HOUSE OF LORDS SESSION 2006–07

[2007] UKHL 13

on appeal from: [2005] EWCA Civ 890

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Hurst) (Respondent)

v.

Commissioner of Police of the Metropolis (Appellant)

Appellate Committee

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Brown of Eaton-under-Heywood
Lord Mance

Counsel

Appellants:
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Anne Studd
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Respondents:
Keir Starmer QC
Danny Friedman
(Instructed by Bhatt Murphy)

Intervener
Lord Goldsmith QC
Philip Sales QC
(Instructed by Treasury Solicitor)

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ON

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LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in full agreement with it, and would accordingly allow the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

2. The respondent in this appeal is Mrs Christine Hurst. Her son, Troy Hurst, was stabbed to death by Albert Reid on 25 May 2000. This was the culmination of a long series of events which demonstrated the violent nature of Reid and his particular hostility to members of the Hurst family. Many of these incidents had been drawn to the attention of the police and the local housing authority. Indeed, on the day of Mr Hurst's death various reports had been made to the police. Although an inquest was opened into Mr Hurst's death, it was adjourned because Reid had been charged with murder. Following his conviction for manslaughter, Mrs Hurst asked the coroner to exercise his discretion to resume the adjourned inquest under section 16(3) of the Coroners Act 1988 ("the 1988 Act"). She wished the coroner to investigate what she alleged were the failings of the police and the housing authority, Barnet Council, to protect her son from Reid. By letter dated 19 November 2002 the coroner declined to reopen the inquest.

3. Under section 11(5)(b)(ii) of the 1988 Act the inquisition returned at the end of an inquest is to set out "how, when and where the deceased came by his death." These apparently simple words have been pored over by the courts on many occasions. It is not, however, disputed that, in accordance with the decision of the Court of Appeal in *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1, under domestic English law an inquest is to determine "by what means", as opposed to "in what broad circumstances", the deceased came by his death. As my noble and learned friend, Lord Brown of Eaton-under-Heywood, explains, however, it is agreed between the actual parties to the present proceedings that, by reason of article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the obligation of the United Kingdom under international law is to hold an investigation which will cover the possibility that failures of the public authorities contributed to Mr Hurst's death.

4. The Court of Appeal held that, having regard to *Jamieson*, there would have been no obligation to hold an inquest with that wider scope before the Human Rights Act 1998 ("the 1998 Act") came into force on 2 October 2000. But, after that date, by reason of section 3 of the 1998 Act, section 11(5)(b)(ii) of the 1988 Act required to be read in a way that was compatible with article 2. So the coroner should be ordered to resume the inquest at which it would be his duty to return an inquisition setting out "by what means and in what circumstances" Mr Hurst died. An inquest with that scope would be capable of covering the allegations against the public authorities, including the police.

5. The Commissioner of the Police of the Metropolis appealed against that decision and argued that the Court of Appeal had misinterpreted section 3 of the 1998 Act. Counsel for Mrs Hurst sought to sustain the Court of Appeal's decision principally on the basis of a broad argument about the effect of the international law obligation in article 2 of the Convention on the approach to be adopted by the coroner. He put rather less weight on the section 3 argument deployed by the Court of Appeal and even less on a further argument relating to section 22(4) of the 1998 Act.

6. What Mrs Hurst had not done, however, was to challenge the Court of Appeal's decision that the allegations against the police could not have come within the scope of an inquest of the *Jamieson* type. For that reason her counsel explicitly acknowledged at the hearing before the House that he could not re-open that aspect of the Court of Appeal's

decision. The decision itself is understandable, given that the earlier decision of this House in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, a case of suicide in prison, proceeded on the basis that *Jamieson* correctly identified the (limited) scope of a verdict under English domestic law. In particular, under rule 36 of the Coroners Rules 1984 "the proceedings and evidence at an inquest" are to be directed only to "how" - in the sense of "by what means"- the deceased came by his death. Therefore, any right to a wider inquiry (into any failure by the prison authorities to put the deceased on a suicide watch) was to be obtained via the application of section 3 of the 1998 Act.

7. The scope of the inquiry, as opposed to the verdict, is a matter for the coroner. Buxton LJ said that, although the coroner in this case had not asked himself "at what point the chain of causation becomes too remote to form a proper part of his investigation", nevertheless, if he had done so, the question could only have been answered in one way – viz, that, applying the approach in *Jamieson*, the chain of causation was indeed too remote to form part of his investigation in this case: [2005] 1 WLR 3892, 3899. At an earlier point in his judgment Buxton LJ had held that any failings of the police to respond to urgent reports of incidents involving the Hurst family were too remote for consideration at any renewed inquest because "any direct causal connection between the failings of the police and the death was broken by the violent intervention of Mr Reid": [2005] 1 WLR 3892, 3898.

8. Often, of course, the law does treat a deliberate act of a third party as breaking a chain of causation. But not always. It depends on the purpose for which the existence of the causal connexion is being used. I refer to the well-known passages in the speeches of Lord Hoffmann in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22, 30G-32A and *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, 367G-368B. Here the need for a causal connexion between an alleged failure and Mr Hurst's death is being used as a way of determining the scope of the inquest. It is not self-evident - to me at least - that any failures by the police to respond to warnings would be too remote to be considered at an inquest simply because Reid committed precisely the kind of violent act which the people giving the warnings feared would happen. Indeed, uninstructed by the case law, I too might have found it difficult to imagine that a resumed inquest would not examine at least some of the authorities' alleged failures. But I have to accept that the cases show that, in relation to *Jamieson* inquests, "how" is to be interpreted narrowly in both section 11(5)(b)(ii) of the 1988 Act and rule

36 of the Coroners Rules. On that basis it can be said that the authorities' failures would lie outside the scope of a resumed inquest.

9. In reality, therefore, the appeal was actually fought out on the other three arguments. I agree with what Lord Brown says on each of them.

10. While I could not help but admire the ingenious ways in which the Court of Appeal attempted to distinguish *In re McKerr* [2004] 1 WLR 807, for the reasons given by Lord Brown those attempts were doomed to fail. In particular, in section 3 the expression "the Convention rights" must be interpreted in the same way as in section 6 - as referring to the rights and fundamental freedoms set out in the articles set out in Schedule 1. See section 1(1). Any other approach would make section 6(2)(b) unworkable.

11. In the *Jordan* appeal [2007] UKHL 14 Mr Blake took the matter a stage further, however. His argument, as applied to Mrs Hurst's case, would be that, even assuming that, for the reasons given in *McKerr*, Mrs Hurst had no article 2 Convention right to require an investigation into her son's death, nevertheless the broader construction of section 11(5)(b)(ii) of the 1988 Act established by *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 should be applied whenever the provision was in play - whether or not the person seeking the resumption of the inquest had an article 2 Convention right. The result would seem to be that the ambit of the jury's verdict would be widened in every inquest.

12. A somewhat similar point has arisen in cases where legislation has to be given a particular interpretation in order to comply with a requirement of European Community law. Where no potential infringement of Community law is involved, can a party insist on the legislation being applied in the same way? As Lord Brown shows, the answer given by the courts is that he cannot: the legislation is interpreted differently, depending on whether or not Community rights are involved. The same should apply in the present context also.

