Case No: C1/2005/0572

Neutral Citation Number: [2005] EWCA Civ 890
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT
Lord Justice Rose and Mr Justice Henriques
CO/989/2003
[2003] EWHC 1721 Admin

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 21 July 2005

Before :

LORD JUSTICE BUXTON
LORD JUSTICE SEDLEY
and
SIR MARTIN NOURSE

- -

Between :

THE COMMISSIONER OF POLICE FOR THE METROPOLIS	**Appellant**
- and -	
CHRISTINE HURST	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

- -

Ms Anne Studd (instructed by **The Solicitor to the Metropolitan Police**) for the **Appellant**
Mr Keir Starmer QC and Mr Stephen Cragg (instructed by **Bhatt Murphy**) for the **Respondent**

- -

Judgment
As Approved by the Court

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Lord Justice Buxton :

Background

1. On 25 May 2000 Mr Troy Hurst, the son of the applicant before the Divisional Court, Mrs Christine Hurst, was killed by a violent stabbing attack perpetrated by a neighbour, Mr Albert Reid. An inquest into Mr Hurst's death was opened very shortly thereafter, but immediately adjourned under the provisions of section 16(1) of the Coroners Act 1988 [the 1988 Act] because Mr Reid had been charged with murder. He was eventually convicted of manslaughter on 16 July 2001. The Coroner accordingly had to decide whether there was "sufficient cause" to re-open the inquest under section 16(3) of the 1988 Act.

2. The Coroner had been strongly pressed by Mrs Hurst and those advising her to re-open the inquest: not to ascertain the cause and immediate circumstances of the death, which were unfortunately plain enough and had in any event been determined in the criminal trial, but to explore further what Mrs Hurst considered had been the many failings of various public authorities in giving her son sufficient protection from the known hostility and propensity to violence of Mr Reid. The concerns asserted by Mrs Hurst included failure by Barnet Council, Mr Reid's landlords, to take sufficient steps to evict Mr Reid in the light of threatening and violent behaviour towards neighbours, including Mr Hurst and his father; failure by Barnet Health Authority adequately to respond to Mr Hurst's personality disorder; and failure by the Metropolitan Police to act upon previous incidents of violence on the part of Mr Reid and, in particular, failure to treat with sufficient seriousness a series of reports of violent and erratic behaviour on the day of the death itself. A further theme of particular concern was the apparent failure of these three authorities to share the information that they had about Mr Reid with each other, and indeed within the police force itself, with the result that, for instance, the officers who attended to deal with the various incidents on the day of the death were not sufficiently briefed about Mr Reid's very violent history.

3. By a substantial letter dated 19 November 2002 the Coroner declined to re-open the inquest. He considered, simply applying the wording of section 16(3) of the 1998 Act, that all the matters required to be ascertained at an inquest had been ascertained in the criminal trial; and then held that the decision not to re-open the inquest was compatible with his and the United Kingdom's obligations under article 2 of the European Convention on Human Rights [ECHR]. The latter conclusion was challenged in the Divisional Court, in judicial review proceedings from which the present appeal is brought.

The decision of the Divisional Court

4. The Divisional Court held, deciding between conflicting first instance decisions, that the duty under article 2 to investigate unexplained deaths applied to the Coroner's exercise of his statutory discretion even though the death occurred before

the coming into force of the Human Rights Act 1998 [the HRA]. They found that duty to be as stated by the ECtHR in *Osman v United Kingdom* 29 EHRR 245 [116], in terms adopted and approved by this court in *R(A) v Lord Saville of Newdigate* [2002] 1 WLR 1249 at paragraphs 12 and 28:

> "It must be established...that 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 "

After an extensive review of the available evidence the Divisional Court, although recognising the stringency of that test, concluded that the Coroner's decision had not been in compliance with article 2. Rose LJ said in paragraphs 110 and 111:

> "Our task is to decide whether, when the Coroner refused to resume the inquest, the material then before him, and now before us, gave rise, arguably, to a breach of Article 2 by either [the Metropolitan Police or Barnet Council]. In my view, it did, and however inadequate a remedy the holding of an inquest in such circumstances may be, the Coroner's refusal to resume it was in my judgment fatally flawed ...and breached his obligation under the Human Rights Act to act compatibly with the Convention.

5. It is not necessary to go further into the detail of the Divisional Court's reasons for that conclusion, because the Metropolitan Police, the only appellant before us, does not contest the proposition that if the Divisional Court was right to consider that article 2 applied to the Coroner's decision, then it was open to it to find on the material before it that the duty imposed by that article had not been fulfilled. Nor is it in issue whether a Coroner's inquest is the most efficacious medium through which to investigate the matters that call for enquiry in this case: a question on which I for my part share the doubts that were plainly entertained by Rose LJ. Granted that the resumption of the inquest is the only available step forward in the investigation, the contest before us is as to whether the decision as to that resumption is governed by article 2.

Events after the decision of the Divisional Court

6. The Divisional Court directed the coroner to resume the inquest. Because of perceived practical difficulties, that step was not put in hand by the coroner before the House of Lords delivered judgment in *In Re McKerr* [2004] 1 WLR 807 [*McKerr*] on11 March 2004. It will be necessary to come back to that case in much greater detail. For the moment, it suffices to note that the House held, contrary to the view of the Divisional Court set out in paragraph 4 above, that the duty to investigate unexplained deaths imposed by article 2 only applied to deaths occurring

after 2 October 2000, the commencement date of the operation of the HRA; the HRA was not, at least in this respect, retrospective; and the investigatory duty that forms part of article 2 was not "free-standing", but only adjectively linked to the duty to protect life. Since the state had no article 2 duty to avoid Mr McKerr's death before 2 October 2000, equally it had no article 2 duty to investigate that death if it occurred before 1 October 2000, even though the issue as to that investigation arose after 1 October 2000. And further, at paragraph 25 of his speech in *McKerr* Lord Nicholls of Birkenhead specifically stated, in terms to which we will again have to return, that the Divisional Court in our case had fallen into error by finding a duty of investigation in respect of a death that occurred on 25 May 2000.

7. Those observations necessarily do not disturb the actual order of the Divisional Court; and in these proceedings one of the interested parties in the court below, the Metropolitan Police, appeals against that order, relying principally on *McKerr*. The other interested parties, the local authority and the health authority, support the appeal but have taken no active part in it. Nor has the coroner taken an active part in the appeal, his position very properly being that he will abide by the order of the court.

