Neutral Citation Number: [2026] EWCA Civ 499

Case No: CA-2025-000589

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
His Honour Judge Sephton KC sitting as a Judge of the High Court
AC-2023-MAN-000263

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/04/2026

Before :

LORD JUSTICE NEWEY
LORD JUSTICE EDIS
and
LADY JUSTICE WHIPPLE

- -

Between :

THE KING **On the application of Sharon O'Brien**	**Appellant**
- and -	
HM ASSISTANT CORONER FOR SEFTON, KNOWSLEY AND ST HELENS	**Respondent**
- and -	
THE CHIEF CONSTABLE OF MERSEYSIDE POLICE	**Interested Party**

- -
- -

Kate Stone (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Louis Browne KC and **David Illingworth** (instructed by **Corporate Legal Resources Sefton Council**) for the **Respondent**
Robert Cohen (instructed by **Legal Services Department, Merseyside Police)** for the **Interested Party**

Hearing dates : 10 March 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22 April 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Edis:

1. Linda O'Brien died in the early hours of 9 May 2020. She fell to her death from the window of her flat at 0243am. It appears that Alan McMahon was in the flat at the time. He left the building at 0257am, and called the emergency services at 0303am. They attended and confirmed that she had died at 0312am. Alan McMahon is no longer an interested party in the judicial review or this appeal, but he remains an interested party in the Inquest.

2. A coronial investigation was opened on 14 May 2020 and on 15 March 2023 the respondent ("the coroner") issued a decision after receiving written submissions. He decided that Alan McMahon was an "interested person" as was Linda O'Brien's next of kin, Sharon O'Brien, and the Merseyside Police. He decided that the Inquest should not be heard with a jury and that Article 2 of the European Convention was not engaged. These decisions impacted his third decision, which was a decision about the scope of the Inquest. Fundamental to all of them was his view of the causation of the death, which is the subject of this appeal.

3. This is an appeal against the dismissal by His Honour Judge Sephton KC, sitting as a Judge of the High Court, ("the judge"), of Sharon O'Brien's claim for judicial review. In that claim she sought to challenge the decision of the coroner that the scope of the Inquest into the death of Linda O'Brien should be restricted to the events on the 8 and 9 May 2020. This meant, the coroner said, that earlier events on and after 7 April 2020 did not "require extensive investigation" and "mention of such events will be for background purposes and information". He concluded that "The Scope of the Inquest will focus upon events of the 8th and 9th May 2020 in particular."

4. A number of challenges were made in the claim form for judicial review of those decisions, but permission was granted for only one by His Honour Judge Davies, sitting in the High Court. He ordered:-

> The application for permission to apply for judicial review is: (i) granted in relation to ground 1 (allegedly prematurely and irrationally deciding that there is no causative connection between the acts and omissions of Merseyside Police and the death of Linda O'Brien and thereby unlawfully limiting the scope of the investigation); but (ii) refused in relation to ground 2 (proceeding with inquest without adequate documentary evidence) and ground 3 (proceeding with inquest without relevant oral evidence).

The facts

5. There has been an investigation by the Independent Office of Police Complaints (IOPC), and there are a number of witness statements. The facts have not been judicially determined, and the narrative I am about to set out is designed to explain the coroner's decision on scope, and the challenge to it.

6. Linda O'Brien and Alan McMahon had been in an intimate relationship. Anthony Larkin, a neighbour, who knew both of them before it started said:-

> "..from the very start I would describe this as a very toxic relationship. Alan was almost from the outset as far as I could see controlling and on occasions violent towards Linda."

7. He describes two incidents where Alan McMahon was arrested "due to his treatment of Linda", and sets out his belief that "he has been to prison for his treatment of Linda and only got out about 6 weeks ago" in his statement dated 9 May 2020. He says that he knew of a restraining order but said "unfortunately she would let him come to the address and in effect breach the order." He called the police on 7 April 2020 when he heard Linda O'Brien screaming in the flat and was surprised the next day to see that Alan McMahon had not been arrested for breaching the order.

8. Anthony Larkin says that Linda had told him that she had looked for possible escape routes from her flat because she knew that Alan McMahon would lock her in.

9. Nicola Elliott was a friend of Linda's. She made a statement describing the toxic relationship and controlling behaviour of Alan McMahon, which deals with one specific incident of violence. After that, she says:-

> "She had been keeping the flat in darkness so he would think she was out if he came back. I pleaded with Linda to stay away from Alan as he would end up killing her. Linda agreed but then said she had an escape route if he did come back. Linda showed me the drain pipe near the window in the small spare bedroom."