13. Although at first sight this may seem strange, any other solution would be even stranger. Here the coroner declined to resume the inquest on 19 November 2002. At that time Mrs Hurst could not herself have insisted on section 11(5)(b)(ii) of the 1988 Act being interpreted

broadly in order to give effect to an article 2 Convention right. So, if she were now entitled to invoke the interpretation reached by the House in *R (Middleton) v West Somerset Coroner* more than a year later, her legal position today would be entirely dependent on her good luck that someone who was assumed to have an article 2 Convention right had managed to obtain that interpretation. As a matter of principle, however, Mrs Hurst's legal position cannot depend on whether someone else happens to have invoked a right and achieved a result which she herself could not have invoked or achieved.

14. The only way to avoid this element of chance would be to say that, even where the Convention-compatible interpretation had not been previously established, a person without the relevant Convention right could make submissions as to what the interpretation would have to be in order to make the provision compatible with the Convention right in a hypothetical case involving someone with the relevant right. And then insist on that interpretation being applied to her case. Such an approach would be tantamount to treating someone without a Convention right as having a Convention right. Even leaving section 7(1) aside, it would be self-evidently untenable. For that good reason, it was not, of course, even remotely suggested by Mr Blake.

15. Having regard to the issues which were argued at the hearing, with some reluctance, I would allow the appeal for the reasons given by Lord Brown.

BARONESS HALE OF RICHMOND

My Lords,

16. The simple issue presented to us was whether the coroner's decision, to resume or not to resume the inquest into the killing of Troy Hurst, should have been governed or guided by the State's positive obligation under article 2 of the European Convention on Human Rights - in short, to conduct an effective investigation into whether the State had failed in its obligation to protect the right to life.

17. As to whether or not the coroner's decision should have been *governed* by the Convention, the short answer is no. Remedies to give

effect in domestic law to the rights enshrined in the Convention were introduced on 2 October 2000. Those remedies consist of the duty of public authorities, including the courts, to act compatibly with the Convention rights (section 6(1)), the right of individual victims to assert or rely upon an actual or threatened breach of that duty in any domestic legal proceedings (section 7(1)), the duty of the courts to interpret and apply legislation compatibly with the Convention rights (section 3(1)) and the power of the higher courts to declare primary legislation incompatible (section 4(1)). It would make no sense to divide up the interpretative and remedial provisions for this purpose. As my noble and learned friend, Lord Rodger of Earlsferry, put it in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, at para 204:

> "Parliament must have intended all the operative provisions of this particular statute to take effect in the same way in respect of any given Convention right."

And as my noble and learned friend, Lord Brown of Eaton-under-Heywood, succinctly stated in *In re McKerr* [2004] 1 WLR 807, para 89:

> "The duty to investigate is, in short, necessarily linked to the death itself and cannot arise under domestic law save in respect of a death occurring at a time when article 2 rights were enforceable under domestic law."

18. As to whether or not the coroner should have been *guided* by the United Kingdom's obligations under the Convention in respect of a death to which the 1998 Act did not apply, I accept, of course, that the coroner was not bound to comply with those obligations. To hold otherwise would be to incorporate the Convention into domestic law by the back door. It may be that he would have been justified in ignoring it altogether. But he did not do so. And to my mind there was one respect in which the values underlying the Convention were obviously relevant to the exercise of his discretion even though the 1998 Act does not apply. I refer to the proper scope of an inquest even under the old law.

19. I question whether the distinction drawn by Lord Brown between a "*Middleton* inquest" and a "*Jamieson* inquest" is as stark as he suggests. A *Middleton* inquest is, of course, one in which the Coroners Act 1988 and the Rules have to be interpreted and given effect in a way which is compatible with the United Kingdom's obligations under article 2. This means, not only that the scope of the inquiry must

encompass whether the authorities were indeed in breach of their positive obligation to protect life (as identified in *Osman v United Kingdom* (1998) 29 EHRR 245), but also that the inquiry "ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case": *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182, per Lord Bingham of Cornhill at p 198, para 20.

20. The decision of the Court of Appeal in *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1 was concerned, and as I read it solely concerned, with the circumstances in which it was proper for the coroner to leave a verdict of "lack of care" to the jury. It was made clear that "lack of care" is a specialised verdict, which should more properly be termed "neglect" (per Sir Thomas Bingham MR at p 25, para (8) of his general conclusions). It referred to "a gross failure to provide adequate nourishment or liquid, or provide or procure basic medical attention or shelter or warmth for someone in a dependent position" (para 9). It could rarely, if ever, be a free-standing verdict rather than annexed to another verdict such as natural causes (para 10). It could only be associated with a verdict that the deceased took his own life where gross neglect was directly connected with the deceased's suicide (para 11). However, "there could be no objection to a verdict which incorporates a brief, neutral, factual statement" of how the deceased came by his death (p 24, para (6)).

21. *Jamieson* was not directly concerned with the scope of the inquiry at an inquest. This has always been a matter for the coroner to determine. The scope of the inquiry is almost always going to be wider than the verdict eventually reached: see *R v Inner West London Coroner, Ex p Dallaglio* [1994] 4 All ER 139, per Simon Brown LJ at p 155. To limit it to the last link in the chain of causation would defeat the purpose of holding inquests at all: *ibid*, per Sir Thomas Bingham at p 164. It is not only that the facts have to be fully investigated in order to discover which of a variety of verdicts is possible. The function of an inquest is to investigate and if possible to answer four questions: who the deceased was, and "how, when and where he came by his death": see Coroners Act 1988, section 11(5) and Coroners Rules 1984, rule 36. *Jamieson* made clear that "how" meant "by what means" rather than "in what broad circumstances". But it did not disapprove previous statements such as that of Croom-Johnson LJ in *R v Southwark Coroner, Ex p Hicks* [1987] 1 WLR 1624, at p 1634, that "the word 'how' is wide and it is not possible to foresee every way in which someone may meet his death". Nor did *Jamieson* cast any doubt upon the words of Lord Lane

LCJ in *R v South London Coroner, Ex p Thompson* (1982) 126 SJ 625, emphasising the inquisitorial nature of the exercise:

> "The function of an inquest is to seek out and record as many of the facts concerning the death as [the] public interest requires."

This was an exact reflection of the views expressed by the Brodrick Committee in their Report on Death Certification and Coroners (1971, Cmnd 4810), at para 16.40:

> "In future, the function of an inquest should be simply to seek out and record as many of the facts concerning the death as the public interest requires, without deducing from these facts any determination of blame."

The final conclusion in *Jamieson* (p 26, para 14) points out that:

> "It is the duty of the coroner . . . to ensure that the relevant facts are fully, fairly and fearlessly investigated. . . . He must ensure that the relevant facts are exposed to public scrutiny . . . 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. . . . "

22. No-one suggests that this is an easy task, when emotions and anxieties are so acutely aroused. But if the coroner had asked himself whether "as many of the facts concerning the death as the public interest requires" had indeed been investigated in this case, he might well have reached a different conclusion. The criminal trial had, of course, dictated the verdict that Mr Hurst had been unlawfully killed. But it had not revealed even as many facts about the conduct of the police that night as Mrs Hurst has now been able to discover. In particular, there was the recorded view of Police Sergeant Mortimer, who had good reason to judge, that Albert Reid was an extremely dangerous man. There was the escalating series of calls to the police as the evening wore on, not all of which were referred to at the trial. There were the reasons for the possession action against Albert Reid, which had been heard and adjourned that very day. All of this suggests that there was an acute public interest, and not merely the private interest of a grieving mother, in a full investigation of how it came about that Troy Hurst met his death. This is so, to my mind, irrespective of the Convention, but the Convention values are also some guide to what facts it is in the public interest to investigate. Although the scope of the inquiry is for the coroner to determine, and his decisions will rarely be subject to review,

it is difficult to imagine that any resumed inquest in this case would not examine the conduct of the police and the housing authority that fateful day if not before.

