THE HIGH COURT

JUDICIAL REVIEW

[2015 No. 515 J.R.]

BETWEEN

FIONA MURRAY, MAIREAD MURRAY,

SIOBHAN MURRAY AND PATRICIA MURRAY

APPLICANTS

AND

BRIAN FARRELL AND

COMMISSIONER OF AN GARDA SÍOCHÁNA

RESPONDENTS

JUDGMENT of Ms. Justice Faherty delivered on the 23rd day of October, 2018

1. The applicants are the sisters and surviving next-of-kin of the late Liam Murray, who was killed in his family home in Rathfarnham on 17th March, 2009.

2. The first named respondent was at all relevant times the Coroner for the Coroner's District of Dublin pursuant to the Coroner's Act 1961, as amended, (hereinafter "the 1962 Act"). For the purposes of the within judgment, the first respondent will be referred to as "the Coroner" or Dr. Farrell. It is understood that Dr. Farrell will not be the statutory officer who will now carry out the inquest into the late Mr. Murray's death since Dr. Farrell is now retired.

3. The second respondent is the statutory body with responsibility for providing policing and security services in the State. The second respondent will hereinafter be referred as An Garda Síochána or "AGS" or "the gardaí".

The Garda investigation

4. Mr. Murray's murder was investigated by An Garda Síochána through Terenure Garda Station. The investigation established that the late Mr. Murray had been shot four times. It was established in the investigation that the deceased spent most of St. Patrick's Day in the company of friends at a named bar. It was established that he left that premises at 6:17pm on 17th March, 2009. His last known contact was with a friend at approximately 7:50pm. The investigation also established that some persons who lived in the vicinity of the deceased's house reported hearing possible gunshots on the night of 17th March, 2009. Mr. Murray was found deceased in his home on 20th March, 2009.

5. As part of the investigation, nearly nineteen hundred lines of inquiry were followed up and almost seven hundred statements were taken. A file was submitted to the Director of Public Prosecutions (DPP) in June 2013.

6. This file concerned two persons who had been arrested in connection with Mr. Murray's death. The DPP directed that no criminal prosecution was to be brought against those persons at that time. It is the position of An Garda Síochána that the criminal investigation remains open and that they will pursue any new avenues of inquiry that may emerge. As outlined in the affidavit sworn by Det. Inspt. George McGeary on 26th May, 2016, there was correspondence from the DPP's office to the applicants' solicitor in or about late 2013, explaining the DPP's decision.

The conduct of the inquest to date

7. An inquest into the death of Mr. Murray commenced in January 2012. On 13th September, 2013, the Coroner received a copy of the Garda investigation file which had been sent to the DPP by An Garda Síochána.

8. As outlined at para. 11 of Inspector McGeary's affidavit, the file that was provided to the Coroner was the "smaller" file which had been provided to the DPP for a decision as to whether to prosecute two arrested persons. A decision was made to re-list the inquest.

9. On foot of the file furnished to him, the Coroner prepared initial draft depositions for the conduct of the inquest.

10. On 17th September, 2013, the applicants' solicitors wrote to the Coroner requesting a copy of the Garda file which had been furnished to him on 13th September, 2013.

11. A follow up letter with the same request was sent on 9th October, 2013.

12. The Coroner responded on 10th October, 2013, advising that the inquest had been listed for hearing on 15th January, 2014, and that draft depositions for the inquest would be furnished as soon as possible.

13. As part of fair procedures, the Coroner granted the applicants representation to participate in the inquest. Pre-hearing disclosure in the form of draft depositions, together with a copy of the post-mortem report, were duly furnished to the applicants' solicitors on 19th November, 2013. They were also advised that additional draft depositions from An Garda Síochána would be furnished on due course.

14. On 22nd November, 2013, the applicants' solicitors wrote to the Coroner noting the following: -

> (i) There was no draft deposition from Detective Inspector McGeary who they understood had charge of the criminal investigation;
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> (ii) There was no draft deposition from Detective Garda Patrick Flood who the applicants understood had made a statement in relation to a previous threat which was made against Mr. Murray by a person the applicants understood to

be a suspect in respect of his murder; and

(iii) The applicants believed that there should be statement from Detective Garda Billings and Detective Garda Begley and those statements should be disclosed to them and that the said gardaí should be called in the inquest.

15. The solicitors also requested that the Coroner issued a summons in respect of a person believed by the applicants to have been arrested and questioned by the gardaí in respect of Mr. Murray's murder.

16. The Coroner was advised that the first named applicant might wish to make a deposition and that same would be forwarded in advance of the hearing date.

17. On 28th November, 2013, the Coroner replied advising that additional statements had been sought from AGS and noting that the first applicant might wish to make a deposition. It was further advised that it was not clear from their letter what other witnesses the applicants were referring to.

18. The applicants' solicitor wrote again on 18th December, 2013, requesting that statements or depositions be made available to them from Detective Inspector McGeary, Detective Garda Flood, Detective Garda Billings and Detective Inspector Begley. The letter went on to state:-

> "5. We are aware of newspaper reports around the time of Mr. Murray's killing which stated that according to An Garda Síochána messages were found on Liam Murray's phone which contained threats against his life. We have no statement or deposition from anybody in relation to this matter. We wish to know whether the phone was examined by An Garda Síochána and if it was we would wish that a witness would be able to give evidence in relation to this at the inquest.
>
> 6. It is our understanding that Liam Murray made a statement in relation to the alleged threat made to him by a certain individual. We understand that a member of An Garda Síochána took this statement from Liam Murray and we believe that that member of An Garda Síochána should have a deposition in respect of the Inquest.
>
> 7. We believe there should be a statement or deposition from a [named] neighbour of Liam Murray who may have heard the shots on the night of the murder.
>
> 8. Detective Garda Tom Doyle, Detective Garda David Connolly, Sergeant Paul Carney and Inspector Tom Murphy have all made statements in relation to the investigation of Mr. Murray's murder and we believe that there should be depositions available from them.
>
> 9. There is a statement furnished to us which indicated that a silver BMW seen with persons in and around the area on the night of Mr. Murray's murder and that was acting suspiciously has been made available to us. We have no idea what steps were taken by An Garda Síochána to follow up on this matter and what enquires were made and [where] those enquires led. We believe that these are important matters that should be dealt with in the Inquest and depositions or statements should be made available from An Garda Síochána in relation to this matter."

19. On 9th January, 2014, the Coroner forwarded draft depositions from Detective Inspector McGeary, Detective Superintendent Begley, Detective Sergeant Thomas Doyle, Detective Garda Connolly, Sergeant Paul Kearney and Inspector Tom Murphy, together with a draft deposition from Mr. Murray's neighbour. It was advised that other issues referred to in the applicants' correspondence could be raised with the Coroner and members of An Garda Síochána at the inquest.

20. On 10th January, 2014, the applicants' solicitors requested a statement from Detective Garda Flood, made in respect of an alleged threat to Mr. Murray by an individual who the applicants understood was a suspect in the murder investigation. They also requested the statements of Mr. Murray himself in respect of the threat to him as well as any other Garda statements made in respect of the alleged threat to Mr. Murray. The letter went on to state:

> "We note that in our letter to you in September of this year we requested a copy of the Garda file which was furnished to your office in or around the 13th September. We never received a response to that request. We note your comments in respect of our outstanding queries from our most recent correspondence. Our clients also have a number of queries in respect of the material already furnished and they are as follows:
>
> 1. What is the source material for the draft depositions furnished to us thus far.
>
> 2. What is the extent of the source material.
>
> 3. Please furnish us with the list of all persons from whom statements were taken.
>
> 4. Please furnish us with copies of all statements taken.
>
> We are of the view that the statements taken lack context in the absence of the balance of the material. We would require all persons who have made depositions thus far to be available to give evidence and be cross-examined. That would also apply to any depositions furnished in the intervening period.
>
> Our clients are unhappy with the amount [of] material furnished and are of the view that it is insufficient to proceed with the inquest on the 15th January."

21. The applicants were furnished with two further draft depositions from members of An Garda Síochána on 14th January, 2014. They were again advised that any other issues as raised in their correspondence, and any submissions they wished to make, could be raised with the Coroner at the inquest.

22. A hearing took place before the Coroner on 14th January, 2014.

23. On that date the applicants' legal representatives made extensive submissions regarding their request to be furnished with all of the material which had been supplied by the gardaí to the Coroner. The hearing was adjourned at the applicants' request. Thereafter, further written representations were made on 4th March, 2014 in the following terms:

> "As legal representatives for the family we have requested copies of all documentation and materials that have been furnished to your office by An Garda Síochána in relation to this matter. At the hearing on the 14th January 2014 the Court was comprehensively addressed in relation to this matter by Counsel for the family. In the course of that hearing it emerged that some of the documentation/material (as furnished to your offices) may not in fact feature or be referred to in the proceedings. That particular issue is to be determined as a matter of law. The difficulty in and about the resolution of that issue has been compounded by the fact that all of the documents as furnished by An Garda Síochána to your offices has not in fact been furnished to the legal representatives on record for the family that is a quite separate and distinct matter. In the circumstances we will respectively advise that the situation be dealt with as follows:
>
> (a) A list of all the documents that have been furnished by An Garda Síochána to your office can now be compiled and furnished to the legal representatives for the family.
>
> (b) The documentation and materials in the aforementioned list which does not form any part of objection could be isolated and identified and where not already provided they should now be provided.
>
> (c) The documentation and materials in the aforementioned list which form the subject matter of objection should be separately itemised so that this particular category can form the subject matter of an entirely separate legal issue to which we have referred above.