10. We were told that this was the window from which Linda O'Brien had fallen to her death.

11. The judge set out further relevant facts in these terms:-

> On 14 December 2017, a restraining order was made against Mr McMahon preventing him from contacting Linda for a period of 18 months.
>
> On 25 August 2019, Mr McMahon was arrested on suspicion of assault and theft from Linda. PC Lee Wood was the officer tasked with the investigations into the allegations of theft and assault. On 26 August 2019, Mr McMahon was sentenced to 22 weeks' imprisonment for assault occasioning actual bodily harm. On 2 September 2019, the Merseyside Magistrates' Court made a restraining order against Mr McMahon for 5 years. It read (so far as relevant):
>
> > "This order is made to protect Linda O'Brien from further conduct which amounts to harassment or will cause fear of violence. Details of the Order: not to approach, contact or communicate with Linda O'Brien by any means whatsoever. not to enter Greenall Court, Prescot."
>
> At 00:40 on 7 April 2020, Anthony Larkin made an anonymous 999 call to Merseyside Police to report an ongoing domestic

incident at Linda's flat. Mr Larkin said that he could hear screaming. As a result of the call, four police officers attended at Linda's flat: PC Hilton, PC Edwards, PC Judge and PC Dowdall. They found Linda and Mr McMahon present. The officers said that Mr McMahon appeared to be intoxicated. Linda was calm, and according to PC Judge, she said that nothing had happened and she could not understand why the police had been called. None of the officers was aware that Mr McMahon was the subject of a restraining order when they attended on 7th April. PC Judge checked on the police national computer ("PNC") and on the STORM log; PC Hilton checked on NICHE and on the PNC; PC Dowdall checked on the STORM log. None of these checks contained any mention of Mr McMahon being subject to the restraining Order. The officers each said that had they known that Mr McMahon was present at Ms O'Brien's flat in breach of a restraining order, they would have arrested him.

PC Judge completed a Vulnerable Person Referral Form ("VPRF") in relation to Linda's involvement in the incident. The form was not completed in Linda's presence and the form did not record (as it ought to have done, had it been completed accurately) that a restraining order had been made against Mr McMahon in order to protect Linda.

The incident was not referred to the Multi-Agency Risk Assessment Conference; it ought to have been referred to the local Independent Domestic Violence Advocate, but was not.

On 15 April 2020, PC Lee Wood wished to notify Linda that police intended to take no further action in relation to the alleged theft in August 2019. In seeking contact details for Linda, PC Wood discovered that Mr McMahon had been seen at her house on 7 April 2020. He enquired whether Mr McMahon was being prosecuted for breach of the restraining order. By email dated 27 April 2020, PC Wood invited PC Dowdall to provide a witness statement for the purpose of prosecuting Mr McMahon for breach of the restraining order. He followed up his enquiry (this time copying in PC Judge) on 5th May 2020.

On 9 May 2020, Mr McMahon called the emergency services. He had been present when Linda exited a window in her flat and fell, sustaining injuries that proved to be fatal. The police attended and Mr McMahon was arrested on suspicion of her murder. Mr McMahon was remanded on bail following his arrest. He was later arrested for theft and multiple breaches of the restraining order.

Dr Rogers undertook a *post mortem* examination of Linda's body. He commented:

> "…the majority of the injuries to Linda O'Brien have been caused as a result of a fall from height but I am concerned by some of the injuries to the right side of the face which in my view would be consistent with assault injuries such as punches/slaps and there was evidence at post mortem that prior to her exiting the window she appears to have been struck with a weapon to the left shoulder/arm area and lower right shin/foot consistent with the broken mop at the scene."

> Dr Rogers recorded that the level of alcohol in the blood was 193 mg/100 ml. He commented that this was almost 2 ½ times the legal limit for driving and he would expect that there would be evidence of significant intoxication.

> On 19 June 2020, Mr McMahon was sentenced to 20 months' imprisonment for breach of restraining order and theft. The accusation of murder was not proceeded with.

12. Surprisingly, there is no evidence about the PNC, and what it actually showed on 7 April 2020. Nor is there any evidence about Alan McMahon's previous criminal history. Sharon O'Brien learned from press reports of the sentencing hearing on 19 June 2020 that he has multiple previous convictions, in addition to that on 26 August 2019 referred to by the judge. No details of these were available to the coroner or the judge, nor are they available to us.

