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Case No: CO/10723/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

26 April 2012

Before :

MR JUSTICE SILBER

- -

Between :

The Queen (on the application of MEDIHANI)	**Claimant**
- and -	
H.M. CORONER FOR INNER SOUTH DISTRICT OF GREATER LONDON	**Defendant**

- -
- -

Tim Owen QC and Leslie Thomas (instructed by **Ziadies**) for the **Claimant**
Jonathan Hough (instructed by **Southwark Council Legal Services Department**) for the **Defendant**

Hearing date: 29 March 2012

- -

Approved Judgment

Judgment Approved by the court for handing down.

MR JUSTICE SILBER:

I. Introduction

1. During the afternoon of 2 June 2008, Thomas Nugesse, a young man of 21 years of age murdered Arsema Dawitt, who was then just 15 years of age and who I will refer to without any disrespect simply as "Arsema". In the period before her death, Arsema had developed a friendship with Nugesse, but in the weeks prior to Arsema's death, Nugesse had become increasingly obsessed with her and he had behaved in a way, which has been described as jealous and controlling.

2. Having stabbed Arsema to death, Nugesse then handed himself into the police and he was remanded in custody. On 5 June 2008, the District Coroner opened an inquest into the death of Arsema and adjourned it pending criminal investigations and proceedings. On the night of 24/25 June 2008, Nugesse was found hanging in his cell having suffered serious brain damage. On 19 May 2009, the Recorder of London sitting at the Central Criminal Court ruled that Nugesse was unfit to plead. On the following day, the jury heard evidence and then concluded that Nugesse had deliberately and unlawfully killed Arsema. The Recorder then imposed an indefinite hospital order on Nugesse.

3. On 3 June 2009, the Coroner was informed of the result of the criminal proceedings and decided against the resumption of the inquest. On 3 July 2009, the claimant, who is the mother of Arsema, made a complaint against the Metropolitan Police Service. On 20 November 2009, the Independent Police Complaints Commission ("IPCC"), who had been asked to investigate these complaints, produced a report. On 29 March 2010, the claimant's solicitors wrote to the Coroner asking her to reconsider the decision against resuming the inquest. By a letter dated 13 July 2010, the Coroner refused to do so and she explained her decision in terms, which are set out in paragraph 22 below.

4. The claimant, who is the mother of Arsema, challenges this decision of the Coroner and she seeks, among other things, a mandatory order that the inquest should be resumed. Permission to pursue this application was refused on paper by Mitting J, but permission was granted later after an oral hearing by Ouseley J.

5. The Commissioner of Police for the Metropolis has been joined in the proceedings as an Interested Party, but he has played no part in the present proceedings. The Coroner has been represented by counsel, who according to her counsel's skeleton argument "*takes a non-adversarial stance*" and only seeks "*to deal with points of specialist law on procedure, and to explain her reasoning*". I am grateful for the assistance that I have had from both her counsel Mr Jonathan Hough and also from counsel for the claimant Mr Tim Owen QC and Mr Leslie Thomas. The issues for me to determine as propounded by Mr. Hough are first whether the decision of the Coroner to conclude that the information before her did not establish an arguable case that officers of the Metropolitan Police Service had acted in breach of an operational duty to protect the life of Arsema pursuant to Article 2 was unreasonable; and second, whether her decision not to resume the inquest was unlawful.

II. The Factual Background

6. Arsema was born on 13 May 1993. In the period before her death, she developed a friendship with Nugesse. The claimant believes that their friendship was always platonic, although some witnesses later referred to him as her boyfriend. The evidence given at the criminal trial, which was before the Coroner, was that their relationship lasted for two years before Arsema broke it off which was something Nugesse found it difficult to accept and he, in the words of prosecution counsel, *"became increasingly jealous and possessive"*.

7. On 16 April 2008, Arsema was with friends at McDonald's in Camberwell when Nugesse entered and an altercation occurred in which Nugesse slapped Arsema apparently leaving her with a black eye. According to Arsema's cousin, Melyon Isak, this marked the end of their friendship.