As already highlighted by our counsel at the hearing on 14th January we know of no authority which would permit a Coroner acting in the discharge of his functions to receive documentation from An Garda Síochána (and without reference to an interested party) to then make determinations or decisions in relation to the materials that are then to form the subject matter of the inquest as conducted in public. We respectively suggest that the procedures require scrupulous fairness and transparency. …

As part of the factual matrix/background to this case it is clear that Liam Murray was the victim of an attempted murder in or about November, 2006. Prior to that date (and indeed subsequent thereto) threats were made to Liam Murray and some of the threats were recorded and documented. It is our understanding that the suspects in relation to the attempt on Mr. Murray's life are one [and] the same persons who are now suspects in relation to his murder in 2009. Complaints were made to An Garda Síochána in relation to those matters and it has been our clients' contention that they are absolutely relevant to the conduct of a proper inquest into the death of the late Mr. Liam Murray. The statements of An Garda Síochána who were involved in that investigation (the 2006 attempt coupled with any threats made prior or subsequent thereto are relevant to the issues to be decided in this case).

In support of our contention that this material is relevant and should be furnished we will rely upon the provisions of Article 2 of the European Convention on Human Rights in respect of the State's obligation to properly carry out a death investigation in cases such as this."

24. After referring to a number of legal authorities, the letter continued:

> "Having regard to the legal framework as cited above together with the relevant provisions of the European Convention on Human Rights and the applicable statutory requirements we require a clear and unequivocal response from your office in relation to these matters. In addition to the material that has already been brought into existence it may be necessary to procure further and additional information so as to ensure that the inquest into the death of Liam Murray is properly conducted".

25. It is common case that the gardaí objected to the file they had furnished to the coroner being given to the applicants. In an attempt to progress matters, the Coroner invited An Garda Síochána to prepare a schedule of documentation contained in the file, in order to narrow down the issues between them and the applicants. Ultimately, An Garda Síochána declined to accede to this request, effectively claiming that the applicants were not entitled to access the content of the file and that any such access was only possible on foot of an application to the High Court for discovery.

26. A hearing was held before the Coroner on 8th June, 2015.

The hearing of 8th June, 2015

27. During the course of the hearing on 8th June, 2015 detailed submissions were made by the applicants' counsel and counsel for An Garda Síochána regarding the release of the material. Counsel for the applicants advanced the argument that the gardaí had already parted with the file and that what the applicants were seeking was solely the file of papers that had been provided to the Coroner. Counsel submitted that the case the applicants were making was not that they would be prejudiced if the file was not given to them; rather, a procedural irregularity arose by virtue of the fact that the Coroner had documents which had not been seen by the applicants.

28. As clear from the transcript of the proceedings, the applicants' arguments were set out as follows:

> "A dilemma therefore has been presented at the very…outset by the production of these documents. So it is quite wrong in my respectful submission, if not unwise as I said at the start, to move from a particular point in time up to an argument and that we all engage in this question of public interest immunity or public interest privilege because we are not there in relation to it. I mean quite frankly that there is a unique set of circumstances that have applied in this case, the horse has bolted. The documents are out there now in the sense they are on your lap and they are within your gift. [The gardaí] repetitively say that [the documents] are exclusively within their possession but you have the documents, Coroner, so they have given them over. They didn't give them over in any qualified way, they gave them up to you under this label of professional courtesy which I knew I nothing about and which the rule of law knows nothing about, but the question really, Coroner, for you to decide is whether you now part with that file and whether you allow access by the family to the file of papers."

29. The Coroner, having considered the submissions of all relevant parties, ruled that he was not the legal owner of the material in question and did not have jurisdiction to decide on the claim of public interest privilege being claimed on An Garda Síochána, that being a matter for the High Court. Accordingly, he determined that he was not entitled to release the file to the applicants. His ruling was in the following terms:

> "…public interest immunity has been claimed in other inquests in this court over the years and once a reasoned argument for that is put forward it would be, and because I understand that the reasons that have been proffered in this case that there is an ongoing Garda investigation, the courts have recognised that the situation can attract public interest immunity

and it would be very difficult for me to, I mean even if we talk about Article 2 cases, Article 2 proceedings do not trump a public interest immunity application and that has been shown in a series of cases in Northern Ireland.

So in the face of a public interest immunity or privilege on the basis that the documents are in relation to an ongoing Garda investigation, a situation that has been recognised by the courts, I would not be in a position to release the papers in the face of such a claim of privilege. Now, I am not making an adjudication, I am simply recognising that this is a situation that has attracted public interest immunity and the courts have decided that the grounds put forward where the privilege is claimed in relation to ongoing Garda investigations, that that is a valid reason for the privilege to be invoked and to be recognised. And all I am saying is that I recognise the application and the privilege and that it would not be legally possible for me to release documents in the face of such a claim. Considering that I believe that I am not the legal owner, while I have for the time being *possession* of the Garda file, I do not have the legal ownership of the file. I do accept that the courts have reserved their position on that. But that was the position that I put forward in *Morris-v- The Dublin Coroner*. And I think the position, that position has been adhered to in other situations similar to this and it hasn't been the subject of a judicial review. It's been accepted by the parties and I would have to, I am afraid, recognise the claim of public interest immunity in relation to the balance of the documents."

The leave Order

30. By Order of the High Court (Hunt J.) dated 11th September, 2015, the applicants were granted leave to apply by way of judicial review, as against the Coroner, for, *inter alia*:

(i) An order of *certiorari* quashing the refusal of the Coroner to furnish the applicants with the copy of the investigation file which An Garda Síochána had furnished to the Coroner;

(ii) A declaration that the practices and procedures in or about the transmission of information, evidence or statements by An Garda Síochána to the Coroner is a practice or procedure that is grossly defective and is a procedure lacking in transparency and a procedure that is not amenable to scrutiny.

(iii) An order of prohibition restraining the Coroner from holding an inquest and/or taking any further steps in an inquest into the death of Liam Murray until such time as the applicants' legal representatives are provided with a copy of the Garda file.

(iv) A declaration that the Coroner lacks or has no jurisdiction to make decisions which involves public interest privilege and/or in the alternative if the Coroner has the requisite jurisdiction that he failed to exercise that jurisdiction in accordance with law and in accordance with Article 2 of the European Convention on Human Rights ("the Convention"), whether by itself or as incorporated into domestic law by the European Convention on Human Rights Act, 2003 ("the 2003 Act").

31. As against An Garda Síochána, leave was granted to the applicants to seek a number of declaratory orders, including that AGS had wrongfully asserted a claim of public interest privilege over the investigation file the subject matter of the inquest and that the refusal of AGS to allow the file to be used in the inquest is incompatible with article 2 of the Convention. Leave was also given for a declaration that in the event that AGS were entitled to assert a claim of privilege, they had not discharged the onus of establishing that there exists a sufficient public interest in the documents.

The Coroners Act 1962

32. For the purposes of the within proceedings, the relevant provisions of the 1962 Act are:-

"26(1) A coroner may, at any time before the conclusion of an inquest held by him, cause a summons in the prescribed form to attend and give evidence at the inquest to be served on any person (including in particular any registered medical practitioner) whose evidence would, in the opinion of the coroner, be of assistance at the inquest.

…

30 Questions of civil or criminal liability shall not be considered or investigated at an inquest and accordingly every inquest shall be confined to ascertaining the identity of the person in relation to whose death the inquest is being held and how, when, and where the death occurred.

31 Neither the verdict nor any rider to the verdict at an inquest shall contain a censure or exoneration of any person.

…

38(3) A witness at an inquest shall be entitled to the same immunities and privileges as if he were a witness before the High Court."

The applicants' submissions, in summary

33. The applicants say that they have a real concern, based on the disclosures which the Coroner has made to them, that the narrative account of the circumstances leading to the death of their brother is seriously misleading. They fear that an incorrect narrative will be produced at the inquest. The issue at stake is whether, and to what extent, the applicants as next-of-kin will have an opportunity to access information relevant to the inquest which they believe is crucial to a truthful narrative as to how their brother was murdered. They assert that there exists innuendo and rumour in the public community regarding the death of their brother. The purpose of the inquest is to allay such innuendo and rumour and ensure that the true circumstances of the death are brought into the public domain.

Counsel emphasises the following:-

(i) The applicants do not wish to gain access to legally privileged material in the possession of An Garda Síochána;

(ii) The applicants do not wish to access privileged information regarding the methodology and practices of criminal

investigations by the gardaí;

(iii) The applicants do not want access to privileged informer type information in the possession of An Garda Síochána or one or more individual members of the gardaí;

(iv) The applicants do not want access to privileged information regarding security or intelligence material in the possession of An Garda Síochána or one or more of its individual members; and

(v) They do not want to use the inquest in a manner inconsistent with the Coroner's civil State investigative function as underscored by ss. 30 and 31 of the 1962 Act.

34. The applicants want two categories of information which they believe is crucial to the integrity of the hearing at the Inquest. Firstly, they want access to information regarding a pattern of threats made in or about November 2006 to the life of their brother. In this regard, they seek access to information regarding an attempt on his life in or about the month of November 2006. The applicants' belief is that the gardaí carried out investigations in respect of these matters.

35. The second category of information concerns the lead up to their brother's murder in 2009. The applicants believe that there is in existence information regarding a similar threat to his life in 2009, including text messages sent to his mobile telephone in advance of his murder. That information forms part of the investigation into his murder.

It is submitted that all of the foregoing is part of the narrative which gives rise to the murder of their brother.

36. The applicants emphasise that they do not want to name or identify or blame any individual. However, they say that the narrative account set out in the documentation which has been disclosed to them to date does not contain reference to the circumstances which arose in November 2006 or in the lead up to the murder in 2009. Thus, they assert that in the absence of this information, the factual matrix regarding the murder will be misrepresented at the inquest.