13. In his letter in pre-action correspondence before the judicial review proceedings, the coroner gives this summary of the CCTV footage of events immediately prior to Linda O'Brien falling to her death:-

> "The initial CCTV from Knowsley Council was enhanced and shows Linda opening the bedroom window from inside, climbing up onto the sill, sitting with her legs dangling and then lowering herself out of the window, part turning, and part holding on.
>
> Linda then fell to their death. There is no obvious sign of any third party at the window. It is not possible to see if there is anyone on the inside of the window."

14. That is consistent with Linda O'Brien attempting to escape from the flat because of Alan McMahon's presence in it, using the escape route she had indicated to Nicola Elliott. The pathologist's evidence suggests she had sustained injuries before she fell, including bruising to the right angle of the mouth, lip and chin which appeared recent and would be consistent with prior assault. A witness, Patricia Schoullar, who saw Linda O'Brien during the evening of 8 May, says that she saw no sign of any injuries on her face then. This raises the possibility that she had been the victim of a further violent assault by Alan McMahon and was attempting to escape from him when she died.

15. There is, therefore, a proper basis for investigating whether any conduct of Alan McMahon had caused Linda O'Brien to fall while trying to escape from her flat. That no doubt is why he is an interested party.

16. The causation question which the appellant says should be investigated as part of the inquest is whether anything could or should have been done on or after 7 April 2020 which would have meant that Alan McMahon was not in Linda O'Brien's flat on the night she died. This involves a consideration of whether, if the police officers attending on 7 April had known of the restraining order, he would have been arrested and charged with the result that he would have been either on remand awaiting trial or serving a sentence for breach on 9 May 2020. 31 days elapsed between the two incidents.

The Coroner's Decision

17. Sharon O'Brien wanted the Inquest to examine whether the death resulted from any act or omission by a Police Officer. Section 7(2)(b) of the Coroners and Justice Act 2009 requires the coroner to sit with a jury if they have reason to suspect that the death resulted from any act or omission by a Police Officer in the purported execution of the officer's duty. The coroner did not say whether he held such a suspicion. Instead he decided:-

> "It is my opinion that death did not result from an act or omission of a Police Officer."

18. He explained this decision further as follows:-

> "In relation to my determining Coronial Causation between the events occurring on 7th April 2020 and 9th May 2020:
>
> • The Standard of Proof is on The Balance of Probabilities;
>
> • The Threshold of Proof is that the events and Police involvement on 7th April 2022 must have contributed more than "Minimally" to the death on 9th May 2022;
>
> • The Causation question is whether, on the Balance of Probabilities, the Event or Conduct in question more than Minimally, Negligibly or Trivially contributed to the death; and
>
> • The event or conduct (on 7th April 2022) must make an actual and material contribution to the death of the deceased.
>
> In my opinion, on the evidence before the Court, there is no Coronial Causation established linking events involving Police Officers on 7th April 2022 to those events on 9th May 2020 resulting in the death.
>
> For these reasons, the Inquest will be heard by The Coroner sitting alone."

19. His decision on Scope, which is the subject of the judicial review challenge, immediately follows that passage in the Decision Notice:-

> "**6. Scope**
>
> As Counsel have correctly stated, it is for the Coroner to "set the bounds of the Inquiry". The Coroner must act reasonably and fairly both in deciding what matters will be investigated and which witnesses are to be called. Fairness will mean that the persons whose acts or omission may have caused or contributed to the death are advised of the situation and The Coroner must exercise discretion reasonably and fairly.
>
> For the above reasons I directed, at the PIRH held on 19th January 2023, that Mr McMahon will be an IP and be called to the Inquest to give oral evidence .
>
> The events of 7th April 2020 and the Restraining Order made against Mr McMahon will not require extensive investigation at the Inquest and mention of such will be for background purposes and information..
>
> The Scope of the Inquest will focus upon events of 8th and 9th May 2020 in particular."

20. The coroner sought to amplify his decision in his letter in pre-action correspondence before the judicial review proceedings. He said this:-

> 62. As to causation, and as is clear from his Directions Notice the Assistant Coroner again accepted the submissions of Merseyside Police, see his Notice; paragraphs 4 and 5.
>
> 63. The submissions he accepted were as follows:
>
> (a) None of the individual errors/issues can arguably be said to have been causative of Linda's death more than a month later.
>
> (b) A "best case" scenario would have resulted in officers arresting Mr McMahon for breach of the Restraining Order on 7/4/20.
>
> (c) However, it is pure speculation that his arrest would have meant Mr McMahon would not have been with Linda on the morning of 9 May 2020.
>
> (d) It simply cannot be known that such an arrest would have resulted in Mr McMahon's incarceration before or on the date of death or that it would have deterred or prevented his reattendance at the address on the date of death (in particular where his disobedience to previous orders is so clear); or in fact that his presence at the address on 9/5/20 was the cause of death.
>
> (e) The appropriate systemic framework was present and there is no sufficient causative link in any event, thus there is no arguable breach of the "general/systemic duty"