8. Ms Isak said that a few days after that incident, Nugesse came to Arsema's house with flowers and letters, and he later started hanging around the flats where she lived. Ms Isak also claimed to receive a text in which Nugesse said she, that is Ms Isak, should not get involved, but that instead she should leave him, that is Nugesse, and Arsema to *"sort this out"* without her. During the course of the trial of Nugesse, a statement was read out from the claimant, which said that Nugesse had gone to Arsema's home with a mediator, but that Arsema had not been interested. The statement also recorded that Nugesse had telephoned and had made threats to Arsema.

9. On 30 April 2008, the claimant and Arsema went to Kennington Police Station accompanied by Ms Isak to report their concerns about Nugesse and they stayed for about 2 hours 40 minutes. They spoke with Station Reception Officer Johnson, who then made a report on the CRIS crime report database. There are variations in the accounts of the claimant and SRO Johnson as to what was said at that meeting, but it would appear that it is at least common ground as is stated in Mr. Hough's written skeleton argument that: -

> (i) SRO Johnson was told about the incident at McDonald's and the officer was shown a photograph on a mobile phone of Arsema's black eye;
>
> (ii) A text message on Ms Isak's phone from Nugesse telling her to leave him and Arsema to solve their problems was shown to SRO Johnson;
>
> (iii) the Claimant said that Nugesse was frightening Arsema by telephoning and insisting that she was '*his*';
>
> (iv) the Claimant said that after she had asked Nugesse what he would do, he had said '*I am going to sort her out and kill her and don't you worry about it*'; and that
>
> (v) there was no other report of threats or violence.

10. On 1 May 2008, DI Wood reviewed the CRIS report and set a list of actions for investigation. DC Nicholas was designated as the Investigating Officer and she then established where Arsema was at school and she then arranged for a school liaison officer, PC Geen to interview Arsema.

11. On 12 May 2008, PC Geen spoke to Arsema at school, who denied having been the victim of an assault and she instead claimed that her cousin had had a problem with Nugesse at McDonalds. She promised to provide contact numbers for her cousin.

12. On 16 May 2008, DS Gittins reviewed the case and gave instructions for further enquiries. DC Nicholas decided to contact Ms Isak, but she could not do so because she did not have the appropriate telephone number.

13. On 23 May 2008, Arsema provided to PC Geen what she said were the contact numbers for her cousin and they were passed on to DC Nicholas, who only picked them up as a message on 28 May 2008. On the following day, DC Nicholas called the number which she had been given, which proved to be Arsema's home number. On her account, she spoke to the claimant, whose English was poor, and who made a comment to the effect, *'It's OK, the boy has gone away'*, but the claimant denies having been contacted by the police.

14. PC Geen became aware that Arsema had not given him the correct number for her cousin, and he claims to have resolved to speak to Arsema on his next available working day, which was 3 June 2008. There was some evidence given at Nugesse's criminal trial which was neither specific nor detailed that Nugesse had been seen hanging around near the flats where Arsema lived after 30 April 2008. The claimant said that Nugesse had spoken to her on the telephone on one occasion and that he had then threatened to kill Arsema.

15. On 2 June 2008, Nugesse followed Arsema on her walk from the bus stop to home after school. He apparently confronted her at the entrance to the flats or in the lobby as she was going to the communal lift. Other residents heard voices raised in anger, and some screaming. At 3.50pm, a resident found Arsema's lifeless body in the lift, with multiple stab wounds. Nugesse telephoned the emergency services later that day and he admitted the killing, claiming that Arsema had been *'cheating on him'*. This comment indicates that he might well have been infatuated with her. As I have explained, he subsequently attempted suicide and in doing so, he suffered serious brain damage.

III. The Investigations by the IPCC

16. After the trial of Nugesse, the claimant made a complaint against the Metropolitan Police Service for failing to respond properly to the report made to SRO Johnson on 30 April 2008. The matter was referred to the IPCC, which had been set up by the Police Reform Act 2002. Section 10 of that Act stated that the IPCC had a duty to ensure public confidence was maintained in police complaints arrangements.

17. The terms of the investigation to be conducted by the IPCC related to the complaints of the claimant and its task was:-

> *"to investigate the circumstances surrounding the police contact with* [Arsema] *and her family concerning the behaviour of Thomas Nugesse prior to 2 June 2008"*.

