in the description of the two obligations by Lord Bingham in paragraphs [1] and [2] of his opinion in *Middleton*. It is the police who investigate suspected homicides. As the High Court recognised, there is no legal duty on a coroner to undertake a further investigation simply because the police inquiries have failed to deliver a suspect for trial. When Lord Bingham said in *Middleton* at [20] that "in England and Wales an inquest is the means by which the state ordinarily discharges [the procedural] obligation, save where a criminal prosecution intervenes or a public inquiry is ordered into a major accident", he was referring to the procedural obligation which attaches to suspected state responsibility. That is the procedural obligation he had described in [2]. He was not suggesting that an inquest is the ordinary way in which the substantive obligation, which includes effective law enforcement, is discharged.

55. For centuries, both before and long after there was an established police force, it was a function of an inquest to investigate homicides and to commit for trial those the jury concluded were responsible. That jurisdiction was abolished by section 56 of the Criminal Law Act 1977 and the prohibitions against identifying those guilty of homicide then introduced.

56. At the resumed inquests, what will be the "the central issues"? The statutory questions remain. In the present case, the stark answers to those questions are known. The identities of the deceased are known; the dates and the places of the deaths are known and it is known that all the deceased were unlawfully killed. An issue identified both by the Senior Coroner who directed the resumption of the inquests and the Coroner concerns prior knowledge. Others may emerge. But the identity of those responsible for the bombings is not a central issue in the inquests. It is difficult to criticise the Coroner, still less to stigmatise as unlawful a decision to refuse to explore a distinct question which the jury is prohibited by statute from answering.

57. In our judgment the Coroner's statement of "the meaning of scope", in paragraphs [18] and following of his ruling (see [20] above) was correct. Moreover, however the test is formulated, his decision in the present case to exclude the Perpetrator Issue from the scope of this inquest was not, in our view, unlawful in the public law sense.

The application to cross-appeal

58. The issue whether the High Court should have concluded that the Coroner was obliged to explore the Perpetrator Issue does not arise in view of our conclusion on the appeal.

59. We add a few words on the article 2 issue. The Coroner correctly distinguished between the procedural obligation to investigate deaths for which the state may bear responsibility and the more general obligation to enforce the criminal law.

60. The fact that extensive criminal investigations have not delivered convictions for the atrocity perpetrated in Birmingham does not begin to establish that proper investigations have not been carried out. We agree with the conclusion of the Coroner in paragraph [91] of his ruling (see paragraph [30] above) that article 2 does not dictate that these inquests must explore the Perpetrator Issue. There may be cases where it can be credibly shown that a police investigation, or prosecutorial consideration, has been so incompetent that the substantive law enforcement obligation has not been satisfied. Ordinarily, the appropriate remedy in those circumstances would be for a further police investigation or prosecutorial review.

61. In any event, in this case, there can be no real possibility that the police investigations can be supplemented by inquiry at these inquests for the reasons identified in paragraphs [57] and [58] of judgment of Simon LJ to which we have already referred. The conclusion of the Director of Public Prosecutions that there is no basis upon which further prosecutions could properly be brought cannot sensibly be impugned and the idea that these inquests, after 44 years, could unearth further evidence capable of bringing perpetrators to criminal justice cannot reasonably be sustained.

62. The more general obligation to investigate these murders arising from the substantive obligation to have in place procedures and means of enforcement has been met by the various police investigations, and the involvement of the Director of Public Prosecutions.

Conclusion

63. For these reasons, the Coroner's appeal is allowed; his ruling of 3 July 2017 is restored. The Respondents' application for permission to bring a cross-appeal is refused.