37. The applicants also make the case that they are the only people who do not know what is in the file in the possession of the Coroner. Apart from the pre-hearing disclosure already made, the applicants believe that the Coroner has relevant information crucial to an intra vires hearing under the 1962 Act. It is submitted that the depositions with which the applicants have been furnished are a distorted version of events that do not represent the truth. Albeit that the applicants have been granted the right to participate in the statutory inquest process, substantive fairness requires that the statutory process has to have integrity sufficient to promote the statutory function. Counsel submits that the applicants have set out a credible basis to raise a question mark over the substantive content of the inquest.

38. The nub of the issue is where do the applicants go to resolve this issue? The position of An Garda Síochána is that they are happy to have the Coroner view the file furnished by them but they assert rights over it and say that the Coroner can only deal with the material in the file in a manner to which the gardaí consent and no more.

39. While it was open to the applicants to walk away from the issue and let the inquest proceed in accordance with the draft depositions furnished to them, this would be in circumstances where the applicants know that same do not represent the true position. That, it is submitted, is an intolerable position for the applicants and accordingly, in the within proceedings, they contend that:

(1) An Garda Síochána's assertion of a class public interest privilege is unlawful;

(2) An Garda Síochána's view of the basis for the Garda file being given to the coroner as one of professional courtesy is unlawful; and

(3) The applicants have set out an evidential basis upon which they advance their argument. It is therefore not a fishing expedition on their part.

40. The applicants accept, and do not criticise, the DPP's decision not to prosecute. However, once such a decision has been made, the 1962 Act process (which came into being prior to the DPP's decision and which was held in abeyance pending such decision) now constitutes the only remaining credible prospect of a civil death investigation in public into the killing of the applicants' brother in which the applicants can participate. Thus, to have an inquest hearing which will omit a relevant piece of information germane to the truth finding function of the inquest is unlawful.

41. Whilst it is accepted that the applicants could request that the Coroner give them an opportunity to provide the information which they themselves have relating to threats made to their deceased brother in 2006 and 2009, the problem remains that the source of the applicants' information is necessarily tenuous. Thus, their ability to speak to the truth of such information as is in their possession is very limited. Yet, they know that the information exists and they are of the view that it is intimately connected to the civil death investigation, albeit the applicants' acknowledge and accept that there is no question of persons being identified in the inquest process or of blame being attached.

42. The applicants seek access to information in respect of threats in 2006 and 2009 to their brother's life. They accept, however, at the same time that the ordinary rules of evidence apply and that their gaining access to the information sought cannot guarantee its admissibility in the inquest process. They acknowledge that they cannot bind the Coroner as to how the information is to be treated at the inquest. It is accepted that the most the applicants can do is to apply at the inquest to produce such evidence if it is not otherwise being produced.

43. It is submitted that in circumstances where:

(1) the adjournment of the inquest because of a pending criminal investigation is over by virtue of the DPP's decision;

(2) there is a clear statutory requirement that there be a civil death inquiry in public;

(3) the applicants had been granted legal representation and are entitled to fair procedures and respect for their constitutional rights as a family; and

(4) the gardaí claim of privilege is of an omnibus nature;

the applicants should be granted access to the documentation which is in the possession of the Coroner, subject to the limitations which the applicants themselves recognise, as have been outlined by counsel to the Court.

44. The applicants want to engage in an inquest process in order to get closure consistent with an effective civil death investigation. Thus, they are asking the Court to assist them in vindicating their constitutional rights in an inquisitorial process where they do not have the legal right to insist on the production of evidence. It is submitted that the Court can fashion a remedy in the absence of a statutory process to compel the production of documents and which takes everyone's position into account.

45. It is submitted that if the Court were to find in favour of the applicants, the Court could make a declaration that AGS have not made out a claim of public interest privilege regarding information concerning the pattern of threats in November, 2006 to the life of the deceased Liam Murray or in relation to the threat made to his life in 2009 or in relation to the texts made to his mobile phone in advance of his murder. Counsel acknowledges, however, that such a declaratory order would involve a legal risk as the Court is not conducting the inquest. He also acknowledges that as the Coroner has now retired, the inquest will be conducted by a new Coroner who retains a statutory discretion as to what is to be admitted. It is further acknowledged that if the material which has been furnished to the Coroner is ultimately released to the applicants, the most they can then do is to apply to have that evidence adduced at the inquest.

The Coroner's submissions, in summary

46. What the applicants want is access to the file provided to the Coroner so they can argue for its relevance to the inquest. The question to be asked, however, is who determines the scope of the inquest – that is a key legal issue in the within proceedings.

47. The Coroner further contends that insofar as there is a dispute in this case, it is that of the applicants and the gardaí. It is not a dispute to which the Coroner should be a party.

48. While the applicants suggest that the Court can make a declaratory order, they nevertheless appears to suggest that it would remain a matter for the Coroner to adjudicate on the privilege claim. However, the fact of the matter is that the Coroner does not have the statutory power to do so. Counsel submits that in those circumstances, no case has been made out against the Coroner, in circumstances where the Coroner simply declined to exercise a jurisdiction which all agree he does not have.

49. Among the reliefs sought by the applicants in the within proceedings is a declaration that the Coroner has no jurisdiction to make decisions which involve public interest privilege. Alternatively, the applicants say that if the coroner has such jurisdiction he failed to exercise it in accordance with Article 2 of the Convention. It is, however, now agreed that the Coroner has no jurisdiction to determine a claim of privilege. Thus, the Coroner argues that the declaratory relief claimed by the applicants is irrelevant in such circumstances.

50. The Coroner further contends that the grounds relied upon by the applicants as a basis for an order of *certiorari* are general and have not been specified such that the Court cannot be expected to direct an order of *certiorari*. All that is pleaded is that in refusing to furnish the file to the applicants, the Coroner did not have regard to "relevant legal criteria", without the applicants specifying the criteria on which they rely. In any event, the Coroner clearly advised the applicants at the hearing that he had no jurisdiction to adjudicate on an issue of public interest privilege. It is thus difficult to see how, in declining jurisdiction, the Coroner could be acting in excess of jurisdiction.

51. It is also the Coroner's position that the applicants have not specified what duties they claim the gardaí have under the 1962 Act.

52. While the applicants plead that the orders and arrangements for the inquest as have been made to date by the Coroner have the effect of circumventing their personal legal rights, including their right to access to and disclosure of information, as a matter of settled law, the statutory process ordained by the 1962 Act is not determined by any party represented before the inquest. There is no legal obligation on the Coroner to structure the inquest in the manner dictated by the applicants. The Coroner is an independent officer holder whose functions can only be exercised within the parameters of the 1962 Act. The inquest is directed by the Coroner and not the applicants.

53. Even if the applicants' requests are considered reasonable, that does not translate into a legal obligation on the Coroner to comply with all of their requests. In the present case, there was legal impediment to the Coroner complying with the applicants' request for access to information since the Coroner takes the view, albeit he received a file from the gardaí, that the file remains the property of the gardaí. Thus, the Coroner cannot direct that it be given to the applicants in the absence of consent from the gardaí.

54. It is important to note that draft depositions compiled by the Coroner, and not the gardaí, have been provided to the applicants. Control of the inquest remains with the Coroner, as deposed to by Dr. Farrell in his affidavit. Furthermore, the Coroner is conducting the inquest with an open mind, as is evident from the contents of Dr. Farrell's affidavit sworn 23rd June, 2016.

The submissions of AGS, in summary

55. Counsel for An Garda Síochána submits that the within proceedings are unmerited as the applicants' concerns can be addressed, firstly, in the applicants' own draft depositions to the Coroner and, secondly, by virtue of their participation in the inquest. Accordingly, the present proceedings are premature as the inquest has yet to get underway. The Coroner should be allowed to conduct the inquest before the applicants assert that same is in any way an incomplete narrative of the circumstances of their brother's death.

56. Insofar as it is suggested that AGS have made any decision which limits the scope of the inquest, or that AGS have withheld documents, that contention is refuted. It is for the Coroner to make decisions as to relevance and it is accepted that he cannot be dictated to by AGS. Contrary to the assertions in the applicants' letter of 14th March, 2014, it is entirely within the prerogative of the Coroner to receive information from AGS and then make such determination as is within his power in relation to that material.

57. In the within proceedings, the applicants do not claim that AGS have wrongly asserted public interest privilege over the Garda file. Nor did they maintain before the Coroner that AGS wrongly assert a claim to privilege. Neither do they assert that they have been prejudiced by the refusal of the Coroner to hand over the file. Rather, they seek the file because they say that only they do not know what is in the file. Thus, they assert a perceived irregularity (where the Coroner has the file and they do not). The thrust of the applicants' submissions to the Coroner (and to the Court) is that they are entitled to equality of arms, a concept which, it is submitted, is not relevant in an inquisitorial process. The case made by the applicants' counsel to the Coroner was that the provision by AGS of a file to the Coroner had "evoked [their] curiosity". While that may be a good argument in an adversarial process, it has no place in an inquisitorial process such as an inquest where it is for the Coroner to inform himself as to relevancy and other matters. Counsel thus submits that no procedural irregularity arises by reason of the fact that the Coroner has the Garda file. No "equality of

arms" issue arises. There is no one with whom the applicants can compare themselves for the purposes of such an argument. The applicants are not "parties" in an adversarial process. Their status is that of interested persons in an inquisitorial process, as is made clear by the Supreme Court in *Ramseyer v. Mahon* [2006] IESC 82, [2006] 1 I.R. 216.