18. Those terms of reference included considering whether the Metropolitan Police Service had failed to investigate reports made by Arsema to SRO Johnson at

Kennington Police Station on 30 April 2008 of assault, harassment and threats to kill by Nugesse. It was made clear that the investigation did not cover the criminal investigation into the death of Arsema, which remained the responsibility of the Metropolitan Police. In addition, this investigation was not focussing on the nature of the State's Article 2 obligation and whether it had been or was being complied with.

19. The conduct of a number of police officers was considered including the fact that SRO Johnson had failed to take appropriate action in response to Arsema's complaint, particularly regarding the allegations against Nugesse of harassing Arsema and of making threats to kill.

20. At the end of a detailed report dated 20 November 2009 running to 57 pages, the IPCC stated that:-

> *"280. Tragically through omission, misunderstanding and assumption the messages and information given by the family to Station Reception Officer Johnson on the night of 16 April 2009 at Kennington Police Station were not sufficiently acted upon by her and others for a variety of reasons."*

IV. The Coroner's Decision

21. The family of Arsema were dissatisfied with the IPCC report for many reasons, which included complaints that it did not consider the failure of the police at Kennington Police Station following the meeting on 30 April 2008 (i) to carry out any risk assessment concerning the actions Nugeese might take against Arsema; (ii) to consider adequately or at all the disparity in age between Arsema (who was then 14 years old) and Nugesse (who was 21 years old) which was relevant to the seriousness of the assault; and (iii) to refer to the appropriate steps which in the light of the information given to SRO Johnson should or could have taken by the police and such steps included taking witness statements from Arsema and her family, advising the family on how to ensure Arsema's safety as well as interviewing Nugesse. The claimant duly asked the Coroner in a letter of 29 March 2010 to reconsider her decision not to resume the Inquest. The Coroner was understandably very sympathetic to the family of Arsema, but having taken advice on whether she was entitled to resume the Inquest after having decided not to do so, she gave her decision in her letter of 13 July 2010 to refuse to resume the inquest.

22. The Coroner explained her decision in that letter by stating that: -

> *"On review of the IPCC report dated 20th November 2009, the court transcript and communications from Ziadies, I find that whilst there were failures in the way the police dealt with the allegation, as described in the report, there was nothing that they knew or ought to have known of a real or immediate risk to Miss Dawitt's life. The threats made appeared to have been made across the telephone rather than face to face, the assault was a "slap" which was later denied by Arsema when interviewed by the police School Liaison Officer. She also denied that she was being harassed. The report had been made 14 or 15 days after the alleged assault, and there was nothing*

> *to indicate that Arsema thought he would carry out his threats. The CRIS indicated that she only wanted him "warned". Further there was no other intelligence or risk assessment to indicate any real or immediate risk posed by Thomas Nugesse to Arsema Dawit's life."*

V. The Challenge to the Coroner's Decision

23. Section 16(3) of the **Coroners Act 1988** deals with the circumstances in which a Coroner can resume an adjourned inquest after criminal proceedings have been finished. It provides that:-

> *"After the conclusion of the relevant criminal proceedings…, the Coroner may, … resume the adjourned inquest if in his opinion there is sufficient cause to do so."*

24. The issue on this application is whether the Coroner was entitled to conclude that there was not "*sufficient cause*" to resume the inquest. It is common ground that the approach to be adopted in considering a challenge to a decision by a Coroner not to resume an adjourned inquest after criminal proceedings have finished, was explained by Simon Brown LJ (as he then was) in a judgment with which Sir Thomas Bingham MR and Farquharson LJ agreed in **R (Dallaglio) v Inner West London Coroner** [1994] All ER 139, 155, when he said that: -

> *"The decision to be made under s16 (3) is of a highly discretionary character and in no way circumscribed by a need to find exceptional circumstances, only 'sufficient cause'. The Coroner states that 'only rarely' are inquests resumed after criminal proceedings but, of course, the section itself envisages, rather than discourages such a course".*

VI. The Investigative Obligation

25. To understand the issues raised on this application, it is necessary to set out the relevant and uncontroversial legal principles relating to the role of inquests and to the investigative duty under Article 2. This provides that: -

> *"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally…"*

26. An inquest is a statutory inquiry, which is established to answer four questions: namely who the deceased was; and when, where and how he or she came by his or her death (**s11 Coroner's 1988 Act and Rule 36 Coroner's Rules 1984**). Normally the question of "*how the deceased came by his or her death*" is to be construed as meaning "*by what means the deceased came by his or her death*".