23. There is nothing in *Jamieson* which precludes or is inconsistent with such a conclusion. All that *Jamieson* precludes is a verdict of "unlawful killing caused or contributed to by police neglect". To be fully compliant with article 2, some such verdict would have to be available, as *Middleton* shows. But the non-availability of such a verdict does not inexorably lead to the conclusion that a resumed inquest would serve no useful purpose. Insofar as the Court of Appeal reached a different conclusion in this case (see [2005] 1 WLR 3892, at pp 3898-3899, paras 18-20) I beg to differ. There clearly is a useful purpose to be served, albeit a less useful one than there might have been.

24. Accordingly, and in agreement with my noble and learned friend, Lord Mance, I would either (a) dismiss this appeal, or (b) allow it only to the extent of setting aside the coroner's decision and remitting the question of whether or not to resume the inquest to him for reconsideration.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

25. Troy Hurst, the respondent's son, was stabbed to death by a neighbour on 25 May 2000, just a few months before the coming into force of the Human Rights Act 1998 on 2 October 2000. That, as will shortly appear, is a crucial consideration in this appeal.

26. Following the killer's conviction for manslaughter the respondent urged the coroner to re-open the inquest into her son's death: the risk of such a violent incident had long been apparent and the police and housing authority were open to criticism for not doing more to avert it. The coroner's refusal to re-open the inquest is the decision under challenge in these proceedings. The respondent's whole case depends upon the scope and findings of any such inquest being determined in accordance with the United Kingdom's investigatory obligation arising under article 2 of the European Convention on Human Rights. It is not

contended that the coroner's decision can be impugned except by reference to the article 2 duty. An inquest conducted in accordance with domestic coronial law prior to the coming into force of the Human Rights Act would satisfy neither the respondent's desire for wide-ranging findings upon the circumstances leading up to her son's death nor the United Kingdom's article 2 duty. The critical question for your Lordships' determination is whether those seeking such an investigation into a pre-Human Rights Act death are entitled in domestic law to the benefit of the Convention.

27. It may be helpful at this introductory stage to clarify the issues by making brief reference to just four cases. The Court of Appeal decided in *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1 (*Jamieson*) that the function of an inquest is to determine "by what means" and not "in what broad circumstances" the deceased came by his death: that is the meaning to be given to the word "how" in section 11(5)(b)(ii) of the Coroners Act 1988 and rule 36(1)(b) of the Coroners Rules 1984, both of which specify the inquest's purpose to be ascertaining "how . . . the deceased came by his death". *Jamieson* concerned the form of the verdict rather than the scope of the inquiry, the latter being left essentially as a matter for the coroner.

28. The following year the European Court of Human Rights in *McCann v United Kingdom* (1995) 21 EHRR 97 (*McCann*) (the "Death on the Rock" case) first identified the procedural duty implicit in article 2 of the Convention, a duty developed in subsequent Strasbourg case law to require the full investigation of any death involving or possibly involving a violation of the State's substantive obligation to protect human life arising under article 2 (essentially wherever state agents or bodies may bear responsibility for the death). Such an investigation, moreover, must be able to state its conclusions on the main issues arising, for example, the justification of any use of lethal force or the responsibility for any systemic failure to protect human life.

29. The other two cases principally bearing on this appeal are the decisions of differently constituted Appellate Committees of this House, both given on 11 March 2004: *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 (*Middleton*) and *In re McKerr* [2004] 1 WLR 807 (*McKerr*). *Middleton* approved *Jamieson*, recognised that in the case of certain deaths a *Jamieson* inquest (as for convenience I shall call an inquest conducted in accordance with that decision) would not meet the United Kingdom's obligations under article 2 of the Convention, and held that in those cases (assuming always that the obligation were to be

satisfied by an inquest rather than some other form of inquiry) the word "how" in the relevant provisions should be construed pursuant to section 3 of the Human Rights Act to mean "not simply 'by what means' but 'by what means and in what circumstances'". Thus the jury's verdict would be able to state their conclusions on the important underlying issues: in that case (concerning a prisoner's suicide in prison) whether he should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent it.

30. *McKerr* decided that in domestic law the article 2 procedural duty applies only in the case of deaths occurring on or after 2 October 2000: the Human Rights Act is not retrospective and the investigatory obligation is necessarily linked to the death itself. (*Middleton* and *R (Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796, - an appeal heard together with *Middleton*—were both in fact concerned with deaths occurring before 2 October 2000 but, as stated in the Committee's opinion in each case, no question had been raised there as to the retrospective application of the Human Rights Act and the Convention; rather they were assumed to be applicable and therefore nothing in those opinions was to be understood to throw doubt on the conclusion of the House in *McKerr*.)

31. Against that background it is now possible to state the central issue in this way: would any resumed inquest here be a *Jamieson* inquest or a *Middleton* inquest (as I shall describe the fuller process provided for by that decision)? The appellant Commissioner of Police (supported by the Attorney General for the Lord Chancellor as intervener) submits that it could only be a (necessarily inadequate) *Jamieson* inquest and accordingly that the coroner acted perfectly reasonably in refusing to reopen it. The respondent contends, and the Court of Appeal held, that it would be a *Middleton* inquest and that the coroner's decision was accordingly irrational.

32. It is agreed between the parties (Mrs Hurst and the Commissioner) that the United Kingdom is indeed under an international law obligation pursuant to article 2 of the Convention to conduct a further investigation into the death of the deceased and that, were such obligation sought to be discharged by reopening the inquest, it would need to be a *Middleton* inquest. The Attorney General, I should note, makes no such concession as to the requirement even under international law for any further investigation: he reserves his position both as to whether the circumstances of this death engaged the article 2 investigatory obligation in the first place and, even were it engaged, as

to whether the contested criminal proceedings brought against the deceased's killer in that event satisfied it.

33. It might perhaps have been submitted—as in the two Northern Ireland cases (*Jordan v Lord Chancellor* and *McCaughey v Chief Constable of the Police Service of Northern Ireland* [2007] UKHL 14) heard together with the present appeal—that even a *Jamieson* inquest here would satisfy the requirements of the article 2 procedural duty and that the coroner ought in any event therefore to have reopened the inquest. Not only, however, was this nowhere raised in the Statement of Facts and Issues as an issue for your Lordships' determination (and so not addressed either by the appellant or the intervener), but Mr Keir Starmer QC in argument expressly disavowed any suggestion that the coroner's decision could be impugned without reference to the United Kingdom's international obligations under the Convention. Given, moreover, the decision in *Middleton* that a section 3 construction of the governing legislation was required to enable an article 2 compliant inquest to take place in that (to my mind analogous) case, it is difficult to see how such an argument could have succeeded. The position here is quite different from that arising in the two Northern Ireland cases where the deceased were directly killed by State agents. As *McCann* had shown, the article 2 obligation in those cases *can* be satisfied by a *Jamieson* inquest.

34. My noble and learned friends, Baroness Hale of Richmond and Lord Mance, whilst accepting all this, would nevertheless dismiss the Commissioner's appeal and so leave in force the Divisional Court's order that the inquest into Troy Hurst's death be re-opened (or require at least that the Coroner re-take the decision whether or not to re-open it), on the basis that even a *Jamieson* inquest would be likely, although of course at the Coroner's discretion, to "examine the conduct of the police and the housing authority that fateful day if not before" (para 22 of Lady Hale's opinion). Given, however, as both Lady Hale and Lord Mance in terms accept, that, upon the conclusion of such an inquest, the jury would be debarred from expressing any views whatever upon the conduct which they had been examining (the whole point of a *Middleton* inquest being, as I have explained above, to enable the jury to state their conclusions on the important underlying issues such as what risks should have been recognised and what precautions taken) the value of such an inquest may be doubted. It might, indeed, be thought the worst of all worlds. Lady Hale and Lord Mance expressly acknowledge that it would not satisfy the UK's international obligations under article 2 of the Convention. Nor would it satisfy the respondent's understandable desire for detailed findings to be made upon the circumstances leading

to her son's death. At best it could occasion a report from the Coroner to a responsible authority under Rule 43 (see para 74 of Lord Mance's opinion). Small wonder that such an inquest was not one for which Mr Starmer has ever contended.