The issues to be determined
58. Arising from the pleadings and the parties' respective submissions, I consider that the following issues arise for consideration:

> • Whether the practices and procedures that have heretofore taken place in and about the transmission of information by An Garda Síochána to the Coroner is defective and/or lacks transparency;
>
> • AGS's claim of ownership and public interest privilege in respect of the file furnished to the Coroner and the scope of the Coroner's jurisdiction to determine such matters;
>
> • Whether the refusal of the Coroner and/or AGS to disclose the Garda file to the applicants is in breach of Article 40.3 of the Constitution or of the applicants' rights as a family or the applicants' Article 2 rights under the Convention; and
>
> • Whether the applicants' rights to fairness in the conduct of the inquest to date have otherwise been breached.

The process by which the Coroner received the Garda file
59. The evidence put before the Court is that for the Dublin area the Coroner has a working arrangement with An Garda Síochána whereby in circumstances where a death involves a criminal investigation, and where that investigation has gone as far as it reasonably can, the gardaí make a file available to the Coroner for the purposes of the inquest. This occurred in the present case. As regards the practice, the following exchange took place between counsel for AGS and the Coroner on 8th June, 2015.

> "[T]he relationship you have with the Gardaí in relation to being presented with files is not something that is enjoyed by all coroners around the country. It doesn't happen with a lot of coroners, it's not an automatic relationship." (at p. 138)

The response of the Coroner was as follows:

> "First of all it is not just a professional courtesy, it's part of our practice and procedure and it has been the case for many years, that we see all of the documentation prior to holding an inquest…" (at p. 139)

60. The applicants contend that insofar as it is asserted that the provision by the gardaí of the Garda file to the Coroner is a professional courtesy that is not correct and is unlawful. They contend that the gardaí have a duty to cooperate properly with and furnish the Coroner with documents upon request. Moreover, they assert that the reference by counsel for An Garda Síochána at the hearing in June 2015 to different standards operating around the country is unlawful: there is either an obligation on the gardaí to disclose documentation or there is not. In circumstances where the AGS's submission to the Coroner is objectively capable of an adverse understanding by an objective bystander that a "cosy relationship" exists between the Coroner and AGS, the applicants accordingly seek a declaration that the method by which the Coroner obtained the Garda file in the instant case is not transparent.

61. The Coroner refutes the applicants' characterisation of his relationship with An Garda Síochána. He points out that the gardaí were not a party to the inquest until an issue arose regarding access by the applicants to the information which the gardaí provided to the Coroner. Thus, the applicants' criticism and innuendo is not warranted. It is submitted that where a criminal investigation has been conducted, it makes practical sense that that information be made available to the Coroner. This does not mean, however, that the gardaí can direct how the Coroner conducts the inquest or makes a decision. Moreover, the Coroner is not restricted to the file provided by the gardaí. It is open to the Coroner to call other evidence and he cannot be prevented by the gardaí from so doing. It is thus argued that the gardaí do not, as a matter of fact or law, control the inquest.

62. The Coroner also argues that the declaration sought by the applicants would not assist them as they would not still receive the file even if the practice of the Coroner receiving a file from the gardaí ceased. It is further submitted that any such declaration would mean that a Coroner's investigation of a civil death would take longer and would be more expensive and inquests would be delayed.

63. Counsel for AGS submits that there is nothing in the exchange which took place between counsel for the gardaí and the Coroner that suggests that the gardaí have an unlawful reach to the Coroner. It is thus argued that there is no basis for the declaratory order sought by the applicants.

64. In their written submissions, the applicants say that in the absence of express statutory provisions providing for the provision and subsequent regulation of documentation or other information to the Coroner from AGS, it is therefore surprising that there is no published administrative system setting out the entitlement and manner in which the Coroner may seek out such documentation and information. That is as may be. To my mind, however, the absence of any written note of the arrangement does not necessarily impugn the process whereby a Garda file is furnished to the Coroner in aid of his carrying out his statutory functions. In his affidavit, Dr. Farrell avers:

> "For the last 25 years the Office of the Coroner for the District of Dublin has automatically been given a copy of the Garda investigation file from An Garda Síochána where same exists. This does not arise out of any "cosy relationship" between the Coroner and An Garda Síochána. Instead, it arises out of a dual concern, firstly to avoid the necessity of having a second "investigation" conducted by the Coroner's Office when much of this groundwork will already have been covered by the Gardaí and secondly to ensure that the scope of the inquest is not artificially limited by virtue of decisions made by An Garda Síochána as to what material will be provided to the Coroner."

65. He stresses that it is for him, as Coroner, to determine independently the likely relevance of any material provided by AGS and what depositions will be required for the inquest. He further sets out that at all times he can seek and prepare such further depositions as may be required for the proper conduct of the inquest and that interested parties may request that further persons may be called as witnesses and that draft depositions be prepared in respect of such persons.

66. To my mind, no persuasive case has been made out by the applicants to suggest that the long standing practice whereby the Coroner receives the Garda file in any way circumscribes or restricts the Coroner in the exercise of his statutory functions. I find no basis for the declaratory order sought by the applicants in that regard.

An Garda Síochána's claim of public interest privilege and the scope of the Coroner's jurisdiction to determine such a claim
67. As deposed to by Det. Insp. McGeary in his affidavit sworn 26th May, 2016, at the time of the provision of the Garda file to the Coroner it was AGS's understanding that the Coroner would extract from the file only such statements and information as were relevant to the performance of the functions of a coroner under the 1962 Act. Det. Insp. McGeary avers:

> "By furnishing the Garda file (i.e. the file sent to the DPP) to the Coroner, I was not thereby agreeing to the circulation to the next-of-kin, or anybody else, of statements or any other materials from the Garda file which are irrelevant to the inquest proceedings".

68. It is submitted on behalf of AGS that this is the fundamental plank which underpins AGS's position before the Court, a position which has been endorsed by the Coroner, as is evidenced by para. 8 of the Coroner's statement of opposition which pleads:

> "The Garda file is not provided to the First Named Respondent on the understanding or the expectation that it will be placed in the public domain or provided at all to any persons participating in the inquest. On the contrary, a copy of the Garda file is provided to the First Named Respondent on the express understanding that only material which is relevant and necessary to the holding of a proper inquest will be put on the public record."

69. It is also AGS's position, as deposed to by Det. Insp. McGeary, that notwithstanding that a file has been furnished to the Coroner, the property in the file remains that of AGS. An Garda Síochána also say that the file remains open and they thus assert a privilege in respect of the file because of a future potential possibility that evidence will emerge sufficient to get further information onto the file so that it can be re-submitted to the DPP for a decision on whether there is to be a prosecution. It is also argued that the completion of a list of all the documents on the file, as sought by the applicants (and indeed as had been suggested by the Coroner in an attempt to narrow the issues), could compromise any future criminal investigation.

70. Counsel for AGS further asserts that it is the Coroner, and not AGS, who identifies the material that is relevant for the inquest. It is submitted that at the hearing before the Coroner AGS stood back from the issue of relevancy and did not make any argument on the relevancy or otherwise of the documents in issue. They assert that it is for the Coroner to determine relevancy, as he has averred on affidavit he did so do. AGS accept, however, that at some later stage the Coroner may re-evaluate the issue of relevance, given that the inquest process is a fluid one. AGS argue that, fundamentally, the applicants have not outlined how access to the Garda file is relevant to the inquest proceedings.

71. The applicants argue that the stance adopted by An Garda Síochána, namely asserting public interest privilege over the Garda file as provided to the Coroner (save presumably that part of the file as has been provided in the form of draft depositions to the applicants) is such that the gardaí are asserting a claim of privilege over a class of documents, which is wrong in law. The submission of the applicants at the hearing on 8th June, 2015 was that the Coroner was conducting an independent civil death investigative function and that it was for the Coroner to make a decision as to what was to happen to the material in his possession.

72. The applicants also say that they do not dispute that AGS conducted a criminal investigation to the best of their ability and that they extracted a file from the fruits of that investigation and sent it to the DPP. The DPP's decision, however, was that there was to be no prosecution. The applicants thus assert that as of the present time, there is no reason to believe that An Garda Síochána have new evidence that would reasonably give rise to an expectation of a new file going to the DPP. Counsel submits that the suggestion that evidence will emerge in the future sufficient to supply the DPP with a new file which may warrant a decision to prosecute is incapable of measurement. The kernel of the issue in this case is that a decision has been made by the DPP not to prosecute. Thereafter, a decision was made to relist the inquest. It is submitted that the inquest process is now the applicants' only opportunity for a meaningful and credible civil death investigation and that the inquest is only opportunity the applicants have to vindicate their rights. Counsel contends, therefore, that it is corrosive for the applicants to have to live with the fact that there is material in existence in the Garda file which has been provided to the Coroner which has not been advanced at the civil death investigation.

73. It is further argued by the applicants that it cannot be credibly asserted that any prosecution by the DPP in the future would be compromised by the disclosure of the Garda file which the Coroner has, particularly when all concerned know that the inquest has to be conducted within the confines of the 1962 Act, in particular ss. 30 and 31 thereof.

74. Counsel relies on *Eastern Health Board v. Farrell* [2001] IESC 96, [2001] 4 I.R. 627 in support of the proposition that notwithstanding the provisions of ss. 30 and 31 of the 1962 Act, an inquest is not to be so sharply truncated as to exclude relevant information. Counsel also cites Dr. Farrell's own book "Coroners: Practice and Procedure (Round Hall Sweet and Maxwell 2000) where at p. 298 thereof he states:

> "The question of how the deceased came by his death is of course wider than merely finding the medical cause of death, and it is therefore right and proper the Coroner should enquire into acts and omissions which are directly responsible for the death". (Paras. 12-13, citing the 1962 Act ss. 30 and 31)

75. I accept this statement as a correct principle of law.

76. That being said, I turn firstly to the question of ownership of the Garda file which has been passed to the Coroner. This issue has been considered but not determined by the courts.