27. A different situation arises where on the facts of the case, the procedural obligation to investigate deaths under Article 2 ECHR requires the State to establish a compliant independent investigation and the inquest is a primary investigation. In those circumstances, the statutory provisions are to be read down so that the "*how*" question has the extended meaning of "*by what means and in what circumstances the deceased*

came by his death". This expanded question entails considering contributing and underlying factors, so that it is often answered by a longer narrative verdict (see **R (Middleton) v West Somerset Coroner** [2004] 2 AC 182).

28. As Mr Hough rightly contends, this different approach to the statutory provision is only taken where:-

i) The state or its agents arguably breached *substantive* obligations under Article 2 (i.e. specific obligations to safeguard life and not to take life); and

ii) Other state investigations have not satisfied the requirements for an independent investigation.

29. In those circumstances, it becomes necessary to consider the substantive obligation referred to in (i) of the previous paragraph. This obligation has two distinct aspects, of which the first is a "*general duty*" to put in place laws and procedures which safeguard the lives of citizens generally. The second aspect, which is of relevance on the present application, relates to the specific operational duties to protect individuals to whom a responsibility is assumed.

30. This obligation was explained by the Strasbourg Court in the case of **Osman v UK** (2000) 39 EHRR 244, which concerned the alleged failure of police to protect the Osman family, who had been subjected to threats and harassment from a third party culminating in the murder of Mr Osman and in the wounding of his son. The Court explained [115] that "*in well-defined circumstances*", the State is obliged to take "*appropriate steps*" to safeguard the lives of those within the jurisdiction including a positive obligation to take "*preventative operational measures"* to protect an individual whose life is at risk from the criminal acts of another.

31. The Court then proceeded to state that the positive obligation had to be interpreted "*in a way which does not impose an impossible or disproportionate burden on the authorities*". Lord Dyson JSC in **Rabone and another v Pennine Care NHS Foundation Trust** [2012] 2 WLR 381 explained that:-

> *"12…In a case such as Osman, therefore, there will be a breach of the positive obligation where:*
>
> > *'the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'."*

32. Lord Bingham of Cornhill had stated in **Van Colle v Chief Constable of the Hertfordshire Police** [2009] 1 AC 225, 256 [56] that Article 2:-

> *"… protected a right fundamental in the scheme of the Convention and it was sufficient for an applicant to show that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge."*

33. The relevant legal principles relating to the nature of the "*real and immediate risk to life"* can be summarised in this uncontroversial way:-

    a) The **Osman** test requires "*that the facts must be examined objectively at the time of the existence of the threat, and that the positive obligation is breached only if the authorities knew or ought to have known at that time that it was a threat to life which was both real and immediate*" (per Lord Hope DPJSC of Craighead in **Van Colle** (supra) [67] 269);

    b) The foreseeable risk of death must be immediate in the sense that it is "*present and continuing"* at the material times. (**Rabone** (supra) per Lord Dyson JSC [39]);

    c) It is the duty of the court to focus *"on what the authorities knew or ought to have known at the time. One must beware of the dangers of hindsight. The court must try to put itself in the same position as those who are criticised were in as events unfolded for them*" (Per Lord Hope of Craighead DPJSC in **Mitchell v Glasgow City Council** [2009] 1 AC 874, 891 [33]); and that

    d) The duty is breached only if that authority *"failed to take measures which, judged reasonably, might have been expected to have avoided that risk"* (**Osman** (supra) [116]).

VII. The Claimant's Case

34. The claimant's case depends on showing that the Coroner erred in law in not resuming the Inquest because there was in the words of section 16(3), "*a sufficient cause to do so"* as (i) there had arguably been a "*real and immediate risk to life";* (ii) the police had arguably *"failed to take measures which, judged reasonably, might have been expected to have avoided that risk"* and (iii) there had not been a proper investigation by the time of the Coroner's decision under challenge or at all.