> (f) It is not arguable that the police failed to take steps within the scope of their powers which would have avoided the risk.
>
> (g) Although the Restraining Order was overlooked and Mr McMahon was not arrested on 7/4/20, this oversight was recognised by PC Wood just a few days later. He took appropriate steps to arrange the arrest of Mr McMahon for breach. Those steps, which would likely have resulted in action within a month of the breach, were sufficient and proportionate given: (a) the operational demands on police in general; and (b) given that Mr McMahon's breach on 7/4/20 arose from simple presence at the prohibited address, and not any further perpetration of violence on that occasion.
>
> (h) In any event, it is pure speculation that the arrest of Mr McMahon on 7/4/20 would have prevented his presence at the address on 9/5/20, or that his presence was causative of death."

The judge's decision

21. The judge dismissed the claim for judicial review on the single ground for which permission was granted. He directed himself that the law on causation for the purposes of an Inquest is explained in *R (Tainton) v HM Coroner* [2016] EWHC 1396 (Admin) and identified two passages in particular as being of significance, [41] and [62]. At [41] Sir Brian Leveson PQBD said:-

> **"**Third, it is common ground that the threshold for causation of death is not the same thing as the standard of proof required to prove causation of death. In cases such as this, the latter is proof on the balance of probabilities. It is agreed that the threshold that must be reached for causation of death to be established, is that the event or conduct said to have caused the death must have "more than minimally, negligibly or trivially contributed to the death" (see e.g. *R (Dawson) v HM Coroner for East Riding and Kingston upon Hull Coroners District* [2001] EWHC Admin 352; [2001] Inquest LR 233, per Jackson J at paras 65–67). Putting these two concepts together, the question is whether, on the balance of probabilities, the conduct in question more **t**han minimally, negligibly or trivially contributed to death."

22. At [62] he said:-

> "The conduct or event must make an actual and material contribution to the death of the deceased. As Ms Dolan pointed out, it is not enough, in the present context, to show that a particular event, or particular conduct, deprived the deceased of an increased chance of life or, to put the point the other way round, made his death more probable than it would otherwise have been."

23. The second of these passages refers to the "context" which in that case was a late diagnosis of a terminal illness. There was no doubt that earlier treatment could have increased the chances of a longer life, but there was no basis on which a court could conclude that it would have actually delayed death, on the balance of probabilities. The court in *Tainton* upheld a decision that causation could not be established on these facts. In other contexts (including the present) the passage at [62] does not add to or amend [41].

24. Therefore, the question for a jury to decide, if the causation issue were left to them, would be whether an arrest of Alan McMahon on 7 April 2020 would, on the balance of probabilities, have prevented the death of Linda O'Brien on 9 May 2020.

25. The judge did not address the ground for which permission for judicial review was granted. This was whether the coroner had prematurely and irrationally decided that there was no causative connection between the acts and omissions of Merseyside Police and the death of Linda O'Brien and thereby unlawfully limited the scope of the investigation. The judge rather approached the case on the basis that it was for him to decide what the evidence showed on the question of causation. The key paragraphs of the judgment are:-

> "41. We do not know what would have happened if Mr McMahon had been arrested. It is not known whether the breach of the restraining order would have been prosecuted, and if so, when or what Mr McMahon's plea would have been. I consider it likely that he would have been released on bail following his arrest because the Bail Act 1976 applies a presumption in favour of bail and because, later on, Mr McMahon was released on bail after he had been arrested for the rather more serious charge of murder. We do not know the effect that conditions of bail might have had – a relevant consideration, given that Mr McMahon appears to have paid scant regard to the restraining order which forbade him from going to Linda's flat. If Mr McMahon had been sentenced before 9 May, it is not known what sentence would have been passed. Although I agree with the remarks that HHJ Davies made when granting permission that, having regard to the Sentencing Guidelines, a custodial sentence would have been a real possibility, it is in my judgment no more than a possibility.
>
> 42. I accept that it is *possible* that if Mr McMahon had been arrested before 9 May, he might have been imprisoned either on remand or serving a sentence on 9 May and it is possible that Linda's death would not have occurred. However, I accept the submission that whether he *would* have been in custody on 9 May is entirely speculative. I do not believe that it is possible to obtain reliable evidence that would enable the coroner or the jury to be satisfied on the balance of probabilities that Mr McMahon *would* have been in custody on 9 May, had he been arrested earlier. I reject the suggestion that the coroner ought to receive opinion evidence about the likely progress of any prosecution