77. In *Morris v. Farrell* [2004] IEHC 600, the applicant had sought the Book of Evidence which the gardaí had provided to the coroner. The coroner believed that the Book of Evidence had been prepared as police property and that it remained police property. It was argued that the coroner had neither authority nor jurisdiction to release it to the applicants, albeit he had discretion to disclose draft witness depositions which had been prepared by him, together with the post mortem reports.

78. In *Morris*, O Caoimh J. was referred by counsel to *Reg. v. H.M. Coroner, ex p. Peach* [1980] 1 Q.B. 211. There, the applicant had sought a declaration that the coroner was entitled to make available to the applicant the statements of all witnesses whom he proposed to examine which touched on the death of the deceased. The applicant's claim was inspired by the fact that the coroner had expressed the view that he was prevented by law in disclosing the documents in question. At p. 218 of the report, Widgery L.C.J. stated:-

> *"In preparation for the hearing before the coroner consideration has been given to whether the applicant, who is an interested person in the inquest, should be entitled to see and profit from some 60 odd statements which have been taken in respect of this case and which he would naturally wish to see in preparations for the hearing."*

79. After describing that the police documents had been provided to the coroner "*as a matter of practice and goodwill*" (similar to the practice described by Dr. Farrell in the within proceedings), Widgery L.C.J. went on to state:-

> *"First of all, as I say, the method of preparation of the statements to which I have already referred indicates that those statements started as police property and, in my judgment, continued as police property, and at the present time are police property. I see no way in which anyone other than the police authorities can obtain any sort of legal title to these documents, and therefore prima facie they are not available to be handed over to the applicant. Prima facie the present custodian of the documents, the coroner, could not without breach of confidence or trust show them to the applicant."*

80. In *Morris*, O'Caoimh J. went on to cite Dr. Farrell's commentary, at paras. 12.09-10 of his textbook, on the ruling in *Reg. v. H.N. Coroner, Ex p. Peach*:-

> *"While accepting that the circumstances of the death of Blair Peach were unusual and that the statements were taken for a particular purpose, it is submitted that in other cases where there is no criminal prosecution, statements taken preparatory to the inquest by members of An Garda Síochána (or coroner's officer) are under the control of the coroner rather than the garda authorities. It is further submitted that any draft depositions prepared by the coroner or his office using a previous statement made by a witness to the gardaí become the property of the coroner in preparing for the inquest. The deposition is only in draft form at that stage and will become a formal deposition only when the evidence is given viva voce by the witness at inquest with any amendments or additions and signed by the witness and the coroner*
>
> *…*
>
> *There are no authorities in Ireland in relation to the power of a coroner to provide statements to interested parties prior to inquest."*

It is clear that Dr. Farrell's latter statement predates the decision of the Supreme Court in *Ramseyer v. Mahon* which is discussed later in this judgment.

81. In *Morris*, in circumstances where it was intimated by counsel for the Attorney General, the Garda Commissioner and other members of An Garda Síochána that they were waiving any claim to privilege/confidentiality to the documents in issue that case, O Caoimh J. found that the coroner was not entitled to rely upon the issue of ownership of the documents as a ground of refusing the furnishing of same to the applicant. In those circumstances, O Caoimh J. did not find it necessary to determine whether the law as stated in *Reg. v. H.N. Coroner, Ex p. Peach* represents correct statement of the legal position in this jurisdiction.

82. He did opine, however, as follows:

> *"…it is clear that the practice referred to in Peach is similar to that followed in this jurisdiction as illustrated by the affidavit of the respondent".*

83. On the issue of ownership of the Garda file, I find the reasoning of Widgery J. in *Reg. v. H.N. Coroner, Ex p. Peach* to be persuasive. Albeit that the Coroner has possession of the Garda file on foot of the long standing procedure whereby the Garda file is furnished to him by AGS, this, to my mind, does not translate into ownership of the file vesting in the Coroner such that he is at liberty to transmit the file to third parties (even if they are interested parties for the purpose of the inquest). Moreover, the Coroner has put sworn testimony before the Court as to the basis on which he received the file. It is also undisputed that the file in issue in this case started out as police property. I have not been persuaded that AGS's ownership thereof has been lost solely because it was furnished to the Coroner for the purposes of preparation for the inquest. I am also fortified in this conclusion by the decision of the Supreme Court in *Fyffes plc v D.C.C. plc S & L Investments Ltd* [2005]1 I.R. 59. This case is discussed later in the judgment.

84. Moreover, even if the Court is wrong on this issue, and that the file could be said to be in the ownership of the Coroner as he has possession thereof, it remains the case that AGS assert a claim of privilege (rightly or wrongly) over the file, which the Coroner is without jurisdiction to determine. It cannot thus be just a question of the Coroner handing over the file to the applicants. The claim of privilege would still attach to it as long as AGS maintained this position. Accordingly, even assuming the relevance of the Garda file to the proper conduct of the inquest, as contended for by the applicants, the issue of public interest privilege would remain to be determined, in respect of which the Coroner lacks jurisdiction.

85. A question which also arises for determination in the present case is whether, as contended by the applicants, the asserted public interest privilege claimed by AGS has fallen away by virtue of the DPP's decision not to prosecute two specific individuals for Mr. Murray's murder. In aid of his submission that the public interest privilege in the present case has fallen away by virtue of the DPP's decision not to prosecute, counsel for the applicants cites the decision of the Supreme Court in *McLaughlin v. Aviva Insurance (Europe) Public Limited Company* [2011] IESC 42.

86. In *McLaughlin* Denham J. addressed the matter of public interest privilege in the following terms:

> *"15. The items of which the Commissioner seeks to claim privilege are required for the purpose of civil proceedings between the plaintiff and the defendant and also for a criminal investigation. The Commissioner claims privilege pending the decision not to prosecute or pending the service of a Book of Evidence, which would contain the items.*
>
> *16. There is a public interest privilege in documents which are a material part of a criminal investigation. There is a public interest privilege in documents created, sought, or obtained for, and relevant to, a criminal prosecution by a prosecutor.*
>
> *17. The fact that the documents and/or items were not originally created by a prosecutor does not exclude them from privilege as there is a public interest privilege in documents and/or items which are a material part of a criminal investigation.*
>
> *18. The onus to establish that the privilege lies upon the person seeking the privilege. In this case, the Commissioner carries the onus.*
>
> *19. I am satisfied that it is established that the documents and items sought, being the two DVR recorders and the two forensic reports, are privileged. This privilege exists until the decision is made not to prosecute or until the decision is made to prosecute, when the matters will be disclosed in the Book of Evidence."*

87. In his judgment in *McLaughlin*, O'Donnell J. addressed the issue in the following terms:

> *"I do not see that this case raises any issue as to priority between civil and criminal proceedings. In this case the Commissioner does not seek a stay on the civil proceedings: he merely seeks to maintain a public interest immunity which it is arguably his duty to assert. As it happens that immunity is limited in time, and as a result the parties to the litigation have the choice whether to proceed without the material in the same way as a party might proceed having failed in the challenge to legal professional privilege, or they can wait until the issue of public interest immunity falls away either by the disclosure of the material in criminal proceedings, or by a decision not to prosecute*." (at para. 5)

88. The submission of AGS in the within proceedings is that notwithstanding that the applicants characterise AGS's position as one which refers only to a future contingent prosecution, it remains the position, as set out in the affidavit of Det. Insp. McGeary, that the investigation into Mr. Murray's murder remains open. As deposed to by Det. Insp. McGeary, AGS are concerned to protect the integrity of the Garda file and this is the basis on which privilege is claimed. AGS contend that notwithstanding the DPP's decision not to prosecute, the file in relation to the murder of Mr. Murray has not been wound down. Accordingly, it is argued by the Coroner and AGS that the views expressed by the Supreme Court in *McLaughlin* cannot be determinative of the issues in the present case. Moreover, both the Coroner and AGS point to the fact that the proceedings in *McLaughlin* were civil adversarial proceeding where the Garda Commissioner had been made a third party and against whom an order for discovery was sought. The Commissioner had asserted a claim of privilege. Moreover, the material over which privilege was claimed had been provided by the plaintiff to the gardaí, unlike, as noted by Hardiman J. in his judgment in *McLaughlin*, the position which arose in *Breatnach v. Ireland No. 3* [1993] 2 IR 458 where the material sought to be discovered was "*internal police material generated by the gardaí*", which, counsel for AGS submits, is akin to the situation in the present case.

89. Furthermore, the Court has been referred to the factual matrix in *McLaughlin* which was that Aviva had been in possession of the material over which the gardaí clamed privilege for a period up to a year and a half from the commencement of the criminal investigation and where it had already used the information to advance the defence of its proceedings. Also, in *McLaughlin*, it was not in controversy that the privilege being asserted was limited in time. It is thus submitted by the Coroner and AGS that there are a number of qualitative differences between the present case (being a murder case which the gardaí have said remains open) and *McLaughlin* which explains why in the latter case, O'Donnell J. could opine that the claimed privilege "*falls away*" once the material is disclosed in criminal proceedings or by a decision not to prosecute the arson.

90. The applicants contend that contrary to the Coroner's and AGS's arguments, there is no basis upon which the Court should depart from the principle outlined in *McLaughlin* given that in the present case, a decision has been made by the DPP not to prosecute and the inquest process has restarted.

91. In all the circumstances of the present case, however, I am firstly satisfied that there was sufficient information before the Coroner such as to allow the Coroner and AGS to maintain that AGS have raised a *prima facie* claim of public interest privilege over the Garda file. Therefore, albeit a decision has been made by the DPP not to prosecute two individuals on the basis of insufficient evidence, I am satisfied that that cannot be dispositive of the applicants' argument that there is no basis for a claim of public interest privilege, in light of the fact that the investigation file into the late Mr. Murray's killing remains open.

92. A further question which arises is whether AGS can be said to have waived their claim of privilege by transmitting the Garda file to the Coroner.