35. The case for the claimant is that these requirements are satisfied. Mr. Owen contends that in respect of Arsema, as at the time when she and the claimant went to the police station on 30 April 2008, there was a *"real and immediate risk to* [her] *life"* so as to meet requirement (i). Again, as to requirement (ii), he contends that on 30 April 2008, there were measures which judged reasonably, might have been expected to have avoided that risk to Arsema's life. Finally as to requirement (iii), Mr. Owen proceeds to submit that a new inquest is now the only public forum in which all the issues surrounding Arsema's death can be ventilated, because the focus of the hearing at Nugesse's trial was on his fitness to plead and so the Court did not hear evidence relating to the broader circumstances relating to her death. He also contends that the IPCC investigation failed to discharge the State's Article 2 investigative obligations.

36. Thus, it is said by Mr Owen that there has not been (as there ought to have been) an effective investigation into Arsema's death capable of satisfying the State's obligations under Article 2, and the only way in which this obligation can be satisfied is by resuming the Inquest because that would enable matters to be considered. I will turn to consider the facts bearing in mind that unlike in the decisions of the appellate

courts in the cases of **Osman, Van Colle, Mitchell** and **Rabone** to which I have already referred, I am not concerned with a claim for damages, but instead with the very different issue of whether the claimant can show that the Coroner erred as a matter of public law in deciding not to resume the Inquest. This issue was considered by Hickinbottom J in his decision in **R (Palmer and Palmer) v HM Coroner for the County of Worcestershire** [2011] EWHC 1453(Admin) in which he made a fact-sensitive decision based on very different facts from those arising in the present case.

VIII. Was there a real and immediate risk of life to Arsema?

37. As I explained in paragraph 22, the Coroner refused to resume the inquest because there was nothing that the police *"knew or ought to have known of a real and immediate risk to* [Arsema]*'s life"*. Mr Owen contends that this conclusion is unreasonable and unlawful because the police knew or ought to have known that there was a real and immediate risk to the life of Arsema on 30 April 2008 when they went to Kennington Police Station to report their concerns about Nugesse during a stay lasting 2 hours 40 minutes. In essence, the case for the claimant is that if SRO Johnson had properly fulfilled her role, she would have properly appreciated by the end of the meeting on 30 April 2008 that there had been a threat to kill Arsema, who was then 14 years of age, by a person who had previously been violent to Arsema, and so SRO Johnson should have informed Inspector Barnes of these matters. If this had been done, he would have conducted a risk assessment and in the words of Lord Bingham in **Van Colle** (supra) [32], "[the police] [are] *then to be treated as knowing what such further inquiries or investigations would have elicited*."

38. There is ample evidence to justify a credible and deeply worrying threat to kill Arsema, which showed the Coroner was not entitled to conclude that there was not sufficient cause to resume the inquest because SRO Johnson according to the IPCC report explained that the claimant had informed her first that Nugesse had told her that he would find Arsema wherever she went; and second that when the claimant had asked Nugesse what he meant by that, his reply was, as set out in paragraph 99 of the IPCC report, that he would find Arsema wherever she went and kill her. These comments had to be considered against the background first that SRO Johnson had been shown a photo of Arsema's black eye, which had been inflicted by Nugesse at McDonald's, and second that the claimant, Arsema and Ms Isak had gone to the police because of concerns about what Nugesse would do to the 14 year old Arsema. SRO Johnson admitted that she only asked Inspector Barnes about how to classify the crime given the ages of Arsema and Nugesse [222].

39. Not surprisingly, the IPCC found that SRO Johnson's performance was poor in recording accurately what she had been told and what she then did with the information and in particular that she failed to appreciate the nature of the threat that the family of Arsema were telling her of in relation to Nugesse, especially as he was at least arguably infatuated with Arsema and not acting rationally.

40. It must not be forgotten that I am not concerned with the issue of whether damages can be claimed on the basis that Arsema's article 2 rights have been infringed. The issue for me is the totally different one of whether the Coroner's decision that there was not sufficient cause to resume the inquest was unreasonable and was unlawful. In my view, this information available on 30 April 2008 ought to have shown that that there was, adopting the wording of section 16(3) of the **Coroners Act 1988**, a

"*sufficient cause"* to believe that as at 30 April 2008, there was (or arguably was) a real and immediate risk to the life of Arsema . The Coroner erred because she failed to attach proper weight to the threat to kill because she considered that:-

(i) *"The threats made appeared to have been made across the telephone rather than face to face";*

(ii) *"The assault was a 'slap' which was later denied by Arsema when interviewed by the School Liason Officer. She also denied she was being harassed"*

(iii) "*there was nothing to indicate that Arsema thought he would carry out his threats"*; and that

(iv) the CRIS indicated that Arsema "*only wanted him warned"*.