35. I must turn now in a little more detail to the circumstances in which this death occurred and then indicate something of the course of events leading up to the present appeal.

36. The deceased (then aged 39) was stabbed to death by his neighbour, Albert Reid, on 25 May 2000. Both were Barnet Council tenants on the Stroud Green Estate in North London. There had been a long history of disruptive behaviour and violence by Reid towards other tenants on the Estate dating back to 1997. Police and local authority reports record a number of instances of Reid's use and concealment of weapons and threats of violence.

37. In April 2000 the Council began possession proceedings against Reid. Reid thought the deceased in part responsible. Increasing concerns about Reid's behaviour were expressed in the weeks leading up to the hearing date, 25 May. One police entry recorded that he was "extremely dangerous and has the potential to seriously injure or kill." In the event the proceedings were adjourned on 25 May and the court refused the Council's application for an injunction in the meantime to remove Reid from the estate. That evening there occurred a series of encounters between Reid and the Hurst family, each reported to the police with increasing urgency. Two of the calls were met with the response that there were "no units available." The final call informed the police of the fatal stabbing. A substantially fuller account of the background to the killing appears in the judgment of the Divisional Court (Rose LJ and Henriques J) [2003] EWHC 1721 (Admin); [2004] UKHRR 139, at paras 39-97.

38. On 30 May 2000 an inquest was opened but immediately adjourned pursuant to section 16(1) of the Coroners Act because Reid had been charged with murder. Following Reid's conviction for manslaughter on 16 July 2001 the coroner was strongly pressed to re-open the inquest under the provisions of section 16(3) of the 1988 Act: "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." By letter dated 19 November 2002 the coroner refused to do so, expressing the view that "all the matters

required to be ascertained have been fully explored and ascertained during criminal proceedings." The coroner further found no reason to reopen the inquiry pursuant to the United Kingdom's procedural duty under article 2 of the Convention (upon which the respondent had particularly relied): he did not regard the circumstances of the death as imposing any such obligation on the United Kingdom and, even were that wrong, expressed the view that an inquest would not satisfy it.

39. On 4 July 2003 the respondent's challenge to that decision succeeded before the Divisional Court. It was held that notwithstanding that the death occurred before the coming into force of the Human Rights Act a freestanding right arose to an article 2 compliant investigation and that the coroner's refusal to reopen the inquest "breached his obligation under the Human Rights Act to act compatibly with the European Convention." The coroner was accordingly directed to resume the inquest. Before he did so, however, this House decided in *McKerr* that the procedural duty under article 2 applies in domestic law only to deaths occurring on or after 2 October 2000. Indeed Lord Nicholls expressly stated that the Divisional Court's decision in the present case "fell into error by failing to keep clearly in mind the distinction between (1) rights arising under the Convention and (2) rights created by the 1998 Act by reference to the Convention." The Commissioner of Police of the Metropolis (who had appeared before the Divisional Court as an interested party) thereupon obtained leave to appeal out of time. Unsurprisingly in those circumstances the respondent totally re-cast her case, no longer relying on section 6 of the 1998 Act but instead invoking section 3. As Buxton LJ came to put it in his leading judgment in the Court of Appeal, the respondent sought "to uphold the Divisional Court's order on grounds that were neither before that court nor before the House of Lords in *In re McKerr*. . . . [The appeal] turned into an inquiry wholly different from that in the Divisional Court"—[2005] 1WLR 3892, 3896 (para 8).

40. In the result, the Court of Appeal dismissed the Commissioner's appeal, holding, first, that "[e]ven before the HRA domestic tribunals were bound to give full weight to the United Kingdom's international obligations to be found in the ECHR . . . [and that] it was not open to the coroner in terms of rationality as a matter of English domestic law to conclude otherwise than that the article 2 obligation required the resumption of the inquest" (Buxton LJ at para 29); and, secondly, that the interpretative obligation under section 3 of the 1998 Act is "to give effect to this country's international obligations, and not merely to its domestic obligations as created by the HRA" (Buxton LJ at para 61).

On the appeal before your Lordships both those holdings are strenuously contested by the Commissioner and the Lord Chancellor.

41. Recognising that her case for a resumed inquest depends upon establishing that it would not be confined to a *Jamieson* proceeding but held rather in accordance with the broader *Middleton* approach, the respondent puts her case on two alternative bases. First she seeks to rely on section 3 of the 1998 Act, the argument which succeeded before the Court of Appeal. Secondly she submits that, even assuming section 3 cannot avail her, the *Middleton* approach must now be applied to *all* inquests, either because section 11(5)(b)(ii) must now be re-interpreted to bring our domestic law into conformity with our international obligations or because *Middleton* is now to be regarded as binding authority on the meaning of section 11 in all cases. Both these arguments were rejected by the Court of Appeal (the first simply on the basis that that court was bound by *Jamieson*).

Section 3

42. *McKerr* concerned a challenge to the Secretary of State's refusal to provide an article 2 compliant investigation into a pre-1998 Act death, a challenge founded on section 6 (1) of the 1998 Act: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right." The House held that "a Convention right" for this purpose meant such a right (as identified in section 1 of the Act) created by the Act in domestic law. Since the Act was not retrospective, the secondary right to an article 2 compliant investigation accordingly arises only in respect of deaths occurring on or after 2 October 2000.

43. What the Court of Appeal held in the present case is that *McKerr* says nothing as to the interpretative obligation under section 3 and that "it is the *international* obligations of the state that section 3 requires to be used in reading and giving effect to legislation" (original emphasis given by Buxton LJ at para 58). Section 3 provides: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." Those Convention rights, said Buxton LJ (at para 44), mean the rights and fundamental freedoms set out in the various articles of the Convention and they "exist and have force because of the United Kingdom's adherence to the ECHR rather than because of the passage of the HRA."

44. For my part I have the greatest difficulty with this approach which necessarily involves construing the words "the Convention rights" where they appear in section 3 differently from their meaning in section 6 ("a Convention right"). But why should they be construed differently? The plain object of section 3 is to avoid where possible action by a public authority which would otherwise be unlawful under section 6. It applies only where there would otherwise be a breach of a Convention right under domestic law. In the present case, as *McKerr* established, it would not be unlawful under domestic law for no further investigation to be carried out into Mr Hurst's death. The scheme of the 1998 Act and the link between sections 3 and 6 are to my mind plain. This is perhaps most clearly demonstrated by the language of section 6(2)(b), language which expressly mirrors that of section 3: "Subsection (1) does not apply to an act if . . . (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

45. The Divisional Court in *Pearson v Inner London North Coroner* [2005] EWHC 833 (Admin) had to confront the very issue now arising. A new inquest into a pre-1998 Act death was there sought under section 13 of the 1988 Act on the ground of insufficiency of inquiry. The main argument before the court was that the coroner had conducted a *Jamieson* inquest, whereas he should have conducted an article 2 compliant inquest. Maurice Kay LJ (with whom Moses J agreed) rejected the section 3 argument:

> "9 . . . One does not reach the stage of resort to section 3 as a tool for interpretation unless and until it is established that the Human Rights Act applies. In *Middleton* and *Sacker* it was simply assumed, without demur, that it applied on a retrospective basis but with the point expressly left open. However, the point was very clearly decided in *McKerr*. It comes to this. When article 2 provides that 'everyone's right to life shall be protected by law', it embraces both a positive obligation on the state to protect everyone's life and a procedural requirement that there should be some form of effective official investigation when an individual has been killed. The present case is concerned with that procedural obligation. It is not the primary obligation imposed by article 2 but, in the words of Lord Nicholls, 'a consequential obligation'. . . . The logic of *McKerr* is inexorable. If the positive

> obligation did not arise in domestic law prior to 2 October 2000, the consequential, secondary, ancillary or adjectival obligation cannot now give rise to a domestic obligation because it is consequential upon and secondary, ancillary and adjectival to the substantive obligation to protect life. I am driven to the conclusion that if the Appellate Committee in *Middleton* and *Sacker* had been required to address this question, it would have yielded to the same inexorable logic."

46. Buxton LJ disagreed with that conclusion: it was clear, he said, that "the Divisional Court did not have the benefit of the detailed argument that has been deployed before us." For my part, however, and despite Mr Starmer's "detailed argument", I find Maurice Kay LJ's judgment compelling. It is true, of course, that section 3 was not in play in *McKerr*: what was there under challenge was the Secretary of State's refusal to exercise a general administrative discretion to set up an inquiry. I cannot suppose, however, that our conclusion there would have been different had it been a section 3 case. Otherwise, as in *Pearson* itself, section 13 of the 1988 Act could be invoked in all these old cases with a view to the ordering of a new inquest—precisely the concern expressed by the House in *McKerr*. As Lord Hoffmann put it (at para 67):

> "[T]he international law obligation is irrelevant. Either the Act applies to deaths before 2 October 2000 or it does not. If it does, there is no reason why the date of accession to the Convention should matter. It would in principle be necessary to investigate the deaths by state action of the Princes in the Tower."

47. Although the respondent sought to pray in aid passages from the opinions of this House in *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, nothing in that case appears to me inconsistent with this view: on the contrary, as Lord Rodger of Earlsferry observed at para 204:

> "Parliament must have intended all the operative provisions of this particular statute to take effect in the same way in respect of any given Convention right."

The contention that Middleton now applies to all inquests

48. Neither way the argument is put do I find persuasive and both were rightly rejected by the court below. *Middleton* clearly accepted that *Jamieson* was correctly decided. Were it otherwise, the House could simply have overruled it without recourse to the Human Rights Act at all, let alone section 3. It is plain that the House was not intending the *Middleton* approach thereafter to apply in all cases. In the first place, an article 2 investigative obligation only arises in the comparatively few cases where the state's responsibility is or may be engaged. Secondly, even where the obligation does arise, it will often be satisfied without resort to a *Middleton* inquest—in some cases by criminal proceedings, in particular "where a defendant pleads not guilty and the trial involves a full exploration of the facts surrounding the death" (para 30 of the Committee's opinion delivered by Lord Bingham of Cornhill); in others, like *McCann*, where "short verdicts in the traditional form will enable the jury to express their conclusion on the central issue canvassed at the inquest" (para 31 of the opinion). All this is clear from the Committee's opinion which in terms recognises (para 36) that only sometimes will a change of approach be called for.

49. Why, then, should *Jamieson* now be re-interpreted? The difficulties with such a proposition seem to me many and various. The first is this. The contention that *Jamieson* must be re-interpreted to enable the United Kingdom to satisfy its international law obligation in those cases where otherwise it would be breached (no domestic law obligation ex hypothesi being engaged in respect of a pre-Human Rights Act death) flies in the face of the conclusion already reached as to the effect of *McKerr*: if *McKerr* necessarily precludes the use of section 3 to achieve the contended for result, so too surely it must preclude the achievement of the same result by the back door route now suggested. That aside, any contention for the re-interpretation of section 11 (5)(b)(ii) requires first that it contains a relevant ambiguity i.e. that it is capable, within the ordinary canons of construction, of bearing one or other of two possible meanings. Again, however, that seems to me irreconcilable with the House's opinion in *Middleton* which, in widening the meaning of "how", expressly relied on section 3. Section 3 is only invoked where, to achieve compliance with the Convention, the court must depart from the unambiguous meaning the legislation would otherwise bear. Nor is it surprising that the House in *Middleton* thought it necessary to resort to section 3: *Jamieson* apart, there was a series of authorities stretching back to *R v Walthamstow Coroner, Ex p Rubenstein* (unreported, 19 February 1982) (itself cited in *Jamieson*) which had similarly construed the provision.

50. Even, moreover, were the respondent's argument to satisfy the threshold condition of ambiguity, she would still have to show that it would be appropriate to resolve that ambiguity by reference to the presumption "that Parliament intended to legislate in conformity with the Convention, not in conflict with it" (Lord Bridge of Harwich's formulation of this principle of construction in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696,747-748). That too, however, presents the respondent with real difficulties. The meaning of the word "how" in this legislation was, as stated, first established in *Ex p Rubenstein* in 1982. Not only was the 1988 Act (in which the present provision appears) itself a consolidating Act (and concerned, therefore, to enshrine the existing law) but it was enacted at a time when Parliament can have had no thought that one day the United Kingdom might be under a procedural obligation to enquire into deaths pursuant to article 2 of the Convention. As already observed, it was not until 1995 that the European Court of Human Rights in *McCann* itself identified any such Convention duty. And, as the Commissioner points out, even had Parliament been aware of this duty, it might well have thought it sufficiently or better discharged by other means: criminal proceedings, a judicial inquiry or some different process. It can hardly be supposed that Parliament would have wanted the wider *Middleton* approach to be adopted for all future inquests.

51. It should be noted that the *Jamieson* interpretation of the word "how" does not, of itself, place the United Kingdom in conflict with its international law obligations. True it is that in *Middleton* the Committee said that: "In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under article 2" (para 47). That, however, is very far from saying that section 11 must accordingly be construed in all cases to require a *Middleton* inquest. Mr Starmer suggested that it would be for the coroner in each case to decide whether a *Middleton* inquest was appropriate. That, however, cannot be. Of course, the scope of the inquiry is ultimately a matter for the coroner. The "verdict" and findings, however, are not. The *Jamieson* construction of "how" severely circumscribes these. But where the *Middleton* construction applies, the verdict and findings are not merely permitted, but *required* to be wider: section 11 dictates that the inquisition "shall set out, so far as such particulars have been proved . . . how . . . the deceased came by his death." If in every case that means "in what circumstances" as well as "by what means", the coroner will inevitably in many cases have to widen the scope of the inquiry beyond that which, under the *Jamieson* approach, he would otherwise regard to be appropriate.