8. The appeal is strenuously resisted by Mrs Hurst, who seeks to uphold the Divisional Court's order on grounds that were neither before that court nor before the House of Lords in *McKerr*. No objection has been taken to that course, though it has meant that this appeal has turned into an enquiry wholly different from that in the Divisional Court. The route by which we are invited to uphold the Divisional Court's order is one of some complexity. We have been assisted in pursuing that route by the admirable arguments of Mr Starmer QC for Mrs Hurst and of Miss Studd for the police: whilst being all the while very conscious that we are being asked to uphold an order that has already been characterised as erroneous in the House of Lords.

9. That has also meant that before us the proceedings took the form of Mrs Hurst, albeit technically the respondent, presenting her new case in support of the Divisional Court's order, which case was then answered by the appellant. That form is reflected in the form of the judgment that follows. However, before setting out the issues as reflected in the respondent's argument it is necessary to summarise the coroner's statutory duties.

The coroner's duties

10. By section 11(5)(b)(ii) of the 1988 Act, the coroner's inquisition returned at the end of the inquest shall set out, insofar as it has been proved, "how, when and where the deceased came by his death". The Coroner's Rules 1984, made under the authority of a provision consolidated in the 1988 Act, provide by rule 36 that the proceedings and evidence at an inquest shall be directed solely to answering that question; and in

particular that no verdict shall be framed so as to appear to determine any question of criminal liability of a named person, or any question of civil liability.

11. The relevant parts of section 16(3) of the 1988 Act, already referred to in paragraph 1 above, need to be set out verbatim:

> "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."

The respondent's arguments

12. The arguments advanced on behalf of Mrs Hurst can be divided into three categories. First, reliance is placed in a number of ways on the effect in domestic law of the ECHR before the HRA. To quote Lord Bingham of Cornhill in *R v Lyons* [2003] 1 AC 976[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"

It was therefore argued that even if, because of the date of the death, the coroner was to be regarded as exercising a discretion governed purely by domestic law, innocent of the HRA, that discretion had to be illuminated by, and exercised in the light of, the United Kingdom's international obligations springing from this country's adherence to the ECHR.

13. Second, section 11(5)(b)(ii) of the 1988 Act had been authoritatively interpreted by the House of Lords in *R(Middleton) v West Somerset Coroner* [2004] 2 AC 182 [*Middleton*], which case concerned a death occurring before the implementation of the HRA, although the timing point that prevailed in *McKerr* was not taken. That interpretation was said now to bind the coroner, and should drive him to resume the inquest.

14. Third, strong reliance was placed on section 3 of the HRA, which reads:

> "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"

15. By section 3(2) of the HRA, that provision applies to all legislation, whenever it was enacted. It therefore applied to the 1988 Act; and in that context section 3 should be read as operating "retrospectively", in the sense that the coroner's duty set

out in the 1988 Act should be interpreted compatibly with article 2 even where, following the decision in *McKerr*, the death to which that duty related was not covered by the provisions of the Convention.

16. As already observed, none of these arguments were placed before the Divisional Court. None of them featured in *McKerr*. And it may also be convenient to emphasise that none of them assert in any way the "overriding common law right" that was very firmly rejected in *McKerr*. I deal with the arguments in turn, but as a preliminary to that must set out the interpretation placed in domestic law before the HRA on section 11(5) of the 1988 Act.

Section 11(5) of the 1988 Act before the HRA

17. *R v HM Coroner for North Humberside ex p Jamieson* [1995] QB 1 [*Jamieson*] concerned a death in prison, the deceased's relatives challenging the refusal of the coroner to permit the jury to return a verdict in which lack of care on the part of the prison authorities in guarding against suicide played a part. This court, in a judgment delivered by Sir Thomas Bingham MR (as he then was), held, at p 24A, that

> "Both in section 11(5)(b)(ii) of the Act of 1988 and in rule 36(1)(b) of the Rules of 1984, 'how' is to be understood as meaning 'by what means'. It is noteworthy that the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but 'how...the deceased came by his death', a more limited question directed to the means by which the deceased came by his death"

It therefore followed [at p26A] that

> "Neither neglect nor self-neglect should ever form any part of any verdict unless a clear and direct causal connection is established between the conduct so described and the cause of death"

18. *Jamieson* was a case about the form of the verdict rather than the scope of the enquiry. Nonetheless, the view taken by this court of the limited permissible range of that verdict makes it inevitable that the enquiry at the inquest should be equally limited to events having "a clear and direct causal connection" with the death. That would only rarely encompass cases of lack of vigilance. It plainly would not extend to the present case, where any direct causal connection between the failings of the police and the death was broken by the violent intervention of Mr Reid.

19. Less than two months after *Jamieson* this court heard and decided *R v West London Coroner ex p Dallaglio* [1994] 4 All ER 139 [*Dallaglio*], which concerned (amongst other questions) the refusal of the coroner to exercise his power under section 16(3)

to resume the inquests into the deaths that occurred in the *Marchioness* disaster on the termination of the criminal proceedings that resulted from that disaster. Counsel for the coroner relied on the *Jamieson* explication of "by what means" to argue that a resumed inquest would not assist the families, since it would not and could not investigate the lack of care that had led to the fatal collision, that collision being plainly the cause of the deaths. However, in the leading judgment Simon Brown LJ, at p 154f, drew attention to section 8(3)(d) of the 1988 Act, which provides that the coroner must sit with a jury

> "If it appears to a coroner.....that there is reason to suspect...that the death occurred in circumstances the continuance or possible recurrence of which is prejudicial to the health or safety of the public or any section of the public"

That appeared to be difficult to reconcile with the limited view of the coroner's powers taken in *Jamieson.* And Simon Brown LJ went on to the further obligation of the coroner recognised at p26B of *Jamieson* to be vigilant to ensure that the relevant facts are exposed to public scrutiny. That scrutiny might have been thought to be restricted to the facts to which *Jamieson* had restricted the enquiry, but Simon Brown LJ drew from that passage the conclusion, at p155b, that

> "It is, in short, for the individual coroner to recognise and resolve the tension existing between ss 8(3) and 11(5)(b) of the 1988 Act and r36. The inquiry is almost bound to stretch wider than strictly required for the purposes of a verdict. How much wider is pre-eminently a matter for the coroner whose rulings upon the question will only exceptionally be susceptible to judicial review"