41. I am bound to conclude that these reasons and the others relied on by the Coroner as justification of the decision not to resume the Inquest individually and cumulatively reach the threshold of being unreasonable and constituting an unlawful decision. That decision is reached because of the threat as set out in paragraph 99 of the IPCC report to find Arsema wherever she goes and to kill her had been made by a man about whom little was known, but who was obviously very jealous of Arsema and who had already used violence against her with the result that she and her family were sufficiently worried so as to go to ask the police for help. I have not overlooked the reasoning of the Coroner, but as to factor (i), the potency of a threat does and could not depend on whether it is made face-to-face rather than on the phone and so this cannot be a factor of definitive or of much weight. Factor (ii) needs to be considered in the light of the facts that this showed violence by a very angry man, who was threatening to kill his victim with whom he was or was likely to be infatuated. Turning to factors (iii) and (iv), the views of a 14 year old girl on the likelihood of a threat to kill being implemented (even if she knew of it) and her wish for Nugesse only to be warned must carry very little weight as her knowledge and opinion of the dangers confronting her cannot reasonably be relied on. I should add that I do not consider that the Coroner could or should have attached any weight to the delay by the claimant of 14 days in going to Kennington Police Station, bearing in mind the lack of experience of the claimant and Arsema in these matters in a country in which they had not lived for a long period. None of these factors or other reasons in the letter showed that the Coroner had made a reasonable or lawful decision bearing in mind the statutory test in section 16(3).

42. Until now, I have been approaching this case on the basis of information actually known to the authorities and it has not been suggested that this is a flawed approach.

43. If, which is not the case, I had been in doubt as to whether the Coroner should have found that in the light of the information disclosed on 30 April 2008, there was a sufficient cause to resume the inquest on the grounds of there having arguably been a real and immediate risk to the life of Arsema on the basis of information *known* to the authorities, I would then have proceeded to consider the matter on the basis put forward by Lord Bingham in **Van Colle** [32] when he said (with emphasis added) that:-

> *"the test [of whether there was a real and immediate risk to the life of Arsema] depends not only on what the authorities knew, but also on what they **ought to have known**. Thus stupidity, lack of imagination and inertia do not afford an excuse to a national authority which reasonably ought, in the light of what it knew or was told, to make further enquiries or investigations: it is then to be treated as knowing what such further enquiries or investigations would have elicited."*

44. This approach was approved of by Lords Brown and Carswell in their speeches in the same case, but Lord Phillips took a different view as he explained [86] in respect of the degree of knowledge required of the authorities to determine if there was a " *real and immediate risk to life*" that:-

> *"There are at least two possibilities. The first is that 'ought to have known' means 'ought to have appreciated on the information available to them'. The alternative meaning is 'ought, had they carried out their duties with due diligence, to have acquired information that would have made them aware of the risk'. The reasoning of the Court [in Osman] leads me to believe that the former was the meaning intended."*

45. These conflicting comments by two former Lord Chief Justices present a first instance judge in my position with the unenviable task of choosing between them, and with the greatest respect, I would prefer the approach of Lord Bingham essentially for the reasons which he gives and which appears to have been adopted by Ouseley J in granting permission to pursue this application. Applying that principle to this case, the police knew what SRO Johnson had been told on 30 April 2008 that Nugesse had previously attacked Arsema and that he had threatened to find and to kill Arsema, and in consequence, they ought to have spoken to Nugesse and made further inquiries. If they had done so, they would have discovered that he was infatuated with Arsema and that he was so jealous that he is likely to have used very serious violence on her and implemented his threat to find and to kill her. It is noteworthy that as explained in the written skeleton argument of the Coroner when Nugesse spoke to the police after he had killed Arsema, he sought to justify the murder by saying that she had been "*cheating on him*". All these matters would have shown that the risk to Arsema's life was real and immediate. This would have shown the need for the police to take some action especially as on 30 April 2008, Arsema was only 14 years of age while Nugesse was seven years older than her. I have concluded that the Coroner was not entitled to conclude that there was not sufficient cause not to resume the inquest.

IX. Could the Police have taken measures within the scope of their powers which judged reasonably might have been expected to avoid the risk?