93. Counsel for AGS cites *Fyffes plc v. D.C.C. plc S & L. Investments Ltd* [2005] 1 I.R. 59 as authority for the proposition that the disclosure of privileged information for a limited purpose does not constitute a general waiver of the privilege. In *Fyffes*, Fennelly J. addressed this issue in the following terms:

> *"The plaintiff…argues for the broad proposition that any disclosure to a third party leads to the loss of the privilege. No authority has been cited in support of such a far-reaching principle. It is not to be found in Matthews and Mallak, Discovery (London, 1992) dealing with the topic of waiver. Apart from the more specific cases of waiver, most of which have been discussed in these proceedings, the authors pose the question whether relevant information has been supplied "with the intention of abandoning" the privilege. They footnote instances of communication to the public generally or to the media. Indeed, these references are the only support for the general proposition that disclosure defeats the privilege.*
>
> *…*
>
> *The plaintiff has not established the existence of any such general principle as that privilege will be lost by any communication to a third party or that, in order to avoid that result, the communication would have to be made in pursuance of a public duty. Indeed [counsel] conceded in argument that communication, for example, by a party to its bankers in negotiating a loan to fund this litigation would not lose the privilege."* (at p. 68)

94. As far as the present case is concerned, based on the legal authority cited above, I am not persuaded that the *prima facie* public interest privilege in the Garda file has been lost by virtue of its transmission to the Coroner.

95. I accept that, as pleaded in para. 17 of the Coroner's statement of opposition, the Coroner does not have jurisdiction to direct the release of the Garda file where AGS is manifestly not consenting to such release, and where they assert public interest privilege. I also find merit in the Coroner's submission that if the file were to be handed over to the applicants, the benefit of a *prima facie* claim to privilege will be lost to AGS.

96. I also accept the submission that the role of AGS when the applicants made their request to the Coroner for the file was to argue for a particular position, namely that they were asserting privilege. Thus, I am satisfied that AGS did not make any decision capable of review in the within proceedings.

97. As already stated, I accept also that it was open to the Coroner (and within his jurisdiction) to recognise the AGS's *prima facie* claim of public interest privilege. It bears repeating that save for noting that ASG was making a claim of public interest privilege, the Coroner properly asserted that he could not weigh or assess that claim as he lacked jurisdiction under the 1962 Act to do so.

98. Counsel for AGS also submits that Det. Insp. McGeary's affidavits outline a cogent and strong basis for not divulging access to the rest of the Garda file save what has been furnished by the Coroner by way of draft depositions. This Court, however, makes no determination on this particular argument in the context of this judicial review application, save to state, as all parties concede, that

the Coroner did not have power to determine whether AGS had in fact discharged the onus on them with regard to the claimed public interest privilege.

99. I accept the Coroner's argument that he did not purport to adjudicate on this dispute in circumstances where a *prima facie* valid claim of public interest privilege (known the law) was made and where he has no jurisdiction to determine whether that claim should be upheld or otherwise. As the Coroner did not have jurisdiction to adjudicate on the claim of public interest privilege, he did not purport to exercise such a jurisdiction. I am satisfied that he acted lawfully in this regard.

100. The applicants contend that they were obliged to come to the High Court to resolve the question of disclosure of information in circumstances where the Coroner has no power to issue subpoenas *duces tecum* and where there is no established mechanism under the 1962 Act to deal with the issue of privilege.

101. While I accept that the assessment of whether public interest privilege arises in the present case is a matter for the High Court, it is not, however, the function of this Court, in the context of the within judicial review proceedings, to decide that claim given that the function of this Court is one of judicial review.

102. I should add that in aid of his opposition to AGS's public interest privilege claim, counsel for the applicants referred the Court to the decision of the UK Court of Appeal in *Peach v. Commissioner of the Metropolis* [1986] 1 Q.B. 1064. In that case, the deceased who had been in the area of a demonstration in respect of which the police had been involved in quelling died in hospital after a head injury. The circumstances of his death was the subject of an investigation by the Complaints Investigation Bureau after a complaint was made that an unidentified police officer had used his truncheon to hit the deceased on the head. The police treated the complaint as a complaint against the police for the purposes of an inquiry under s. 49 of the Police Act 1964.Statements and other documents obtained during the inquiry were handed over to the coroner who held an inquest and returned a verdict of death by misadventure.

103. The mother of the deceased brought an action against the Commissioner of Police of the Metropolis for damages. The Commissioner filed a list of documents for which privilege was claimed which included reports, statements and correspondence prepared in pursuance of the s. 49 inquiry.

104. The Court of Appeal dismissed the Commissioner's appeal against an order that the documents should be disclosed, holding:

> *"…although there had been an inquiry under section 49, the dominant purpose of the inquiry was to investigate a violent death that was a matter of public concern and in circumstances where it was apparent from the beginning that an inquest would be held and that there was a possibility of a prosecution; that such an inquiry could not be treated merely as a private inquiry into the conduct of the police under section 49 of the Act of 1964 and, therefore, the commissioner could not claim that privilege attached to documents prepared during the investigation and that they should be disclosed as being relevant to the issues in the action."*

105. In the course of his judgment, Fox L.J. stated:

> *"…in the present case an inquest was virtually certain and a prosecution a definite possibility. Either could have resulted in the contents of a statement being disclosed publicly.*
>
> *...*
>
> *I can see no considerations of public interest in this case which outweigh the public interest in enabling the case to be investigated with the assistance of the information obtained in the police investigation when memories were fresh, and which may be highly material to issues in this action."* (at pp. 1080-1081)

106. Purchas L.J. opined:

> *"If contemporary criminal proceedings emanated from those inquiries the statements obtained would not be privileged. After a period of some six years the trial of the civil action in which evidence is given orally, based upon recollection, would be seriously inhibited if contemporary statements were not available for the purpose either of refreshing the memory of the makers of those statements or for cross-examining them were they to testify to facts not supported by the contents of those statements.*
>
> *In my judgment, in the class of documents with which we are now faced there is an overwhelming bias in favour of the public interest being served by the disclosure of those documents and that, therefore, there is no justification for creating a new class of privileged documents which would be to the effect of extending the class in respect of which Neilson v. Laugharne [1981] Q.B. 736 remains an authority to the class of documents with which the court is concerned on appeal."*

107. In reliance on *Peach v. Commissioner of the Metropolis*, what is advanced by counsel for the applicants in the present case is that it would be an unrealistic and unfair procedure for the applicants to have to deal with the inquest if they have to depend on their own recollection about what they were told about events relating to their brother's death in circumstances where they believe there are statements on the Garda file which relate to threats made to their brother's life in 2006 and 2009.

108. Counsel for the Coroner submits that the applicants' reliance on *Peach v. Commissioner of the Metropolis* is misconceived. She argues that that case was not dealing with the question of whether a file in a criminal investigation was required to be handed over to the family of the deceased in the course of an inquest; rather the case concerned a civil action where the asserted public interest privilege was determined by the courts.

109. I am constrained to agree with counsel for the Coroner. In *Peach v. Commissioner of the Metropolis*, the court was able to adjudicate on the issue of public interest privilege, an option not available to the Coroner in the present case. In circumstances where all accept that the Coroner has no jurisdiction to determine the issue of public interest privilege, I am satisfied that *Peach v. Commissioner of the Metropolis* is sufficiently distinguishable from the present case as to be of little assistance to this Court.

110. As the Coroner is without jurisdiction to adjudicate on public interest privilege, I find that no case has been made out that the Coroner acted unlawfully in the manner in which he (properly) declined jurisdiction to adjudicate on the public interest privilege claim. The Coroner's declining to exercise a jurisdiction he did not have cannot be amenable to judicial review.

111. Both the Coroner and AGS argue that it is open to the applicants to issue plenary proceedings against AGS seeking discovery of the file. Moreover, the Coroner argues that notwithstanding that there is clearly an issue of contention between the applicants and the gardaí, it is not appropriate for the applicants to use the within judicial review to seek what is effectively discovery of the Garda file in circumstances where the Coroner had no jurisdiction to determine the asserted claim of public interest privilege. I agree with this submission.

112. The applicants submit that the plenary discovery procedure is not open to them. Counsel argues that this is because in order to succeed in such discovery proceedings, the applicants would have to firstly establish that they suffered a wrong and, secondly, that AGS were able to establish the identity of the wrongdoer. It is submitted that these are the two conditions are expressly prohibited by ss. 30 and 31 of the 1962 Act.

113. Notwithstanding the applicants' arguments, I am satisfied, however, that it is open to them, if they wish, to institute plenary proceedings against the gardaí seeking discovery of the file. The entitlement to commence such proceedings was described by Barrington J. in *Doyle v. Commissioner of An Garda Síochána* [1999] 1 I.R. 249, in the following terms:

> *"This is not a case in which discovery is sought as an interlocutory order for the purpose of assisting in resolving the main issues in the action. Nor is it a case arising under O. 31, r. 29 which deals with making an order for discovery against a person who is not a party to the action. The sole object of this action is discovery. It remains to consider whether it is the kind of case in which discovery can or ought to be made. There is no doubt that the High Court has jurisdiction at common law to entertain an action for sole discovery such as the present one. But the authorities establish that this is a jurisdiction to be exercised sparingly and it has been exercised only in cases where the plaintiff was in the position to prove that he had suffered a wrong but he was not, and the defendant was, in a position to establish the identity of the wrong doer."* (at p. 265)

114. It is not however for this Court to predict the outcome of any such plenary proceedings as may be commenced by the applicants. Suffice it to say that in circumstances where the Coroner's statutory remit does not admit of a determination as to whether an asserted claim of public interest privilege has been made out, I am satisfied that there is a process available to the applicants whereby they can seek to make a case for discovery of the Garda file.