> following arrest; such evidence would, in my judgment, be purely speculative and of no probative value.
>
> 43. In my judgment, it could not be said that, on the balance of probabilities, Mr McMahon *would* have been in custody on 9 May, had he been arrested on or after 7 April. It follows that any failure to arrest Mr McMahon prior to 9 May cannot be proved to have contributed more than minimally, negligibly or trivially to Linda's death because the causative link between arrest and incarceration on the relevant date cannot be established on the balance of probabilities."

Discussion

26. As I have said at [25], the judge made his own findings of fact on the evidence. I consider this to have been an error of law. The judge was not there to find the facts. He was there to review the approach of the coroner to determine whether the coroner had reached his decision on scope "prematurely and irrationally". For this reason, I consider that this court should review the decision of the coroner for itself to determine whether the ground of challenge is made out.

27. The difficulty with the coroner's decision on causation, as originally expressed, is that it is unexplained. The Decision Notice identifies the legal test and then simply says:-

> "In my opinion, on the evidence before the Court, there is no Coronial Causation established linking events involving Police Officers on 7th April 2022 to those events on 9th May 2020 resulting in the death."

28. When writing to Sharon O'Brien's solicitors in the pre-action correspondence, the coroner added some reasoning, see [19] above. He said, among other things:-

> "(d) It simply cannot be known that such an arrest would have resulted in Mr McMahon's incarceration before or on the date of death or that it would have deterred or prevented his reattendance at the address on the date of death (in particular where his disobedience to previous orders is so clear); or in fact that his presence at the address on 9/5/20 was the cause of death."

29. The last clause of this sub-paragraph is difficult to follow. Why has Alan McMahon been treated as an "interested person" to be called at the Inquest to give evidence? There is a clear evidential basis for investigating at the Inquest whether his presence in the flat was a cause of death. That is what the Inquest as presently constituted will be about. The evidence suggests that Linda O'Brien sustained injuries which were not explained by her fall, and which were fresh; she fell when she was using the route by which she had planned to escape from him; he had a propensity to use violence against her when he was drunk; she is very likely to have been in fear of him and this explains why she tried to get away. Obviously, if his presence in the flat is not found to have been a causative factor in her death, then the steps available to the police to prevent him from being there will not be found to have contributed to it. However, the coroner was

clearly wrong, in his letter written after the event, to express a concluded view on this question as a reason for not investigating the role of the police.

30. I agree with the coroner that an arrest followed by a release on bail, with whatever conditions, would probably not have kept him away from Linda O'Brien's flat. The restraining order had failed to achieve this, and there is no reason why bail conditions would have been any more successful. This is why he would probably have been remanded in custody on 7 April.

31. I do not accept that it was right for the coroner, at any rate at this stage in the proceedings, to find that it could not be known whether arrest on 7 April 2020 would have led to Alan McMahon being in prison (on remand or serving a sentence) on 9 May. To take such a decision without even looking at his antecedent criminal history was premature and, in the present context, irrational. It appears that consideration of the Sentencing Guidelines only arose when the judicial review proceedings were underway, and Judge Davies raised them. Consideration of the outcome of the arrest which ought to have happened, involves consideration of materials which I shall describe, which neither the coroner nor the judge mentions.

32. Some evidence about what would have happened can be drawn from what did actually happen in August 2019. Alan McMahon was arrested on 25 August for assaulting Linda O'Brien and sentenced on 26 August for that offence. This means that he was, almost certainly, held overnight and produced at the Magistrates' Court where he pleaded guilty and was sentenced to 22 weeks' imprisonment. In those days, that would have caused him to be in prison for 11 weeks. The time between 7 April and 8 May is, as I have said, 31 days. If the same thing had happened again and he had been arrested on 7 April, the outcome for him would have been no better. In fact, some matters suggest that the outcome would have been worse for Alan McMahon if he had pleaded guilty on first appearance this time.

33. First, he was probably released at the half way point of the sentence, which would be around 11 November 2019. The total term expired in January, just a few weeks before the 7 April. This is a serious aggravating factor.