20. Sir Thomas Bingham MR, at p 164f, also addressed *Jamieson*:

> "*Jamieson's* case was specifically directed to the verdict of lack of care in the context of deaths in custody, but the court's ruling was of wider application and it is true that if these inquests were to be resumed the verdicts which the coroner could properly leave open to the jury at the end would be both limited and predictable. The court did not, however, rule that the investigation into the means by which the deceased came by his death should be limited to the last link in the chain of causation. That would not be consistent with the court's conclusion in [*Jamieson* at p 26B] which emphasised the need for full, fair and fearless investigation and the exposure of relevant facts to public scrutiny, and it would defeat the purpose of holding inquests at all if the inquiry were to be circumscribed in the manner suggested. It is for the coroner conducting an inquest to decide, on the facts of a given case, at what point the chain of causation becomes too remote to form a proper part of his investigation. That question, potentially a very difficult question, is for him"

In our case, the coroner did not ask himself that question, or at least not in that precise form. As I have already ventured to suggest, had he posed that question, and if the reference in *Dallaglio* to the "chain of causation" bears the usual legal meaning of that expression, then the question could only have been answered in one way.

21. Lord Bingham of Cornhill, delivering the opinion of the Appellate Committee, reverted to *Jamieson* at paragraph 28 of *Middleton*. In that case, as will be described below, the House held itself obliged, in the light of article 2, to read section 11(5)(b)(ii) significantly more widely than had this court in *Jamieson*; and thus to place upon the coroner obligations as to investigation of allegations of lack of care in prison deaths that had been repudiated in *Jamieson*. Lord Bingham said:

> "Remarkably, as it now seems, the Court of Appeal made no reference to the European Convention in [*Jamieson*], and the report does not suggest that counsel referred to it either. Counsel for Mrs Middleton criticised the reasoning of that decision, but it appears to the committee to have been an orthodox analysis of the Act and Rules and an accurate, if uncritical, compilation of judicial authority as it then stood."

The House then set out a summary of the findings in *Jamieson*, including those described above, without further comment. *Dallaglio* was not cited to the House and not mentioned in the opinion, though Lord Bingham can scarcely have been unaware of that case.

22. The treatment of the case in *Middleton* unavoidably confirms that the *Jamieson* view, that "how" in section 11(5)(b)(ii) means "by what means", and no more, was the law of England until the coming into operation of the HRA. If this court in *Dallaglio* placed a gloss on that formulation, unperceived by the House in *Middleton,* for the reason set out at the end of paragraph 20 above that gloss cannot assist Mrs Hurst.

Reconsideration of section 11(5)(b)(ii) in the light of ECHR jurisprudence?

23. Mrs Hurst argued that even without reference to the HRA the interpretation of section 11(5)(b)(ii) adopted in *Jamieson* should be revisited in the light of this country's obligation to conform its domestic law to its international obligations as found in the ECHR. Reference is made to the observations of Lord Bingham quoted in paragraph 12 above, and also to what was said in that same case by Lord Hoffmann, [2003] 1 AC 976[22]:

> "There is a strong presumption in favour of interpreting English law (whether common law or statute) in a way that does not place the United Kingdom in breach of an international obligation"

Mrs Hurst contends that the jurisprudence of the ECtHR imposing the duty under article 2 of effective investigation, conveniently listed by Lord Bingham in paragraph 2 of the report of the Appellate Committee in *Middleton*, largely or entirely post-dated *Jamieson*. Had it been available to this court in that case, and more particularly to counsel appearing in that case, the outcome might have been different. Or, alternatively, *Jamieson* should simply be reconsidered as being inconsistent with the jurisprudence of the ECtHR. We were shown a case in the Court of Appeal in Northern Ireland, *Jordan* [2004] NICA 29, in which Nicholson LJ expressed support for both of those views.

24. None of this was addressed in *Middleton*. That is more than merely a passing observation, because if this issue were being considered at the level of the House of Lords it would, whether right or wrong, at least not face the objections in terms of *stare decisis* that in my view makes the argument unavailable in this court.

25. In *Leeds City Council v Price* [2005] 1 WLR 1825 this court had to consider whether it was bound to follow a decision of the House of Lords that was said to conflict with a subsequent decision of the ECtHR. This court held that the principles of *stare decisis* required it to follow the House of Lords decision, as a binding precedent in the domestic hierarchy. The court cited a ruling, prior to the implementation of the HRA, by Judge LJ in the Divisional Court in *R(Bright) v Central Criminal Court* [2001] 1 WLR 662 at p682:

> "We are not permitted to re-examine decisions of the European court in order to ascertain whether the conclusion of the House of Lords or Court of Appeal may be inconsistent with those decisions, or susceptible to a continuing gloss. The principle of stare decisis cannot be circumvented or disapplied in this way"

The constitution of this court that decided *Price* does not appear to have been told that the observations of Judge LJ were approved generally by this court, and applied in the post-HRA world, in *Kaya v Haringey London Borough Council* (2001) 34 HLR 1 [36]-[37]; see also *R(Williamson) v Secretary of State for Education* [2003] QB 1300[41]. And that must logically be the case: we are bound by this court as much as we are by the House of Lords.

26. *Jamieson* is thus binding authority on the meaning of section 11(5)(b)(ii), authority that cannot be displaced by resort to subsequent jurisprudence of the ECtHR. The case could therefore be undermined only if it could be said to have been decided *per incuriam* of the Convention jurisprudence. But that argument cannot run in a pre-HRA case. The interpretative obligation of the court in pre-HRA cases was that enunciated by Lord Bridge in *R v Secretary of State for the Home Department ex parte Brind* [1991] 1 AC 696 at pp 747 and following. Neither the comparatively cautious approach in that case, nor the underlying Convention jurisprudence, can be characterised as a statute or a rule having statutory effect such as to bring the case within the third rule in *Young v Bristol Aeroplane Co.*

27. I accordingly find myself obliged to conclude that without the assistance of the HRA the interpretation of section 11(5)(d)(ii) remains as laid down in *Jamieson.*

Reconsideration of the section 16(3) duty in the light of the Convention jurisprudence?

28. When the coroner gave his decision he did so under section 16(3) of the 1998 Act: see paragraphs 3 and 11 above. In the course of that decision he addressed his responsibilities under article 2. His conclusion that article 2 did not compel a resumption of the inquest was held by the Divisional Court to have been incorrect, a conclusion that is not contested before us: see paragraphs 4 and 5 above.