46. As I explained in paragraph 37(d) above, the Article 2 duty owed by the State is only breached if reasonable steps at the material time could have reasonably been taken to have avoided the risk. In **Osman v Turkey** (supra), the Strasbourg Court stated that "*a failure to take reasonable measures which could have a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State*". At paragraph 130, the Court referred to the failure "*to take measures within*

the scope of their powers which judged reasonably might have been expected to avoid the risk".

47. There is little known about Nugesse, other than his age and that he had no known convictions, but there were some steps that could have been taken, and indeed ought to have been taken because the police could have contacted Nugesse, made an assessment of the risk he posed by speaking to him, could have arrested him for an offence of assault and then released him on bail with a condition that he would not approach Arsema. Each or all of these steps might well have been expected to have avoided the risk. In addition, the police should have warned Arsema and her family about safety precautions which they should have taken to mitigate the risk of Nugeese implementing his threat to kill Arsema. I consider that on any view, this should have shown that there was sufficient cause for the Coroner to investigate this further as these matters could have had a real prospect of preventing the murder of Arsema. Indeed, nothing contrary to this was stated in the Coroner's reasons.

X. Has there been a proper investigation prior to the decision of the Coroner to refuse to resume the Inquest?

48. Mr. Owen points out that a new inquest is the only public forum in which all the issues surrounding Arsema's death could have been aired because the criminal hearing on 18 May 2009 did not hear evidence relating to the broader circumstances surrounding her death and the police investigation. Mr. Owen explains correctly that the reason for this was that the focus of the court hearing at the Old Bailey was solely into the fitness of Nugesse to plead and whether he had committed the act of killing Arsema.

49. Mr Owen was also correct in contending that there had not been a full exploration of the facts surrounding the death of Arsema and indeed it is noteworthy that in **R (Middleton) v West Somerset Coroner** [2004] 2 AC 182, Lord Bingham giving the opinion of the Appellate Committee said that:-

> *"30. In some cases the state's procedural obligation may be discharged by criminal proceedings. This is most likely to be so where a defendant pleads not guilty and the trial involves a full exploration of the facts surrounding the death. It is unlikely to be so if the defendant's plea of guilty is accepted (as in Edwards), or the issue at trial is the mental state of the defendant (as in Amin), because in such cases the wider issues will probably not be explored."*

50. The IPCC was not considering whether the State had breached its Article 2 obligations, but its task was to examine different matters concerning police conduct. So it did not focus on the issues of first whether there had been a "*real and immediate risk to life"*; or second whether the police had *"failed to take measures which, judged reasonably, might have been expected to have avoided that risk"*. None of these matters were considered by the IPCC, probably because they fell outside its terms of reference. I should add that the Coroner did not refuse to resume the inquest because there had been a proper investigation.

XI. Should the Decision of the Coroner be impugned?

51. I must record my admiration for the sympathetic way in which the Coroner considered the matter. Her decision, as the Coroner, not to resume the inquest deserves great respect, especially as she set out the correct legal principles. I must repeat that the issue in this case is not whether as in cases to which I have referred such as **Osman**, **Van Colle, Mitchell** and **Rabone**, claims for damages can be brought, but the totally different issue of whether the Coroner erred in refusing to make an order for resumption of the inquest.

52. I have explained the approach, which Simon Brown LJ explained that should be taken to the power of the Coroner to resume the Inquest after the criminal trial. So, the issues for me to determine as propounded by Mr. Hough are first whether the decision of the Coroner to conclude that the information before her did not establish an arguable case that officers of the Metropolitan Police Service had acted in breach of an operational duty to protect the life of Arsema pursuant to Article 2 was unreasonable and second whether her decision not to resume the inquest was unlawful.

53. Having applied those principles and those relating to the investigative duty, I have come to the conclusion that the answers must be in the affirmative and so the decision of the Coroner not to resume the inquest was so flawed that I must quash it. It is quite likely that if the Coroner had had the benefit of the oral and written submissions, which I have had, she would have reached the same conclusion as the one at which I have arrived.

Postscript

54. After I circulated the draft judgment, I asked counsel for their submissions on the appropriate consequential orders which I should make. It was agreed that orders should be made first that an inquest should be held into the death of Arsema; and second that it should be held by a different Coroner other than Dr Wilcox, who now holds a different coronial position having become HM Coroner for Westminster. I hope that this will be heard as soon as possible.