34. Secondly, this was now a breach of a restraining order, which may well be a more serious offence than the assault for which that sentence was imposed. In the absence of any investigation into events of 25 August 2019 the seriousness of that assault is difficult to assess. In the absence of his antecedents, again, a definitive view on the probable range of outcomes is difficult to form, but these absences could easily be corrected by an investigation. Merseyside Police, an interested party, will have this information readily to hand. It was premature to reach a conclusion about the probable course of events following the 7 April 2020 without conducting that straightforward investigation.

35. Sentencing for breach of a restraining order is governed by a Guideline which the sentencing court is required to follow. This is a matter of law which does not require evidence. The relevant Guideline was effective from 1 October 2018. It provides categories for culpability and harm. The court is required to select a starting point and sentencing range by selecting appropriate categories.

Culpability

In assessing culpability, the court should consider the intention and motivation of the offender in committing any breach.

A

- Very serious and/or persistent breach

B

- Deliberate breach falling between A and C

C

- Minor breach
- Breach just short of reasonable excuse

Harm

The level of harm is determined by weighing up all the factors of the case to determine the harm that has been caused or was intended to be caused.

Category 1

- Breach causes very serious harm or distress

Category 2

- Cases falling between categories 1 and 3

Category 3

- Breach causes little or no harm or distress*

* where a breach is committed in the context of a background of domestic abuse, the sentencer should take care not to underestimate the harm which may be present in a breach

36. This would probably have been a culpability B offence because it may not have been dealt with as a "very serious or persistent breach" (category A). In fact, Alan McMahon did repeatedly breach this order, according to Anthony Larkin. It was not a minor breach or one where the breach was just short of a reasonable excuse (category C). The fact that Linda O'Brien was prepared to tolerate his presence is not a reasonable excuse, or anything like it. Controlling men are able to coerce partners into behaviour which may well be damaging to them and expose them to risk. The fact that she developed an escape strategy shows what she really thought about him. It was category 2 for harm because it did not involve very serious harm or distress, but it was not an offence involving little or no harm or distress. In making that last judgment, the court is required by the Guideline to consider that "where a breach is committed in the context of a background of domestic abuse, the sentencer should take care not to underestimate the harm which may be present in a breach". Again, that reflects what is known about

coercive relationships. That means that the starting point was 12 weeks' imprisonment with a range extending up to 1 year.

37. There were serious aggravating factors, already identified, which required an increase. The Guideline lists such factors and says:-

> "The tables below contain a **non-exhaustive** list of additional factual elements providing the context of the offence and factors relating to the offender. Identify whether any combination of these, or other relevant factors, should result in a further upward or downward adjustment. In some cases, having considered these factors, it may be appropriate to move outside the identified category range."

38. The aggravating factors in the list were "previous convictions having regard to a) the **nature** of the offence to which the conviction relates and its **relevance** to the current offence; and b) the **time** that has elapsed since the conviction" and:-

- Breach committed shortly after order made

- History of disobedience to court orders (where not already taken into account as a previous conviction)

39. The salience of these factors would be affected by the previous convictions, but these appear to be seriously aggravating from what is now known about them. The domestic abuse context has already been taken into account in assessing the offence as a B2 offence. If there are previous convictions for domestic abuse offences (especially involving Linda O'Brien) in addition to the August 2019 offending, this would further aggravate the sentence.

40. The Guideline on Imposition of custodial and community sentences would strongly suggest that the sentence should not have been suspended. Again, the antecedent record of Alan McMahon would be relevant to that question.

41. Accordingly, if Alan McMahon had been sentenced prior to 9 May 2020 it is not merely probable, but highly likely that Alan McMahon would have been in prison on that date. This would have required him to plead guilty to the charge because no trial would have taken place before 9 May. He had been caught red handed by four police officers, and may have elected to secure his credit against the inevitable custodial sentence. That is what he did the previous August. The PNC antecedents printout would reveal whether it was his habit to plead guilty when charged with criminal offences. A reasonable assessment would be that this would have been an immediate sentence at the top of the category range of 12 months, less one third for that early plea so 8 months. He would have served half of that, and would not have been at liberty after 31 days. Release by that point would require a very substantially shorter sentence which is unlikely.