29. The present point is a short one, but in my view it is compelling. 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: see the summary by Lord Bingham of Cornhill, cited in paragraph 12 above. That duty should in particular guide the exercise of discretions. When, absent the HRA, the coroner came to exercise his discretion under section 16(3), he had to take those international obligations into account in deciding whether there was sufficient cause to resume the inquest. Not only were the international obligations sufficient, they were, as the Divisional Court found, compelling. 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.

30. It may be prudent to note in this connexion that, in contrast to the argument based on the interpretation of section 11(5)(b)(ii), this argument is not vulnerable to the rule of *stare decisis.* That is simply because section 11(5)(b)(ii) has been interpreted in authority binding on this court, whereas section 16(3) has not. Nor is the argument undermined by *McKerr*, which is concerned with the application of the obligations in English domestic law created by the HRA, and not with the pre-existing obligations of the United Kingdom in international law.

31. I would therefore uphold the conclusion reached by the Divisional Court on the ground indicated in paragraph 29 above.

32. Somewhat allied to this point, though different from it, is an argument that attracted Rose LJ, based on observations of Lord Hope of Craighead in *R v Home Secretary ex p Launder* [1997] 1 WLR 839 at p 867. There the Secretary of State, in dealing with an extradition request, had purported to apply to it the requirements of the ECHR. Lord Hope held that in those circumstances it was no sufficient answer to complaints that he had not performed that task adequately to say that the ECHR did not bind the executive. Put shortly, and not in the terms used by Lord Hope, if the Secretary of State undertook to apply the ECHR, even if at that date not obliged to do so by the HRA, he must get that application right. So, in our case, the coroner had volunteered to consider the ECHR, and equally must apply it correctly.

33. I would hesitate to adopt that argument, at least in the terms that it was put to us. If a given chapter of the law is irrelevant to a judicial or administrative decision, it is difficult to see that the decision-maker acts irrationally, in the sense of making a decision that has to be quashed, if he forms an incorrect judgement about that chapter of the law. There is no jurisprudence developing Lord Hope's approach, no doubt because it became redundant at least in relation to Convention questions, once the HRA did make the executive bound by the ECHR as a matter of English domestic law. And it was probably redundant in most cases, and certainly in cases such as the present, even before the HRA, once the approach referred to in paragraph 29 above was properly understood: an approach that does not seem to have been put to the House of Lords in *Launder*, where the ECHR points in any event only arose very late in the day.

34. In so saying, I am conscious that a view similar to that of Lord Hope was expressed, obiter, by Lord Phillips of Worth Matravers MR in *R(Mahmood) v Home Secretary* [2001] 1 WLR 840[36]. However, the point seems neither to have been argued before that court nor developed by it, and had it been I would respectfully suggest that the point would not have withstood the objections to it suggested in paragraph 33 above. It is not necessary to investigate these essentially historical issues further, because the appellant succeeds in any event on the basis set out in paragraph 29 above.

Middleton *as binding authority on the interpretation of section 11(5)(b)(ii)?*

35. This argument has already been outlined in paragraph 13 above. Addressing the impact of article 2 on the legislation as to the duties of coroners, the Appellate Committee said at paragraphs 34 and 35 of *Middleton*:

> "It is correct that the scheme enacted by and under the authority of Parliament should be respected save to the extent that a change of interpretation (authorised by section 3 of the Human Rights Act 1998) is required to honour the international obligations of the United Kingdom expressed in the Convention. [35] Only one change is in our opinion needed: to interpret 'how' in section 11(5)(b)(ii) of the Act and rule 36(1)(b) of the Rules in the broader sense previously rejected, namely as meaning not simply 'by what means' but 'by what means and in what circumstances'".

That enabled coroner's juries in want of care cases to express, in an appropriate case, an opinion on events leading up to the death: *ibid*, paragraphs 31-32.

The same view was expressed by the House, per Lord Hope of Craighead, in a case heard by the same constitution at the same time as *Middleton*, *R(Sacker) v West Yorkshire Coroner* [2004] 1 WLR 796 [*Sacker*]. Lord Hope, at paragraph 27, referred to what had been said by Lord Bingham in *Middleton*, and continued:

> "The word 'how' in section 11(5)(b)(ii) of the 1988 Act....is open to the interpretation that is means not simply 'by what means' but rather 'by what means and in what circumstances'. The provisions of section 3 of the Human Rights Act 1998 indicate that it should now be given the broader meaning."

36. Mrs Hurst argued that *Middleton* bound all subsequent courts, including this court in this case, to interpret section 11 in those terms. Therefore, even though *McKerr* precluded the direct application of article 2 to the present case, the coroner should have applied section 11 in the meaning now placed on it by the House of Lords. This, it is fair to say the leading argument advanced on Mrs Hurst's behalf, would, if correct, determine the case in her favour. It is however vulnerable to a series of substantial objections.

37. First, appreciating that the death in *Middleton* had occurred before the implementation of the 1998 Act, Lord Bingham, at paragraph 50, was careful to say that nothing in *Middleton* should be understood to throw doubt on the conclusion of the House in *McKerr*. One is obliged to observe that Mrs Hurst's argument uses *Middleton* for exactly that purpose. Second, if Lord Bingham had intended that his interpretation should apply in pre-HRA cases such as that of Mrs Hurst, it would have been impossible for him to express himself about the pre-HRA law in the terms that he adopted in *Middleton*: see paragraphs 21-22 above. And it is quite clear in any event from both *Middleton* and *Sacker* that neither judgment was intended to say anything about pre-HRA cases.

38. It will have been seen from the passages quoted above that both Lord Bingham and Lord Hope found authority for the new interpretation that they adopted in section 3 of the HRA. The extent to which section 3 is "retrospective" is a matter of acute controversy in the present case, to which I shall have to return at length. But it is quite clear that Lord Bingham and Lord Hope had no such thought in mind when they referred to section 3. They plainly did so because (the point that arose in *McKerr* not having been taken before them) they saw themselves as freed in HRA cases to apply the liberty granted to the courts by section 3. What they said as to the meaning and application of section 11 of the 1988 Act therefore went no further than to determine its meaning and application in cases governed by the HRA.