52. I turn, therefore, to the other limb of this argument, the submission that *Middleton* is now binding authority on the meaning of section 11 in all circumstances, a conclusion, as already explained, plainly contrary to what the House in *Middleton* intended. The answer to it in my judgment is to be found, as the intervener argues, in the analogous field of European Community law where, pursuant to *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, a similarly strong interpretive obligation is imposed on member states to construe domestic legislation whenever possible so as to produce compatibility with European Community law. The closeness of this analogy has been recognised by the House in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557—see particularly Lord Steyn's opinion at para 45. Where the *Marleasing* approach applies, the interpretative effect it produces upon domestic legislation is strictly confined to those cases where, on their particular facts, the application of the domestic legislation in its ordinary meaning would produce a result incompatible with the relevant European Community legislation. In cases where no European Community rights would be infringed, the domestic legislation is to be construed and applied in the ordinary way. Thus in *R v Secretary of State for Transport, Ex p Factortame Ltd* [1990] 2 AC 85, Part II of the Merchant Shipping Act 1988 was to be disapplied in those cases where its operation would infringe directly effective European Community rights; but not otherwise. Similarly in *Imperial Chemical Industries plc v Colmer (Inspector of Taxes)(No 2)* [1999] 1 WLR 2035 the House, following a reference to the Court of Justice of the European Communities (*Imperial Chemical Industries plc v Colmer* [1999] 1 WLR 108), held that ICI remained bound by domestic legislation upon its ordinary meaning notwithstanding that in certain circumstances such a construction would be incompatible with European Community rights. This principle was again applied by the Court of Appeal in *Gingi v Secretary of State for Work and Pensions* [2002] 1 CMLR 587 where Arden LJ expressly approved the following passage from *Bennion, Statutory Interpretation*, 4th ed (2002), p1117:

> "It is legitimate for the national court, in relation to a particular enactment of the national law, to give it a meaning in cases covered by the Community law which is inconsistent with the meaning it has in cases not covered by the Community law. While it is at first sight odd that the same words should have a different meaning in different cases, we are dealing with a situation which is odd in juristic terms."

Buxton LJ, who gave the leading judgment in *Gingi*, recognised the relevance of the principle to the present case and, as already stated, rejected this limb of the respondent's argument. He was right to do so.

The third issue

53. The third issue for the House's determination on this appeal (stated as issue two but more conveniently dealt with in the light of the conclusions reached on the other two issues) is whether, in exercising his discretion under section 16(3) of the Coroners Act, the coroner would require to take into account the United Kingdom's international obligations under article 2. Having myself reached the conclusion that, even were the inquest now to be re-opened, it could only proceed in accordance with the *Jamieson* approach, the third issue collapses: the Court of Appeal's conclusion that it was irrational not to resume it was necessarily dependent upon their holding that section 3 applied (or upon the respondent making good her alternative argument for saying that a *Middleton* inquest would now be held).

54. Since, however, the point was fully argued, and since Buxton LJ's view that "Even before the HRA domestic tribunals were bound to give full weight to the United Kingdom's international obligations to be found in the ECHR" has caused some concern in particular to the intervener, I shall briefly indicate why, from my part, I think the Court of Appeal were in error on this issue too, even supposing, as for this purpose one must, that to re-open the inquest would enable the coroner to satisfy the UK's international obligations in respect of Mr Hurst's death.

55. Must a statutory discretion be exercised "to give full weight to the UK's international obligations?" There are, of course, many dicta of high authority supporting the proposition that it is lawful to have regard to unincorporated treaty obligations in the exercise of a discretion. One such, in the context of the Convention, appears in Lord Bingham's opinion in *R v Lyons* [2003] 1 AC 976, para 13:

> "Even before the Human Rights Act 1998 the Convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, *guiding*

> *the exercise of discretions*, bearing on the development of the common law." (Emphasis added)

56. It is another thing, however, to say that the decision-maker is *bound* to have regard to such obligations and, moreover, (a necessary further part of the respondent's argument), bound to give effect to them unless there is good reason not to. Such a contention appears to run flatly counter to this House's authoritative decision in *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696. It was there held that decision-makers are under no obligation to exercise discretionary powers conferred upon them in domestic law so as to comply with unincorporated international obligations. Of the argument that by the same token that international obligations will determine the construction of ambiguous legislation so too where a discretion can be exercised either so as to conform to or to infringe a basic human right it must be exercised so as to conform, Lord Bridge said this (at p 748):

> "I confess that I found considerable persuasive force in this submission. But in the end I have been convinced that the logic of it is flawed. When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within Convention limits would be to go far beyond the resolution of an ambiguity. It would be to impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it. . . . When Parliament has been content for so long to leave those who complain that their Convention rights have been infringed to seek their remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot

> escape the conclusion that this would be a judicial usurpation of the legislative function."

Similar views are to be found in the other speeches. As, indeed, Neill LJ was later to observe in *R v Secretary of State for the Environment, Ex p NALGO* (1992) 5 Admin LR 785, 798, only Lord Templeman thought that article 10 was "a relevant matter to be taken into account." A series of earlier Court of Appeal decisions had been to the same effect: *R v Chief Immigration Officer, Heathrow Airport, Ex p Salamat Bibi* [1976] 1 WLR 979, *Fernandes v Secretary of State* [1981] Imm AR 1; *Chundawadra v Immigration Appeal Tribunal* [1988] Imm AR 161.

57. Some considerations are required to be taken into account by decision makers. Others are required not to be. But there is a third category: those considerations which the decision maker may choose for himself whether or not to take into account. As was stated by Cooke J in the New Zealand case of *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 183:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds the decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people including the court itself, would have taken into account if they had to make the decision."

A little later he added that even if the statute was silent,

> "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the Ministers . . . would not be in accordance with the intention of the Act."

Lord Scarman in *In re Findlay* [1985] 1 AC 318,334 approved those two passages in Cooke J's judgment as "a correct statement of principle."

58. Applying that principle to the present case it seems to me quite impossible to say that the unincorporated international obligation on the UK here was "so obviously material" to the coroner's decision whether or not to resume this inquest that he was required to give it "direct consideration". Still less in my judgment was he obliged to give effect to it, the very contention so roundly rejected in *Brind*.

59. Even, therefore, had the coroner recognised and felt able to satisfy the international law obligation upon the United Kingdom by re-opening the inquest, I for my part would not hold his refusal to do so irrational or otherwise unlawful.

Section 22(4)

60. There remains one final argument advanced by the respondent as a basis for upholding the Court of Appeal's decision, the contention (not previously advanced but nonetheless entertained by the House) that, even were she not otherwise able to rely on section 3 of the 1998 Act, she can do so here in reliance upon sections 22(4) and 7(1)(b) of the Act. Those sections provide:

> "7(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may . . . (b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act."

(Section 7(6) provides that "legal proceedings" in section 7(1)(b) includes "proceedings brought by or at the instigation of a public authority.")

> "22(4) Paragraph (b) of subsection (1) of section 7 applies to proceedings brought by or at the instigation of a public authority whenever the act in question took place; but otherwise that subsection does not apply to an act taking place before the coming into force of that section."

61. It is Mr Starmer's submission that a coroner's inquest is a proceeding "brought by or at the instigation of a public authority" and that the respondent is accordingly entitled to rely on her Convention right to an article 2 compliant inquest notwithstanding that her son's death occurred before 2 October 2000 so that the coroner would not otherwise be acting unlawfully under section 6 of the Act. I would reject this argument for reasons which can be very briefly stated.

62. Whilst it is clearly the case that the coroner is a public authority and that it is he who, in circumstances prescribed by section 8 of the Coroners Act, is required to "hold an inquest into the death of the deceased", it does not seem to me that the holding of an inquest constitutes the bringing (or instigating) of proceedings within the meaning of this legislation. There has been a great deal of discussion in the case law about the true scope of section 22(4). Essentially, however, it has been recognised to operate so as to allow victims to invoke rights which would otherwise be unenforceable in domestic law. Convention rights may be used as a shield to defeat proceedings brought against victims by public authorities, but not as a sword. As the late Peter Duffy QC explained in the annotations to section 22(4) in Current Law Statutes, vol 3 (1999), it was "to enable the Act to be used defensively against public authorities with retrospective effect but not, it appears, offensively", an explanation noted by Lord Hope of Craighead in *R v Kansal (No 2)* [2002] 2 AC 69 at para 56.