42. This assumes that if he had been arrested he would have been charged and prosecuted. There is no reason to suppose that if he had been arrested, he would not have been charged and brought to the court on the following day. The judge said that it is not known whether the breach would have been prosecuted, but did not explain why the Crown Prosecution would or might have failed to apply the Code for Crown

Prosecutors, as it is obliged to do. This lays down a two part test. The first part, which requires a realistic prospect of conviction, was satisfied. The evidence was overwhelming. The second part requires a decision that a prosecution would be in the public interest. It is simply inconceivable that any CPS lawyer could have thought that this was not satisfied. The judge was wrong to say that *he* did not know whether a prosecution would have followed from an arrest. This is an example of the way in which the judge approached his task. He was required to consider whether the coroner's decision was lawful, rather than to take his own decision on factual issues. The coroner did not express any doubt about the likelihood of arrest and prosecution following the events of 7 April; indeed, he did not mention this issue in his Decision Notice or in his subsequent letter.

43. The next question which requires consideration is what might have happened if Alan McMahon had not pleaded guilty. The court would have decided whether to accept jurisdiction or send the case to the Crown Court, and he would have had the right to elect trial by jury if he wanted to. Whichever mode of trial was decided, it is not likely the trial would have been concluded by 9 May, so the issue here is whether bail would have been granted. Again, the coroner does not appear to have considered this question, but the judge did place importance on his view of it. He said that he was able to form a conclusion on the balance of probabilities that it was likely bail would have been granted. He said that this was because the Bail Act 1976 provides a presumption in favour of bail, and because Alan McMahon was released on bail after he had been arrested for the "rather more serious charge of murder". Again, with respect to the judge, this reasoning is not sustainable. The presumption in favour of bail in the 1976 Act applies in almost all cases, but yet people are remanded in custody. This is because there are statutory grounds which, if present, enable the court to remand in custody. One of these applies where there are substantial grounds for believing that the defendant would commit a further offence while on bail. The coroner had relied on Alan McMahon's "disobedience to previous orders" in his pre-action correspondence. This meant that he felt that he would continue to breach the restraining order if granted bail. This was not an irrational conclusion, and if the magistrates' court had come to the same view it is probable that bail would have been refused. The judge fell into error in relying on the grant of bail by the police during the investigation into the allegation of murder. Alan McMahon was never charged with murder and the police had no power to do anything other than grant him bail, or release him unconditionally under investigation, once it was no longer necessary or possible to detain him under the Police and Criminal Evidence Act 1984. Again, in making this error the judge was not reviewing the decision of the coroner, but substituting his own view.

44. Both the coroner and the judge viewed the criminal justice process as if it were a random affair whose outcomes could not be predicted. It is true that other decisions could be taken than those which I have indicated were probable. The police could have decided to take no further action against Alan McMahon. They could have released him on 7 April either under investigation or on police bail with a view to a written charge being issued under section 29 of the Criminal Justice Act 2003. The Crown Prosecution Service might have decided not to charge him. The court might have granted bail or imposed a non-custodial sentence. However, none of these possibilities prevents an assessment of what would probably have happened. That assessment should proceed on the basis that the decision-makers, the police, Crown Prosecution Service and the court, would have acted rationally on the evidence available and would have been aware

of the domestic abuse context in which the offence had been allegedly committed. They would all have been concerned to protect Linda O'Brien from this abusive situation. It is not unusual to find people in her position tolerating the continued presence of their abuser and placing themselves at risk. The reasons for this are complex, but do not necessarily mean that this risk is not a real one. Any court dealing with domestic abuse knows this, and is required to follow the Sentencing Council Guideline on "Domestic Abuse: overarching principles". This has been in force since October 2018 and says:-

> "9. The domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship. Additionally, there may be a continuing threat to the victim's safety, and in the worst cases a threat to their life or the lives of others around them.
>
> 10. Domestic abuse offences are regarded as particularly serious within the criminal justice system. Domestic abuse is likely to become increasingly frequent and more serious the longer it continues, and may result in death. Domestic abuse can inflict lasting trauma on victims and their extended families, especially children and young people who either witness the abuse or are aware of it having occurred. Domestic abuse is rarely a one-off incident and it is the cumulative and interlinked physical, psychological, sexual, emotional or financial abuse that has a particularly damaging effect on the victims and those around them.
>
> 11. Cases in which the victim has withdrawn from the prosecution do not indicate a lack of seriousness and no inference should be made regarding the lack of involvement of the victim in a case.
>
> 12. A sentence imposed for an offence committed within a domestic context should be determined by the seriousness of the offence, not by **any** expressed wishes of the victim. There are a number of reasons why it may be particularly important that this principle is observed within this context:
>
> - The court is sentencing on behalf of the wider public
> - No victim is responsible for the sentence imposed
> - There is a risk that a plea for mercy made by a victim will be induced by threats made by, or by a fear of, the offender
> - The risk of such threats will be increased if it is generally believed that the severity of the sentence may be affected by the wishes of the victim."