39. Mr Starmer said that to limit *Middleton* in that way produced a striking and unusual result, that section 11 meant different things according to whether it was applied to pre-HRA or post-HRA cases. I acknowledge the forensic force of that observation, but that force is much reduced when one considers the singular nature of section 3, and the nature of the exercise that it requires of the courts. Although when explaining the effect of section 3 it is natural to speak of the resulting "meaning" of the legislation, as did Lords Bingham and Hope in the cases just considered, in truth the exercise mandated by section 3 is different from that of finding simply the verbal meaning of the words used in legislation. The draftsman of section 3 was careful to speak not in terms of elucidation of the meaning of words, but rather of the active duty of the court to read and give effect to those words in a way which is

compatible with the Convention rights. As Lord Steyn points out in his exposition of section 3's origin and purpose in paragraphs 40-50 of his speech in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, an exposition that I would respectfully adopt, section 3's technique has its origin in the *Marleasing* rule in Community law, a rule very different from an ordinary English rule of interpretation; and thus goes well beyond the rules of interpretation previously used to give effect to the ECHR, as for instance is found in *Brind*. Accordingly, not only should one not be surprised if the application of section 3 produces a result different from that which English law would reach without the benefit of section 3; but also section 3's particular nature means that careful consideration has to be given to the standing of the ECHR in any case to which it is sought to apply the section.

40. For these reasons, therefore, it is not possible to rely on the fact that section 3 was used in *Middleton* to put a particular construction on section 11 of the 1988 Act to assert that *Middleton* is authority for the application of the section 3 reading of section 11 in every case. But if section 3 cannot be deployed through the medium of *Middleton*, may it nonetheless be applied directly to the present case, to require the coroner and this court to read and apply section 11 in a way which is compatible with the Convention rights even though the facts on which the Convention right is based occurred before the HRA? This is a completely new issue, not addressed in any of *Middleton*; *McKerr;* or this case in the Divisional Court. A series of difficult issues arise: the meaning of "the Convention rights" in section 3; whether section 3 should in this case be applied "retrospectively", in which connexion close attention has to be paid to the speeches in the House of Lords in *Wilson v First County Trust(No2)* [2004] 1 AC 816 [*Wilson*]; and the effect of *McKerr* on this issue. I deal with these in turn.

"The Convention rights"

41. Miss Studd submitted that the attempted application of section 3 to Mrs Hurst's case fell at the first hurdle. What section 3 required was the giving of effect to legislation in a way which was compatible with Convention rights. That meant, rights arising under the 1998 Act. But, as *McKerr* showed, Mrs Hurst had no such rights. Even if section 3 could in principle be applied to her case, it would not help her.

42. Counsel for Mrs Hurst submitted a reply which argued that section 3 had been applied by the English courts in cases such as *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 and *X v Y* [2004] EWCA Civ 662, where, because the respondent was not a public authority, the rights relied on were not directly enforceable in domestic law. The rights used in the section 3 exercise must therefore have been the rights held by the claimants against the United Kingdom in international law, by virtue of the United Kingdom's adoption of the ECHR many decades before the HRA. It was those rights that Mrs Hurst sought to assert through the medium of section 3.

43. That argument has to be approached with considerable caution. Both in *Ghaidan* and in *X v Y* the article of the ECHR relied on was article 8. Since the early days of ECHR jurisprudence that article has been recognised as placing upon the state not merely a negative obligation of non-interference with family life, but a further positive obligation, for that reason unusual in ECHR terms, to further family and private life even in the sphere of relations of individuals between themselves: see for instance *Marckx v Belgium* (1979) 2 EHRR 330[31] and *X and Y v Netherlands* (1985) 8 EHRR 235[23]. It is that *state* obligation that overlays cases, or at least overlays cases where the interpretation of legislation is involved, that seek to assert article 8 values in private law litigation.

44. But there is a more direct reason why international obligations, as opposed to the obligations created by the HRA, are to be relied on in the application of section 3. Section 1(1) provides that in the HRA, and thus in section 3, "the Convention rights" means the rights and fundamental freedoms set out in [various articles of] the Convention: meaning thereby the ECHR. Those obligations exist and have force because of the United Kingdom's adherence to the ECHR rather than because of the passage of the HRA; and it is the jurisprudence of article 2 in that sense that Mrs Hurst says should direct the court's reading of section 11 of the 1988 Act.

45. This distinction is, with respect, illuminated by the analysis of Lord Hoffmann in paragraph 63 of *McKerr*. Lord Hoffmann said:

> "Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention, But they are domestic rights, not international rights. Their source is the statute, not the Convention."

What *McKerr* holds is that Mrs Hurst does not have the right in domestic law created by section 7 of the HRA to claim that the coroner has acted unlawfully under section 6 of the HRA by not respecting her article 2 right to a proper investigation into her son's death. But that says nothing about her rights against the state in international law created by the United Kingdom's adoption of the ECHR: and it is to those rights that section 3 relates.

Can section 3 be applied retrospectively?

46. *McKerr* held that the obligation under the HRA to carry out an article 2 enquiry did not apply in respect of a death that occurred before 2 October 2000, the date of implementation of the HRA. That it was the HRA rights that were under consideration, and not the rights in international law, is plain throughout, illustrated for instance by Lord Steyn's observation in paragraph 40:

> "Mr McKerr's case is crucially dependent on the applicability of section 6(1) of the Human Rights Act 1998"

The outcome of that case was however determined by the holding of the House, albeit elucidated principally in the context of section 6, that the [article 2] obligation to hold an investigation is an obligation triggered by the occurrence of a violent death: see in particular per Lord Nicholls of Birkenhead at paragraph 21. That at its lowest makes an assumption about the content in international law of article 2, an assumption by which we are bound. To seek to apply section 3 by reference to an obligation that arose before the HRA came into operation, because it arose on the date of the death, would therefore be to apply section 3 to, or at least in the context of, an event that occurred before the section became part of English law.

47. The principles of "retrospectivity", and the extent to which they apply to section 3, were reviewed in *Wilson*. In the leading speech Lord Nicholls of Birkenhead pointed to the tension between the specific provision applying section 3 to legislation whenever enacted; and the general proposition that a statute should not render unlawful acts that were lawful at the time when they were done. He continued, at paragraph 19:

> "The answer to this difficulty lies in the principle underlying the presumption against retrospective operation and the similar but rather narrower presumption against interference with vested interests. These are established presumptions but they are vague and imprecise.....As always, therefore, the underlying rationale should be sought. This was well identified by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712,714:
>
> > 'the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective-rather it may well be a matter of degree-the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended'.
>
> Thus the appropriate approach is to identify the intention of Parliament in respect of the relevant statutory provision in accordance with this statement of principle.
>
> [21] I emphasise that this conclusion does not mean that section 3 never applies to pre-Act events. Whether section 3 applies to pre-Act events depends upon the application of the principle identified by Staughton LJ in the context of the particular issue before the court. To give one important instance: different considerations apply to post-Act criminal trials in respect of pre-Act happenings. The prosecution does not have an accrued or vested right in any relevant sense."