***Is the refusal of the Coroner and/or AGS to disclose the Garda file in breach of the applicants' rights under Article 40.3 of the Constitution or of the applicants' rights as a family or of Article 2 of the Convention or otherwise unfair*?**

115. The applicants submit the provisions of Article 40.3 of the Constitution include a continuing duty on the State to vindicate the constitutional right to life of a person within the State, and that where that life has been terminated by violent and unlawful conduct there is a continuing constitutional duty to investigate the circumstances of that death in an effective and independent way. It is submitted that the provisions of Article 40.3, and related constitutional provisions on the rights of the family, confer a continuing duty on the State to vindicate the applicants' constitutional family rights as the next-of-kin of their deceased brother by way of an effective and independent investigation into his violent death.

116. The applicants also contend that in circumstances where there is no statutory process to guide the Coroner as to how a decision on the request for access to the Garda file should be made, the Constitution provides the process whereby a remedy can be fashioned in order to vindicate their constitutional rights.

117. The applicants also say that there can be no basis to again adjourn the inquest to see if at some future time the DPP might prosecute. If the inquest is to resume (as has been decided) then the integrity of that process is a core constitutional value to be protected. Thus, it is argued that the Constitution must fashion a remedy to protect their rights, in the absence of a statutory mechanism in the 1962 Act to do so. Counsel refers to *Carmody v. Minister for Justice, Equality & Law Reform* [2009] IESC 71:

> *"Where a citizen's constitutional rights are violated, statute law or some other rule of law will provide a remedy which vindicates such rights". Where a statute or a rule of law does not provide a remedy for the violation of such a right the citizen is entitled to rely on the provisions of the Constitution for a remedy in vindication of the right".*

118. Counsel also submits that in adjudicating on the issues which arise in the within proceedings, the Court can have regard to the case law of the European Court of Human Rights ("EctHR") which establishes, insofar as it relates to an inquest, that there can be a breach of the human right to life guaranteed by Article 2 of the European Convention on Human Rights ("the Convention") where:

> (a) An inquest is not commenced promptly and heard expeditiously;
>
> (b) Relevant witnesses were not adduced in evidence;
>
> (c) There was a failure to provide legal aid to the victim's family;
>
> (d) The family were not permitted to properly participate;
>
> (e) There was non-disclosure of material to the victim's family;
>
> (f) Claims of public interest privilege were used to prevent proper investigation of relevant matters;
>
> (g) The scope of the inquest was too narrow;
>
> (h) There was a lack of appropriate public scrutiny.

119. In aid of his submissions counsel cites *El Masri v. The former Yugoslav Republic of Macedonia* (Application No. 39630/90), 13th December, 2012. In El Masri, which was an Article 3 case, the EctHR opined:

> *"182. The Court reiterates that where an individual raises an arguable claim that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. Such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights*

of those within their control with virtual impunity…

183. The investigation into serious allegations of ill-treatment must be both prompt and thorough. That means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions… They must take all reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony and forensic evidence… Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard…

184. Furthermore, the investigation should be independent from the executive… Independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms…

185. Lastly, the victim should be able to participate effectively in the investigation in one form or another…"

120. In *Ergi v. Turkey* (Application No. 23818/94), 28th July, 1998, the EctHR addressed what constitutes an effective investigation for the purposes of Article 2:

"82. In addition, the Court has attached particular weight to the procedural requirement implicit in Article 2 of the Convention. It recalls that, according to its case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State (see the above-mentioned McCann and Others judgment, p. 49, § 161; and also the Kaya v. Turkey judgment of 19 February 1998, Reports 1998-I, pp. 322, 324, §§ 78, 86). Thus, contrary to what is asserted by the Government (see paragraph 75 above), this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise ipso facto to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death."

121. The applicants submit that the principles enunciated by the EctHR applies to the inquest process under 1962 Act and that they are entitled to the scope of the rights identified in *Ergi*, which the EctHR has re-stated in *Yasa v. Turkey* (2nd September, 1998), *Tanrikulu v. Turkey* (8th July, 1999) and *Demiray v. Turkey* (21st November, 2000).

122. In *Demiray v. Turkey* (21st November, 2000), the Court stated:

"48. The Court reiterates that the obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see Tanrýkulu v. Turkey *[GC], no. 23763/94, § 101, ECHR 1999-IV).*

…

50. The Court feels it important to point out from the outset that the obligation to carry out an investigation in circumstances such as those of the present case is not confined to cases where it has been established that the killing was caused by an agent of the State. In the instant case the mere fact that the authorities were informed of the death gave rise ipso facto to such an obligation under Article 2 (see Tanrýkulu cited above, § 103)."

123. The applicants contend that the values set out in the jurisprudence of the EctHR are comparable to what is provided for in Article 40.3 of the Constitution. It is thus submitted that in determining the manner in which the Coroner must carry out his statutory function, the Court can have regard to Article 2 of the Convention and the manner in which it has been interpreted by EctHR.

124. Counsel for the Coroner argues that the applicants' arguments as to their constitutional rights do not assist the Coroner in knowing what it is alleged he did wrong, or what order the Court is being asked to make as would affect the Coroner's successor when the inquest resumes. It is also submitted that the applicants' Article 2 arguments are pitched at a very high level of generality. While it would be difficult to disagree with the principles relied on by the applicants, the Coroner's argument is that it is difficult to see how these general propositions can be distilled down and applied to the facts of the present case.

125. The Coroner also argues that the obligation under Article 2 applies to the totality of the investigation which is conducted into the death of an individual. The EctHR has recognised that different countries have different systems for the investigation of death which occur other than by natural causes and there must be flexibility in this regard. The EctHR has never held that an inquest per se is the only possible way in which the investigative obligation under Article 2 can be discharged. Rather, the EctHR will examine further steps taken by the State authorities to examine whether the general principles set out by its case law have been fulfilled. Counsel submits all of the EctHR case law relied on by the applicants involved killings at the hands of the security forces. Accordingly, particular considerations applied in those cases. As regards the latter argument, I accept the applicants' submission that EctHR's case law is concerned with standards of human rights in domestic legal systems and that it is not qualified by the civil jurisdiction from which the case law emanates.

126. Counsel for the Coroner point to the fact that there has been no criticism by the applicants of how the criminal investigation into their brother's murder was conducted. Nor has there been any criticism of the DPP's decision (on the basis of insufficient evidence) that no prosecution against two specific individuals be pursued. Both the Coroner and AGS argue that this is the basis upon which the gardaí regard their investigation file as still open. It is submitted that this is a relevant factor in the context of the claims made by the applicants under Article 2 of the Convention.

127. It is a fact that a detailed criminal investigation was conducted into the death of the late Mr. Murray. It is submitted by counsel for the Coroner that the decision of the EctHR in *ROD v. Croatia* (Application no. 47024/06), 18th September, 2008, is authority for the proposition that the very fact that the Garda investigation did not result in bringing the perpetrators of Mr. Murray's murder to justice does not mean that it was not an effective investigation. In *ROD*, the Court opined:

"As regards the adequacy of the steps taken, the Court is not persuaded that the applicants that there had been any

*significant oversights or omissions. The above shows that the key traceable witnesses were interviewed and the available evidence collected and reviewed. The Court is satisfied the police acted promptly and pursued every line of information. The fact that the investigation did not succeed in identifying the perpetrator was not in itself render the investigation ineffective. In the circumstances, the court cannot impugn the authorities for any culpable disregard, discernible bad faith or lack of will. Having regard to the above the court considers the facts do not disclose any appearance of the violation of Article 2 of the Convention in account of the effectiveness of the investiga*tion." (at p.7)

128. Counsel also relied on the decision of the EctHR in *Aliyev v. Azerbaijan* (Application No. 35587/08), 31st July, 2014, where it was again held that the requisite investigation is one of means not results. The EctHR set out the nature of the obligation to investigate under Article 2 of the Convention in the following terms:

> *"69. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 "to secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also require by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or private individuals…The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life….*
>
> *70. The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible…This is not an obligation of result but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death, or identify the person or people responsible, will risk falling foul of this standard. Whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention…Moreover, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice. In all cases, the next of kin of the victim must be involved in the procedure to such an extent as is necessary to safeguard his or her legitimate interests…*
>
> *71. A requirement of promptness and reasonable expedition is implicit in this context…It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular investigation. However, a prompt response by the authorities in investigating a use of lethal force generally may be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion or tolerance of unlawful acts."*

129. The Coroner thus argues that the criminal investigation undertaken in the present case meets all of the requirements of *Aliyev*. He submits that it is also clear from Aliyev that the applicants are not entitled to disregard the Garda investigation into their brother's death (as they seek to do) merely because no prosecution has been achieved. It is submitted that the Coroner's inquest into the death of their brother is not intended to be the sole inquiry vehicle under which the death of an individual can be investigated. It is argued that if that were the case, the inquiry would not meet Article 2 requirements in light of the restrictions contained in ss. 30 and 31 of the 1962 Act.

130. It is also argued that Article 2 cannot assist the applicants if the Coroner is without jurisdiction to adjudicate on the quest of public interest privilege, despite the applicants' highly principled Article 2 arguments.

131. The Coroner further contends that the case law of the EctHR relied on by the applicants is not authority for the proposition that the applicants have a right to unlimited access to the Garda file in circumstances where that file remains open. While s.2(2) of the 2003 Act imposes an obligation on a court insofar as possible to interpret and apply legislation in a manner compatible with the Convention, that does not mean that the 1962 Act can be interpreted *contra legum* in order to allow the Coroner to exercise a power he does not have. This is so no matter how worthy the applicants' arguments are.

132. The Coroner's submissions with regard to the applicants' Article 2 claims were adopted by counsel for AGS in the course of her submissions to the Court.