55. There has, however, been a dispute as to what order should be made as to costs with the claimant asking for an order for costs against the Coroner on the basis that she had not taken a neutral role, but that instead she had pursued an adversarial role. The Coroner resists this on the basis that through her counsel she has adopted a neutral role.

56. Under CPR Part 44.4(a), the court in deciding what order to make about costs, must have regard to all the circumstances, including the conduct of the case. In the context of a challenge to a coronial decision on a judicial review application, it is common ground that the correct principles were explained by Brooke LJ in a judgment with which Sir Martin Nourse and Longmore LJ agreed in **R (Davis) v Birmingham Deputy Coroner** [2004] 1 WLR 2739, when he said after carrying out an extensive analysis of the law that:-

> *"47… if, however, an inferior court or Tribunal appeared in proceedings in order to assist the court neutrally on questions*

> *of jurisdiction, procedure, specialist case law and such like, the established practice of the court was to treat it is as a neutral party, so that it would not make an order for costs in its favour or an order for costs against it whatever the outcome of the application".*

57. This principle was followed by Wilson J (as he then was) in **Plymouth City Council v HM Coroner for the County of Devon** [2005] EWHC 1014 (Admin), which was a case in which the Coroner had provided real assistance to the court in a "*low-key constructive, helpful*" way.

58. Mr. Owen describes as *"absurd"* the idea that the Coroner's participation was to adopt a "*neutral stance*". He bases this submission primarily on first the length and nature of the oral and written submissions of the Coroner at both the substantive judicial review hearing and at the permission hearing; and second the decision of the Coroner not to resume the Inquest after a letter requesting her to do so was sent after the permission hearing.

59. I have considered with care what role the Coroner had adopted in the hearing before me in both the oral and written submissions and I am quite satisfied that her counsel adopted a non-adversarial and neutral point of view. He did not argue that the claim should be rejected, but instead he provided much valuable objective assistance to me such as first providing the transcript of the criminal trial; second arranging for the answer to an inquiry raised at the claimant's permission hearing as to whether Nugesse had criminal convictions; third providing much material relating to the background of the Coroner's decision; fourth, supplying a detailed summary of the relevant legal principles on this complex area of law, which was invaluable to me and which was adopted by the claimant's counsel; and fifth making helpful and carefully balanced submissions on the open question of whether the views of Lord Bingham or those of Lord Phillips in relation to the **Osman** test should be accepted, to which I referred in paragraphs 43 to 45 above.

60. In brief, in this case, the role of the Coroner was in Wilson J's words "*low-key constructive, helpful*" and she adopted a "neutral stance". She should not be ordered to pay costs as the cases just because she did not resume the Inquest because as I have explained, she was entitled to adopt a neutral stance.

61. I do not accept the claimant's contention that the length of the hearing before me was lengthened by the submissions of the Coroner's counsel because if they had not been made, then it was inevitable that the written and oral submissions of the claimant's counsel would have been longer. I stress that I was greatly assisted by counsel for the Coroner, who properly adopted the role of amicus.

62. Turning to the oral permission hearing, the judge must have been assisted by the submissions from counsel for the Coroner who apparently explained the proper approach to these article 2 claims. The fact that this led to permission being refused on some issues does not show that the Coroner's counsel took an adversarial stance and so no order for costs is appropriate for the permission hearing, especially as the Coroner did not ask for her costs in the Acknowledgement of Service or at the hearing, which thereby showing her neutral stance.

63. I do not consider that the length of either the permission hearing or the substantive hearing would have been so much shorter if the Coroner had not been involved in the way she was so as to require an adverse costs order against her. In addition, the fact that she did not accede to the request of the claimant's solicitors after the permission hearing to resume the Inquest does not mean that an order for costs should be made against her especially as her counsel took a neutral and helpful line at the substantive hearing.

64. I have taken account of all Mr. Owens's objections but have concluded that there should be no order as to costs, I note that a similar approach was adopted by Burnett J in **R (Pounder) v HM Coroner of the North and South District of Durham and Darlington** (23 Feb 2010).

65. Before parting with this case, I should stress that I hope that the new inquest will be heard as soon as possible.