48. Lord Hope of Craighead also examined the issue at some length. He said, at paragraphs 98-99:

> "Then there is the general presumption that legislation is not intended to operate retrospectively. That presumption is based on concepts of fairness and legal certainty. These concepts require that accrued rights and the legal effects of past acts should not be altered by subsequent legislation. But the mere fact that a statute depends for its application in the future on events that have happened in the past does not offend against the presumption....there is an important distinction to be made between legislation which affects transactions that have created rights and obligations which the parties seek to enforce against each other and legislation which affects transactions that have resulted in the bringing of proceedings in the public interest by a public authority. The concepts of fairness and legal certainty carry much greater weight when it is being suggested that rights or obligations which were acquired or entered into before 2 October 2000 should be altered retrospectively.....[99] To restrict the application of the interpretative obligation, without exception, to 'events' that happened or 'transactions' entered into on or after 2 October 2000 would be to introduce a restriction which is not stated expressly anywhere in the 1998 Act. A restriction in such absolute and all-embracing terms would seem to be contrary to the intention of the legislation and incapable of being read in to it by necessary implication."

49. By contrast, however, Miss Studd particularly relied on the speech of Lord Rodger, because he concluded in terms, at paragraph 212, and under a heading "The 1998 Act, including section 3, not retroactive" that none of the operative provisions of the HRA, including section 3, is retroactive. That conclusion must, however, be subject to a number of qualifications. First, Lord Rodger made clear, in his paragraph 202, that his speech was confined to the effect of section 3 in civil proceedings, to which the reiterated language of vested rights and pending actions is most suited, and which, as Lord Rodger pointed out in his paragraph 215, was the subject-matter of *Wilson* itself. Second, in his paragraph 210 Lord Rodger specifically reserved his opinion on whether, in view of "the overwhelming importance and absolute nature" of articles 2,3 and 4, Parliament might have intended them to have a more general effect than he discerned in the rest of the Convention.

50. Miss Studd also relied on two other elements in *Wilson.* First, the observation of Lord Scott of Foscote at paragraph 160 that the specific reference to retrospectivity in section 7(1)(b) of the HRA indicates that the Act was not intended to have retrospective effect in any other respect. It should however be noted that Lord Hope of Craighead gives what is, with great respect, a cogent explanation in his paragraph 90 of why that specific provision was inserted. He did not think, nor did other of their Lordships, that it concluded the case against section 3 operating retrospectively in some cases. Second, Lord Rodger pointed, in his paragraphs 206-207, to the

oddity if section 6 and section 3 produced different results when applied to events occurring before the HRA, granted that they were directed at broadly the same aims. There is, with great respect, force in that observation, but the fact that section 6 has been decided not to operate retrospectively was not seen by the House as erecting an absolute barrier to section 3 operating retrospectively in all cases.

51. I venture to draw that latter conclusion because the observations of Lord Nicholls and Lord Hope, cited in paragraphs 47 and 48 above, clearly leave open the possibility of retrospective operation; neither of Lord Scott or Lord Rodger expressed dissent from, in particular, the analysis of Lord Hope in his paragraph 99; and both of Lord Scott and Lord Rodger to a greater or lesser extent reserved the position outside the specific area of civil litigation.

52. We already know, from the analysis of Lord Bingham in *Middleton*, how section 11(5)(b)(ii) would be read and given effect were section 3 to be applied to it. If, therefore, there is applied to this case the approach of Lord Nicholls and Lord Hope, the first question must be whether to require the coroner now to apply section 11 in that sense would interfere with vested rights or interests, or operate unfairly in the sense stated by Staughton LJ in *Tunnicliffe*. Miss Studd valiantly sought to argue that indeed that would be the effect, but she had an uphill task. The vested rights suggested were those of the police and other public authorities, who either had been entitled to assume that only an investigation in *Jamieson* terms would take place; or who were entitled now to assume that the hour for any investigation had passed. These were not attractive propositions, quite apart from being inconsistent with the approach of Lord Nicholls in his paragraph 21, cited in paragraph 46 above. All that this demonstrated was that the language and tests set out in *Wilson* are grounded in the law of private rights, and apply in only a limited way to the obligations of public bodies.

53. Those obligations are contained in the ECHR, and there are no good reasons for holding that in an appropriate case a question that now arises as to the application of those rights to the interpretation of English legislation should not be answered by the application of the principles of article 2, even though the article 2 obligation rested upon the public authorities before 2 October 2000. I would respectfully pray in aid in that connexion the observations of Lord Hope in paragraph 99 of his speech in *Wilson*, cited in paragraph 46 above. And the issue of whether this is an appropriate case for an article 2 investigation has been answered in the judgments of the Divisional Court, in terms that are not appealed. It is true that Miss Studd pointed to some issues of policy that had not been before the Divisional Court, principally the disruption caused to public services by enquiries that might relate to deaths that occurred many years ago. But where the obligation is to submit to an enquiry, lapse of time will be a legitimate reason for contending, in an appropriate case, that the enquiry is impracticable. That possibility is not a reason for rejecting the availability of such enquiries in principle.

54. It is in my respectful view clear from *Wilson* that the House did not hold that in no case could section 3 be applied to circumstances existing before the implementation

of the HRA. In the present case there are, as the Divisional Court held, very strong reasons of general public policy, as well as reasons relating to this country's obligations under the ECHR, why an enquiry of the kind mandated by article 2 should take place. No unfairness will be caused to any individual by the holding of such an inquiry, even though it relates to a death the occurred before the HRA came into operation. I would therefore conclude in principle that there is every reason for giving section 3 a limited retrospective application in order to bring about the resumption of the inquest. That immediately raises the issue of whether that conclusion can stand in the light of *McKerr*.