63. Section 7(1)(a) allows the victim of an actual or threatened unlawful act to "bring proceedings against the authority". Section 7(1)(b) allows him to rely on his Convention rights in legal proceedings brought *by* the authority. Only in the latter case can he rely on conduct violating his rights which was not unlawful in domestic law when it took place.

64. Inquest proceedings are in no sense brought *against* those participating in them. Least of all are they brought against those like this respondent whose sole concern is that such proceedings *should be* brought. In the present case, your Lordships will appreciate, the inquest stands adjourned and it is the respondent who seeks, the coroner who refuses, its re-opening. The true analysis here is that the respondent is herself "bring[ing] proceedings against the authority" within the meaning of section 7(1)(a) rather than relying on a Convention right in a legal proceeding brought by a public authority within the meaning of section 7(1)(b).

65. In my opinion, therefore, none of the respondent's arguments for upholding the Court of Appeal's judgment are sustainable. I would accordingly allow the Commissioner's appeal and hold the coroner's decision of 19 November 2002 to have been lawful.

LORD MANCE

My Lords,

Introduction

66. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Baroness Hale of Richmond and Lord Brown of Eaton-under-Heywood.

67. Three issues requiring resolution by the House were identified in the agreed Statement of Facts and Issues. They were:

"(i) Whether by virtue of section 3 of the Human Rights Act 1998, sections 16 and 11(5)(b)(ii) of the [Coroners Act 1988] are to be read and given effect so as to be compatible with Article 2 of the Convention [on Human Rights].

(ii) Alternatively, whether irrespective of the Human Rights Act 1998 being applicable to the discharge of his statutory duties, in exercising his discretion under section 16(3) of the 1988 Act, the coroner was required to take into account the United Kingdom's international obligations under Article 2 of the Convention.

(iii) If the inquest is only resumed in accordance with (ii) above, what does section 11(5)(b)(ii) of the 1988 Act require the scope of the inquiry to be."

68. In his case, Mr Starmer QC for Mrs Hurst identified a wider-ranging set of issues. These included a new argument under section 22(4) of the Human Rights Act 1998, which the House undertook to resolve. It is in substance another route by which Mr Starmer seeks to succeed on issue (i). They also included a suggestion that, quite apart from the Convention, the coroner's decision not to resume the inquest was based upon too narrow an interpretation of his discretion under

section 16(3) of the 1988 Act. In oral submissions before the House, Mr Starmer recognised realistically that he could not pursue any such suggestion.

69. Mr Starmer continued however to support the affirmative answer which was given by the Court of Appeal to issue (ii): cf paragraphs 29 and 31 per Buxton LJ (with whose reasons the other two members of the court agreed). This constituted one of two "separate and distinct conclusions" which led Buxton LJ to order the coroner to resume the inquest: paragraph 64. The other (matching issue (i)) was that section 11(5)(b)(ii) of the 1988 Act should, in the light of section 3 of the Human Rights Act 1998, be read compatibly with the United Kingdom's international duty under article 2 of the Convention to hold a full inquest meeting the standard set by the European Court of Human Rights in *McCann v United Kingdom* (1995) 21 EHRR 97: cf paragraphs 62 and 64 per Buxton LJ.

70. Buxton LJ's description of these two conclusions as separate and distinct indicates that he did not regard the first conclusion as in any way dependent on his conclusion on issue (i). However, in addressing issue (ii), Mr Starmer accepted that, even if he succeeded on issue (ii), "it would be hard" for him to challenge the coroner's refusal to resume the inquest as a matter of discretion unless he could also show that the inquest, when held, would have been "Convention-compliant". During the course of his submissions, he nevertheless carefully examined the scope of pre-Human Rights Act case-law, including *Jamieson*, with a view to showing that if offered, as he put it, a sufficient "basis for an investigative inquest in this case – ie were reasonable steps taken to protect Troy Hurst?", even without any such adjustment as he submitted should, if necessary, be made under issue (i). Even though a coroner's verdict may not under pre-Human Rights Act case-law go as far as the jurisprudence of the European Court of Human Rights indicates should be the case under article 2, it would in these circumstances be wrong in my view to regard Mrs Hurst as precluded from pursuing a case to the effect that pre-Human Rights Act case-law enables a sufficiently full investigation to achieve what would, for practical purposes in the present case, be a Convention-compliant process. In paragraphs 64-65 of his written case, Mr Starmer quoted passages from *R v. Inner West London Coroner Ex p Dallaglio* [1994] 4 All ER 139, 154d-155c and 155d-f and 164e-165a. There, Simon Brown LJ and Sir Thomas Bingham MR distinguished carefully between the limited scope of the verdict which the coroner might at the end leave to the jury and the broader scope of the investigation, which might form a proper part of his investigation during the course of the inquest, and Simon Brown LJ said

at p.155d that, rather than ask what would be the proper scope of any resumed inquest, the "better questions" were whether a full inquest would now be a practicable proposition and would satisfy any worthwhile purpose; and, in the result, the matter was remitted to a new coroner for him to consider whether to resume the inquest in that light. Mr Starmer's case continued by saying, at paragraph 66, that

> "if the Coroner in this case had followed the approach set out in *Dallaglio*, he would have exercised his discretion under section 16(3) … to resume the inquest into Troy Hurst's death. That submission is reinforced by reference to domestic caselaw postdating *Jamieson* that recognises that the investigation of neglect arising because of communications failures is legitimate in an inquest".

Mr Starmer's case then referred to a number of cases, the latest *R (Takoushis) v. Inner North London Coroner* [2005] EWCA Civ 1440; [2006] 1 WLR 461; there, in setting aside a coroner's refusal to summon a jury under section 8(3)(b) of the 1988 Act, Sir Anthony Clarke MR said at paragraph 41:

> "Although the possible verdicts at an inquest under the 1988 Act are circumscribed and, in particular must not ascribe criminal or civil liability, that does not mean that the facts should not be fully investigated …."

Mr Starmer at all times of course put his submissions higher, seeking a fully Convention-compliant inquest, in which there would be no circumscription of verdict. But, disagreeing with the last sentence of paragraph 34 in Lord Brown's opinion, at no point do I regard him as having abandoned the lesser alternative of a full investigation as summarised in paragraph 66 of his case.

Issue (i)

71. As Lord Brown observes, issue (i) was the subject of various alternative submissions by Mr Starmer. First, I agree that the Court of Appeal was wrong to conclude that, by virtue of section 3 of the Human Rights Act 1998, section 11(5)(b)(ii) of the Coroners Act 1988 has had since 2 October 2000 to be interpreted to require an inquest complying

with the United Kingdom's international obligations under article 2 of the Convention on Human Rights, no matter when the date of death. The Convention rights, in this case the right to life under article 2 in particular, only apply domestically to deaths occurring on or after 2 October 2000. The Convention right to a proper investigation is an ancillary aspect of the right to life under article 2, and therefore also only applies in respect of deaths occurring on or after 2 October 2000. Under section 6, a public authority, failing to carry out such an investigation in respect of a death occurring prior to 2 October 2000, cannot be regarded as acting incompatibly with a Convention right, since the relevant Convention right only applies domestically in respect of deaths occurring on or after 2 October 2000.