45. To find that the decision-makers would have applied these principles rationally and have made decisions in such a way that Alan McMahon was in custody on 9 May 2020 is not, as the judge thought, to reach a conclusion which is "entirely speculative". There is no indication that the coroner had the Sentencing Guidelines and Code for Crown Prosecutors I have mentioned in mind, or knew anything about sentencing practice and the making of charging or bail decisions. Many courts will have the necessary expertise to reach sound conclusions without the benefit of any evidence on these questions, but if a court considers that it does not, then expert evidence is admissible and available. The judge decided that evidence about the likely progress of any prosecution following arrest would be "purely speculative and of no probative value". This, presumably, was so whatever the evidence said and whoever gave it. I would readily accept that courts should refuse to accept evidence which may be properly so described, and should always manage expert evidence carefully so as to ensure it remains within proper bounds. These powers mean that the court will ensure that it receives expert evidence of opinion which fills a gap in its knowledge. Lord Justice Lawton, giving the judgment of the court in a criminal case, explained the admissibility of expert evidence in *R v Turner* [1975] QB 834 in this way:-

> "The foundation of these rules was laid by Lord Mansfield in *Folkes v. Chadd* (1782) 3 Doug.K.B. 157 and was well laid: the opinion of scientific men upon proven facts may be given by men of science within their own science. An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."

46. Expert evidence is not, of course, confined to matters of "science", but the principle there explained holds good. I therefore reject the judge's blanket ban on all expert evidence on the question of causation. In any event, I strongly suspect that if the coroner had obtained the key document in the case, Alan McMahon's antecedents, it would have become rapidly clear that he would not have been granted bail, and that, when sentenced, he would have received an immediate custodial sentence of some length. The conclusions reached by the coroner and the judge in the absence of that document are, in my judgment, flawed on that ground alone.

47. For these reasons I am unable to accept the judge's answer to the question posed by the ground on which HHJ Davies had given permission. This was expressed in this sentence:-

> "Since I do not believe that it is possible to obtain reliable evidence that would enable the coroner or the jury to be satisfied on the balance of probabilities that Mr McMahon would have been in custody on 9 May, had he been arrested earlier, I think that the coroner was entitled to reach the conclusion that he did. I do not consider his decision to be premature or irrational."

48. I accept that the coroner was entitled to decide the scope of the Inquest, and to decide what evidence should be adduced at it. This is a matter for him to decide, and he has a wide discretion. However, here that discretion was exercised on the basis of the

coroner's decision that it could not be established on the balance of probabilities that arresting Alan McMahon on 7 April would have resulted in his detention at the time of Linda O'Brien's death. He reached that decision on what I have found to be a false view of the facts, and in ignorance of key materials. He said in his letter: "It simply cannot be known that such an arrest would have resulted in Mr McMahon's incarceration before or on the date of death". This was not the right test. It cannot be "known", if that means a higher standard than the balance of probabilities, but it is the balance of probabilities which is the test here.

49. The coroner's decision not to sit with a jury resulted from a finding that there was no reason to suspect that an act or omission of a police officer caused the death. This is a lower standard still. In fact there is a reason to suspect that the restraining order was there to be seen on the PNC by the officers who attended on 7 April 2020 and that as a result of their failing to see it they omitted to arrest Alan McMahon. They agree that if they had known of the order that would have been their duty and they would have done so. Had they done so there is a proper basis on which an Inquest could determine, without speculation, that Alan McMahon would not have been present in the flat on 9 May 2020. If it is found, as it might be, that his presence made a material contribution to Linda O'Brien's decision to leave her flat through the window, then there is a basis on which it could properly be found that the omission caused the death.

Conclusion

50. I would therefore allow this appeal and quash the decision of the coroner in the Decision Notice and remit the matter to be reconsidered by another coroner. This will involve a reconsideration of the decisions about the need for a jury and whether Article 2 is engaged, since those were premised on the coroner's premature decision about causation. In doing so I add that I do not agree with the judge that including the conduct of the police within the scope of the Inquest would have the consequence he feared:-

> "The investigation proposed by the claimant would be extremely wide ranging and complex. Since the inquest is an "inquisitorial and relatively summary process" and "not a surrogate public inquiry," a decision to limit the scope of the enquiry to avoid this expensive and time-consuming investigation is consistent with the purpose of an inquest and could not be said to be irrational."

Lady Justice Whipple

51. I agree.

Lord Justice Newey

52. I also agree.