Section 3 and McKerr

55. *McKerr* is unfortunately only reported in the first volume of the Weekly Law Reports, and thus we do not have the benefit of the report of the arguments that would be found in the Appeal Cases. Nonetheless, from the content of their Lordships' speeches one can say with some confidence that the arguments put before us did not feature in that case. Nor could they have done. The relief sought in *McKerr* was judicial review of the failure of the Secretary of State to arrange an enquiry, by whatever means, that was article 2-compliant. That failure was justiciable only under section 6 of the HRA, as was accepted throughout: see paragraph 40 above. Since it was by then settled by *Lambert* [2002] 2 AC 545 and *Kansal(No 2)* [2002] 2 AC 69, and accepted in *Wilson*, that section 6 was not retrospective, the decision turned on whether the investigative duty under article 2 was conditioned on the article 2 duty to protect life, or was in some way separate from that duty, so as to apply even in the case of a death to which the duty to protect life did not apply. Unsurprisingly, the House could find no way in which such a duty could be found within the confines of section 6. Section 6 applied only to obligations imposed by the HRA, and the article 2 obligations that the HRA imposed took effect only from 2 October 2000.

56. It is important for our purposes to note why the House found unacceptable the assertion by Mr McKerr of a free-standing duty outside the confines of the HRA. I have already, in paragraph 45 above, drawn respectful attention to the distinction stressed by Lord Hoffmann between domestic rights created by the HRA and rights and obligations, even if in the same terms, existing in international law. The error of Mr McKerr's argument was that it relied on the latter obligation, which, as Lord Hoffmann pointed out at paragraph 67, was irrelevant in creating a section 6 duty. The obligation in international law was not limited by time; the obligation in the same terms under the HRA, which is what Mr McKerr did rely on and had to rely on, only came into existence with the HRA on 2 October 2000.

57. This distinction was stressed by other of their Lordships: by Lord Steyn at paragraph 48; by Lord Rodger of Earlsferry at paragraph 80; and by Lord Brown of Eaton-under-Heywood at paragraph 90. And of particular importance in the present connexion are the observations of Lord Nicholls at paragraph 25:

> "I respectfully consider that some of these courts, including the Divisional Court in *Hurst's* 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. These two sets of rights now exist side by side. But there are significant differences between them. The former existed before the enactment of the 1998 Act and they continue to exist. They are not as such part of this country's law because the Convention does not form part of this country's law. That is still the position. These rights, arising under the Convention, are to be contrasted with rights created by the 1998 Act. The latter came into existence for the first time on 2 October 2000. They are part of this country's law. The extent of these rights, created as they were by the 1998 Act, depends on the proper interpretation of that Act."

58. The right asserted by Mr McKerr, limited as it was to a claim as to the Secretary of State's obligation under section 6, was necessarily limited to the domestic obligation created by section 6. But the application of section 3, which is what our case is concerned with, is completely different. We have already seen, in paragraph 44 above, how it is the *international* obligations of the state that section 3 requires to be used in reading and giving effect to legislation. As Lord Nicholls stresses, those obligations pre-date the HRA and are not affected in any way by the terms of the HRA. The short point, therefore, is that *McKerr* simply does not address a case formulated, as our case now is formulated, in terms of section 3; and, further, that the very strong distinction drawn by the House between rights created by the HRA and rights pre-existing in international law goes a good way to reinforcing the contention that the date of implementation of the HRA cannot be dispositive in determining whether article 2 obligations of the state in international law are potentially available to be taken into account in interpreting legislation that bears on those obligations.

59. It was however suggested to us that *McKerr* was relevant to this case in a more indirect way. We have seen the caution that is exercised before any legislation is applied retrospectively, a caution that is stressed in *Wilson* in respect of section 3. Should the refusal in *McKerr* to order an enquiry into a pre-HRA death as it were tip the balance in determining whether Parliament can be taken to have intended section 3 of that same Act to be deployed in the case of a pre-HRA death? This is not a straightforward question, and it is not made any easier for this court by not being addressed at all in any of *Middleton*; *Sacker*; *McKerr*; and *Wilson*; all of which are binding on us for what they decide. I would however venture the following observations.

60. First, I see no sign of any view in *McKerr* that investigation of deaths occurring before 2 October 2000 was necessarily to be avoided. The case turned more technically on the unavailability of the particular remedy sought to promote that end, namely the obligation and correlative right created on that date by the HRA. Second, the duty created by section 3 appeals to obligations that were accepted,

indeed stressed, in *McKerr* to be binding upon the United Kingdom. And it is a duty that is of overwhelming importance and absolute in its nature, as for instance Lord Rodger stressed in *Wilson*: see paragraph 48 above. Leaving aside the issue of retrospectivity, there would be no good reason for article 2 not to be applied in the present case, and many good reasons why it should be. Third, therefore, are those conclusions to be dislodged by the fact that that result cannot be achieved without applying section 3 to events that occurred before it was enacted?

61. That turns on what are to be taken to have been the intentions of Parliament in formulating section 3. Parliament could have drawn section 3 tightly together with the rest of the HRA by providing that the interpretative obligation only applied in respect of rights recognised under the HRA. That would have concluded this case in favour of the appellants, because then the claim based on section 3 would have had to march with the claim based on section 6; which latter *McKerr* establishes is not available. But that is what Parliament did not do. Parliament deliberately took what the speeches in *McKerr* confirm to have been a much more expansive view, by imposing on the courts, by section 3, an obligation to give effect to this country's international obligations, and not merely to its domestic obligations as created by the HRA. In a case in which, as I have found, there are good reasons for giving section 3's reliance on *international* obligations retrospective effect, it would in my view be inconsistent with Parliament's intention in drafting section 3 to hold that that conclusion was not available just because the *domestic* rights created by the HRA were not available.

62. I would therefore hold that by the operation of section 3 of the HRA section 11(5)(b)(ii) of the 1988 Act is to be read and given effect in a way that is compatible with the United Kingdom's international duty under article 2 of the ECHR. The reading of section 11 thus produced is that formulated by Lord Bingham of Cornhill speaking for the Appellate Committee in *Middleton*. Applying that reading I would order the coroner to resume the inquest.

63. I am conscious that this conclusion differs from that of the Divisional Court in *Pearson v HM Coroner* [2005] EWHC 833 (Admin), which did hold that the conclusion in *McKerr* inexorably prevented the application of section 3 in the case of a death that occurred before 2 October 2000. I would say no more than that it is clear that the Divisional Court did not have the benefit of the detailed argument that has been deployed before us; and that for the reasons set out above I am unable to agree with their conclusion.

Disposal

64. I would dismiss this appeal, and not disturb the order of the Divisional Court that the coroner should resume the inquest. My reasons for so doing are not those of the Divisional Court, but the two separate and distinct conclusions set out in paragraphs 31 and 62 above.