72. Second, subject to what I say below with regard to the scope and effect of *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1, I am in general agreement with Lord Brown's reasons in paragraphs 48 to 52 for rejecting Mr Starmer alternative submissions. The gist of Mr Starmer's submissions was that the House of Lords decision in *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 has in some way affected the previous jurisprudence (including *Jamieson*) on the scope of a coroner's investigation and verdict in relation to deaths occurring prior to 2 October 2000. The answer to them is that the broad interpretation which the House gave in *Middleton* to section 11(5)(b(ii) of the 1988 Act only applies in relation to deaths, and to inquests held in relation to deaths, involving potential state responsibility and occurring since 2 October 2000.

73. With regard to the new argument based on section 22(4) of the Human Rights Act 1998, I agree that Mrs Hurst cannot succeed for reasons given by Lord Brown in paragraphs 60 to 64 of his opinion.

74. Like my noble and learned friends, Lord Rodger and Baroness Hale, I am not persuaded that the distinction between a "*Middleton*" inquest and a "*Jamieson*" inquest is as stark as I believe Lord Brown to be suggesting in paragraphs 51, 56 and 57. In the light of the reasoning in *Jamieson* and its affirmation in this House in *Middleton* (which post-dated the coroner's decision in this case not to resume the inquest) the present coroner could not be faulted if he thought that a resumed inquest could lead only to a simple *verdict* of unlawful killing. A quite different matter is, however, the scope of the *investigation* which the coroner might undertake during a resumed inquest and which might lead him to make a report to the responsible person or authority under rule 43 of the

Coroners Rules 1984 with a view to preventing the recurrence of such a fatality.

75. In this same connection, I have difficulty with the reasoning of the Court of Appeal. Buxton LJ considered at paragraph 18 that any direct causal connection between any police failings and the death was broken by Mr Reid's violent intervention, so that no *verdict* (beyond unlawful killing) would have been possible. That I can accept. But at paragraph 20 Buxton LJ concluded that, if the coroner had asked himself whether the chain of causation (between any such failings and the death) was too remote to form a proper part of his *investigation*, the coroner could (in the light of what Buxton LJ had said in paragraph 18) only have answered the question in one way. That I consider, with respect, was a non sequitur. The nature of the verdict and the scope of the coroner's investigation are different matters. Then, at paragraph 29 Buxton LJ concluded that the coroner should, even "absent the Human Rights Act", have taken this country's international obligations under article 2 into account "in deciding whether there was sufficient cause to resume the inquest". That I can also accept. But he went on to say: "I would hold that it was not open to the coroner in terms of rationality as a matter of English domestic law to conclude otherwise than that the article 2 obligation required the resumption of the inquest". The problem here lies in seeing how it could be irrational to refuse to resume an inquest which Buxton LJ had already held in paragraph 20 could achieve no purpose, even in terms of investigation.

76. I would resolve that problem by holding, in agreement with what Baroness Hale says in paragraph 23 of her opinion (and also, as I understand it, with what Lord Rodger says in paragraph 8 of his opinion), that Buxton LJ was wrong in paragraph 20 to conclude that a resumed inquest could serve no purpose. It seems to me difficult to accept that it would have served no useful purpose in terms of *investigation* (cf paragraph 80 below). The coroner appears to me to have been wrong in his decision letter dated 19 November 2002 to give as his reason for not resuming the inquest that "all the matters required to be ascertained have been fully explored and ascertained during criminal proceedings". It follows that his decision is potentially vulnerable to review.

Issue (ii)

77. In the light of the way in which this appeal has been argued, issue (ii) is the prism through which the House has to view the question whether the coroner's decision should now be reviewed. The coroner had discretion under section 16(3) of the Coroners Act 1988 "to resume the adjourned inquest if in his opinion there [was] sufficient cause to do so". A decision under section 16(3) was described by Simon Brown LJ in *R v Inner West London Coroner, Ex p Dallaglio* [1994] 4 All ER 139 as "of a highly discretionary character". Issue (ii) raises the question whether Buxton LJ was right in paragraph 29 to consider that, even prior to the 2 October 2000, a coroner was bound at least to take into account this country's international obligations under article 2 of the Convention, when deciding whether to resume an inquest.

78. On this issue, I agree with Baroness Hale's remarks in paragraph 18 of her opinion, both generally and all the more so in circumstances where the coroner did in fact take article 2 into account (even though he did this at a time, prior to the House's decision in *In re McKerr* [2004] UKHL 12; [2004] 1 WLR 807, when it was assumed that he was bound to do so). I have corresponding difficulty in accepting Lord Brown's reasoning in his paragraphs 53 to 59 on what he terms the third issue. *R v Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696 establishes that a domestic decision-maker exercising a discretion is not *obliged* to exercise it in compliance with this country's international obligations. But he or she *may* do so: *R v Lyons* [2002] UKHL 44; [2003] 1 AC 976, paragraph 13 per Lord Bingham. I find unattractive the proposition that it is entirely a matter for a discretionary decision-maker whether or not the values engaged by this country's international obligations, however fundamental they may be, have any relevance or operate as any sort of guide (the term used by Lord Bingham in *R v Lyons* at paragraph 13).

79. Lord Brown in paragraph 57 cites Cooke J's words in *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 183, approved by Lord Scarman with whose speech all other members of the House agreed in *In re Findlay* [1985] 1 AC 318, 334B. Cooke J said that "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the Ministers ….. would not be in accordance with the intention of the Act". This country's international obligations in relation to a death potentially involving state responsibility appear to me to merit equivalent recognition at least as a relevant factor, even if the decision-maker were

in the event to regard them as outweighed by other considerations. I find support for that approach in the Court of Appeal's reasoning in both *Rantzen v Mirror Group Newpapers (1986) Ltd* [1994] QB 670, 692D and *R v Lord Saville of Newdigate, Ex p A* [2000] 1 WLR 1855, paragraph 37.

80. Here, in any event, the coroner did direct attention to article 2 (and I do not think that it can be assumed that he would have declined to do this, had the prevailing view at the time been that it was optional whether or not to do so). He concluded that there was no "negligence" in relation to the circumstances giving rise to Troy Hurst's death sufficient to engage article 2 and that a coroner's inquest would not in any event fulfil the requirements of article 2. The former proposition assumes the outcome of any investigation, before holding the investigation. The latter proposition may be accepted as regards any verdict. But the scope of a domestic *investigation* could well have gone far, if not the whole way, towards meeting this country's international obligations, and the coroner, as I have said in paragraph 76, was wrong in my view to conclude that a domestic investigation could or would add nothing to the previous criminal investigation.

81. These points were and are open to Mr Starmer on behalf of Mrs Hurst under the agreed issues. They do not involve or require any cross-appeal. Mrs Hurst as respondent is seeking to uphold, not to set aside or vary any order made in the courts below. The points were in my judgment covered by Mr Starmer's submissions, even though his primary concern was to establish that Mrs Hurst had a right to an inquest which would be fully compliant with the international standards set under article 2 by *McCann*. I do not consider that the coroner's discretion to refuse to resume the inquest was exercised upon grounds which can stand scrutiny.

Conclusion

82. In disagreement therefore with the conclusion reached by the majority of the House, in my judgment the House should either (a) dismiss the appeal on the basis that it was (as Buxton LJ thought and in the circumstances which Baroness Hale has encapsulated in paragraph 23 of her opinion) not open to the coroner in terms of rationality to do other than resume the inquest, or (b) (alternatively, if that view is not accepted) should only allow the appeal to the extent of varying the orders made in the courts below so as to provide for the coroner's

decision to be set aside and for the question of the resumption of the inquest under section 16(3) of the Coroners Act 1988 Act to be remitted to him for reconsideration.