Lord Justice Sedley:

65. The requirement of section 3 of the Human Rights Act 1998 to read and give effect to all legislation, so far as possible, in a way which is compatible with the rights scheduled to the Act is expressly applied to legislation "whenever enacted". If this means that it operates either generally or on the facts of this case without limit of time, its effect on ss.11 and 16 of the Coroners Act 1988 is, as is conceded, to require the coroner in the present case to implement the state's positive obligation under article 2 by resuming the inquest on Troy Hurst.

66. It is the decision of the House of Lords in *McKerr* which has prompted this appeal and made it arguable, in the face of the apparent purpose of s.3, that the Convention rights do not reach a death occurring before 2 October 2000. The decision in *McKerr,* however, did not involve s.3. It was concerned with the possibility of applying s.6 to a death occurring before (as it happened, almost two decades before) the entry into force of the Human Rights Act. Its essential conclusion was that the remedy under s.7(1) for an act made unlawful by s.6(1) was not available because, save as expressly provided by s.22(4), the Act was not generally retrospective.

67. The situation in *McKerr* was that the inquest had been formally abandoned in 1994, with the result that no proceedings at all were extant. If there was to be a human rights challenge, it had to be a challenge to the refusal of the state to open a fresh inquiry into the death. Hence the reliance on s.6 alone. Hence too the unspoken but self-evident policy consideration that if the McKerr inquest had to be reopened in order to comply with art.2, so would countless others, reaching back indefinitely.

68. In the present case, by contrast, the inquest stands adjourned, and the coroner has to decide according to law whether to resume it. His obligation to decide is present and inescapable, and the law which governs his decision is now required by s.3 to be read through the prism of Convention rights, with consequences which are not in dispute. This situation, as it seems to me, bears no element of retrospectivity on its face. The latent element of retrospectivity lies in the fact that the inquest is concerned with a death that occurred just over four months before the Human Rights Act was due to come into effect, and it is upon this single fact that the appeal turns.

69. The strongest apparent support for the Commissioner's contention that this is enough to shut out any Convention rights is probably Lord Brown's acceptance at §89-90 of *McKerr* of the argument that "The duty to investigate is ... necessarily linked to the death itself and cannot arise in domestic law save in respect of a death occurring at a time when article 2 rights were enforceable under domestic law." One sees from §88, however, that the argument had been predicated entirely on the

negative domestic obligation created by s.6 and enforced through s.7, which was of course not present in domestic law at the time of Mr McKerr's death. It was for that reason that art.2 – the duty to investigate - could not now be relied on.

70. I do not think, with great respect, that the proposition which I have quoted, or the similar passages in the other speeches (§21 per Lord Nicholls, §40, 48 per Lord Steyn, §62, 66 per Lord Hoffmann, §75, 81 per Lord Rodger), were intended to deal with more than the situation before the House and others which might replicate it. The present case does not replicate it. Because it concerns a post-October 2000 statutory decision-making process, it differs importantly from *McKerr*. Lord Nicholls at §28 of *McKerr* noted this exact distinction:

> "In these proceedings Mr McKerr is not challenging any decision of the Armagh coroner. ... Nor is Mr McKerr asking the House to interpret the statutory provisions relating to coroners in a way which would make them compliant with the investigative requirements of article 2."

Lord Hope in *Wilson* (below) at §95 made the same point from the opposite perspective:

> "...a person who claims that a court or tribunal has failed to fulfil the interpretative obligation laid down by s.3(1) has no need to go to s.7(1)(a) for his remedy."

71. Lord Nicholls in *McKerr* (§25) was critical of the Divisional Court in the present case for having lost sight of the distinction between rights arising under the Convention and rights created by the Human Rights Act by reference to it. I hope that the foregoing reasoning respects the distinction, and that in doing so it respects what Lord Nicholls subsequently said in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, §23: that the compatibility of legislation with the Convention rights falls to be assessed under the Human Rights Act "when the issue arises for determination": that is, in my understanding, now.

72. If I am right so far, there is no true issue of retrospectivity: s.3 has since 2 October 2000 required coroners' decisions, including the one we are considering, to be Convention-compliant except where the contrary is dictated by or under statute. But if I am wrong, I do not consider that such retrospectivity as is involved in the respondent's case is sufficient to defeat it.

73. Retrospectivity is not a simple or clear-cut concept. The problems it throws up are compounded by the fact that in this single respect, and perhaps deliberately in view

of the drafter's wise refusal to attempt to solve all potential problems, this elegant piece of legislation leaves major questions of retrospectivity unanswered save in the instance covered by s.22(4) – and, I would respectfully add, in the applicability of s.3 to all legislation "whenever enacted". But, as Lord Nicholls remarked in *McKerr* (§16), the proposition that the Human Rights Act is otherwise not retrospective raises almost as many questions as it answers. Past events, as he pointed out, and as the present case illustrates, have continuing effects.

74. It is not in *McKerr* but in *Wilson* [2003] UKHL 40 that this arguably retroactive impact of s.3 of the Human Rights Act is addressed. *Wilson* was a case where "the agreement was made pre-Act, and the Court of Appeal was interpreting the legislation post-Act" (§16), putting it on a broad par with the present case. The House dealt with the potential unfairness of doctrinally letting s.3 operate in such a situation by recognising that, although the section on its face has no limitation of time, it is capable of working injustice if indiscriminately applied to past events. The common law afforded a solution in the principle of construction that the more unfair it is to let a statute reach back in time, the more resistant the court must be to letting it do so: see Lord Nicholls at §20-22, Lord Hope at §98-99, Lord Hobhouse at §128; Lord Rodger passim; cf Lord Scott at §153, 160-161.

75. I respectfully agree with Buxton LJ that one can discern in the present case almost none of the features which ordinarily bring the principle of resistance to retrospectivity into play. We are concerned not with a step which will undo or undermine vested rights or settled interests, but with a decision which, if made in conformity with art. 2, will reopen and reconfigure a public inquiry which would otherwise be abandoned. I do not doubt that this will be stressful for some of the officers and officials involved, the more so because of the lapse of time, and possibly costly for the authorities, but I cannot accept that this is capable of defeating an obligation resting upon the state, and since 2 October 2000 justiciable in domestic law, to hold a proper inquiry into Mr Hurst's death.

76. For these reasons, as well as for those set out by Buxton LJ, I would dismiss this appeal.

Sir Martin Nourse:

77. I have had the advantage of reading in draft the judgments of Lords Justices Buxton and Sedley. I agree with them and cannot usefully add anything of my own.