133. It seems to me that in assessing whether, by virtue of what has transpired to date, the applicants have been deprived of an effective civil death effective investigation as required by Article 40.3.2 of the Constitution and Article 2 of the Convention, it is apposite firstly to consider the parameters of the statutory inquest process.

134. In *Northern Area Health Board v. Geraghty* [2001] IEHC 109, [2001] 3 I.R. 321, Kelly J. opined that a coroner:

> *"…must have a certain amount of latitude and discretion depending on the facts of each individual case so as to bring about an investigation into the real and actual cause of death" and that it would be "unwise to set down any hard and fast rules regarding the scope of the coroner's investigation".*

135. The scope of the coroner's investigation was also considered in *Eastern Health Board v. Farrell* [2001] 4 I.R. 627. There, the family of the deceased claimed that the aspiration pneumonia from which the deceased died arose because of the deceased's mental handicap which, in turn, caused by an encephalopathic reaction to what is commonly known as the 3-in-1 vaccination when he was an infant. In that case, the coroner had arranged the attendance of several expert medical witnesses who were questioned as to a possible link between the vaccination and the death of the deceased. Counsel for the applicant protested that the respondent did not have authority to enquire into any such possible link, and that he was, contrary to the 1962 Act, delving into the area of civil liability.

136. The Supreme Court affirmed the order of the High Court that the hearing of the inquest was *ultra vires* the 1962 Act.

Keane C.J. opined:

> *"If a coroner's inquest were to extend its inquiries beyond the circumstances, including the proximate medical cause of the death, in which the death occurred, it would become, in my view, an inquiry of a radically different nature and one which was not envisaged by the Oireachtas in enacting the Act of 1962. The holding of such an inquiry is not merely unwarranted, having regard to the restrictive terms in which s. 30 is couched: it is wholly at odds with the general policy underlying the legislation, as reflected in the definition of the circumstances in which a coroner is obliged or entitled to hold an inquest, the restrictions on his powers to summon medical witnesses and the limited financial resources available to him in conducting the inquest.*
>
> *I emphasised at the outset that an inquest is an essentially inquisitorial process in which there are no parties and no trial*

takes place. What is to happen in the present case if the notice parties at the resumption of the inquest express their dissatisfaction with the report of Dr. Butler and ask for a further adjournment so as to enable another independent expert commissioned by them to produce a further report? It must never be forgotten that in adversarial litigation, however protracted and cumbersome it may become, the issues between the parties are strictly defined by the pleadings. That is not so in inquisitorial procedures and it is a matter of public knowledge that, in the case of tribunals of inquiry, it has even proved difficult to confine the inquiries within reasonable limits by an insistence on strict adherence to the terms of reference prescribed by the Oireachtas. The inquiry undertaken by the respondent in the present case is governed by no pleadings and is not constrained by any terms of reference. In my view, that is a serious, although clearly unintended, distortion of the important function which, as a matter of history, the coroner's inquest has discharged under our law and which consists in essence of an expeditious and economical inquiry into four limited but significant issues: the identity of the deceased and where, when and how his death occurred."

137. The Supreme Court again addressed the issue in *Ramseyer v. Mahon* [2006] IESC 82, [2006] IR 216. In that case, the applicant, who was the sister and next-of-kin of the deceased, claimed that the coroner, by denying her access to certain documents, proposed to conduct the inquest in a manner unfair to her interests. The applicant had sought copies of all statements or draft depositions made by potential witnesses in order to enable her to participate fully in the inquest as a properly interested party. The coroner had submitted that the draft depositions remained unsworn until the inquest and, therefore, were of no probative value.

138. Writing for the Supreme Court, Fennelly J. described the inquest process in the following terms:

"20 The inquest is concerned with "how, when and where the death occurred." The "when and where" pose no problems of interpretation. The answer may or may not be easy in any particular case, but the concepts of time and place are objective ones. If the inquest jury can reach a conclusion, their verdict will name a place and record a time. "How" is a less neat notion. It leaves more room for argument about the scope or extent of the coroner's inquiry. Where, for example, the evidence shows that the deceased died from head wounds inflicted by an axe swung at him by a named person, the jury can scarcely be constrained to state merely that he suffered head wounds caused by an axe without mention of the human agent. They must not, of course, say that he was murdered, or, by the same token, that the death was accidental. Section 31(1) provides that: "Neither the verdict nor any rider to the verdict at an inquest shall contain a censure or exoneration of any person".

21 The true meaning and practical implications of these sections has been very clearly explained in two judgments of this court. Firstly, in Farrell v. Attorney General [1998] 1 I.R. 203, Keane J. recalled with approval the words of Lane L.C.J. in R. v. South London Coroner, ex parte Thompson (1982) 126 S.J. 625 at p. 223:-

> *"it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a criminal trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."*

22 The same judge, as Chief Justice, repeated these words in the subsequent case of Eastern Health Board v. Farrell [2001] 4 I.R. 627. He added, nonetheless, a useful gloss to the section in the following passage at p. 637:-

> *"While this provision undoubtedly lays stress on the limited nature of the inquiry to be conducted at an inquest, the prohibition on any adjudication as to criminal or civil liability should not be construed in a manner which would unduly inhibit the inquiry. That would not be in accord with the public policy considerations relevant to the holding of an inquest to which I have referred. It is clear that the inquest may properly investigate and consider the surrounding circumstances of the death, whether or not the facts explored may, in another forum, ultimately be relevant to issues of civil or criminal liability. The intention of the Oireachtas that the inquest should not simply take the form of a formal endorsement by the coroner or a jury of the pathologist's report on the post-mortem is also made clear by s. 31 which, although prohibiting the inclusion in the verdict or any rider to it of any censure or exoneration of any person, goes on to provide in subs. 2 that:-*
>
> *'notwithstanding anything contained in sub-section (1) of this section, recommendations of a general character designed to prevent further fatalities may be appended to the verdict at any inquest'."*

139. Fennelly J. next addressed the extent of the right of the applicant to access, in advance of the inquest, the information in possession of the coroner. In this regard, he cited Kelly J. in *Northern Area Health Board v. Geraghty* [2001] 3 I.R. 321:

> *"I would be slow to hold that an inquisitorial procedure whose verdict cannot impose civil or criminal liability of any sort on any person requires the full panoply of natural justice requirements of disclosure in advance of the hearing to be applied to it as would be the case, for example, in a criminal trial." (at para. 24)*

140. Fennelly J. found the *dictum* of Kelly J. to be "*a useful guide*". (at para. 25) He went on to state:

"26 The guiding criteria for the decision on this appeal can now be considered. It is necessary to consider, firstly, the nature of an inquest and the role of the coroner. Secondly, it is necessary to consider the status and rights of a person such as the applicant.

27 I must repeat that the inquest is an inquisitorial proceeding. There is neither prosecutor nor defendant; neither plaintiff nor defendant. There is neither indictment nor statement of claim. There are no parties and nobody is obliged to take a position or give notice of a position as to the "how, when and where" of the death. Furthermore, the inquest is confined to finding facts and is precluded from expressing any views in a verdict or rider about innocence or guilt of any person. It is, on the other hand, necessary to bear in mind the qualification of Keane C.J. at p. 637 of Eastern Health Board v. Farrell [2001] 4 I.R. 627, quoted above:-

> *"… that the inquest may properly investigate and consider the surrounding circumstances of the death, whether*

or not the facts explored may, in another forum, ultimately be relevant to issues of civil or criminal liability.""

141. Fennelly J. found it "*in no way inconsistent with the inquisitorial character of an inquest that persons with a legitimate interest should propound a version of the facts which accords with those interests*." (at para. 29) He further opined:

> *"30 It follows that persons represented at an inquest are entitled to an appropriate level of fair procedures. They are entitled to be present, to call witnesses and to cross-examine. But all of this is subject to the overriding consideration that they are assisting in an inquiry into the facts and are not either responding to or making a charge. They are subject to the directions of the coroner, who is entitled to conduct the hearing in his discretion, while respecting the legitimate interest of interested persons to pursue lines of inquiry.*
>
> 31 The extent to which persons are entitled to access to materials in advance depends on the circumstances of the case. As Kelly J. stated, the right to fair procedures does not exist in a vacuum. The coroner has a wide discretion as to how to conduct an inquest, a discretion which extends to the provision of material in advance. The governing criterion is whether the party seeking the material can show that he or she will be prejudiced in participation in the inquest in its absence. A party such as the applicant is emphatically not entitled to an order for general discovery as in civil litigation or as in Nolan v. Irish Land Commission *[1981] I.R. 23."*

142. It is clear from *Ramsayer* that the Coroner has a wide discretion as to how the inquest is conducted. As also made clear by Fennelly J., the parties to an inquest are not entitled to general discovery.

143. In *Morris v. Farrell*, O'Caoimh J., in considering whether there was an obligation on the coroner to furnish the documents in question in that case to the applicant, opined:

> *"One has to bear in mind the fact that an inquest is not a lis inter partes. The judgment of Keane J. in Farrell v. Attorney General [1998] 1 I.R. 203 clearly illustrates this fact. The further judgment of Keane C.J. in Eastern Health Board v. Farrell [2001] 4 I.R. 627 insofar as (it) indicates the limits of the inquiry to be conducted by the Coroner must also be borne in mind."*

144. Furthermore, albeit having found that the coroner should have provided the documents to the applicant in circumstances where the gardaí had waived any claim to confidentiality or privilege, O'Caoimh J. did not find that this failure vitiated the inquest. In arriving at his conclusions in this regard, the learned Judge considered the rights afforded under Article 40.3 of the Constitution and Article 2 of the Convention in the context of the inquest process. He stated:

> *"The respondent, having obtained the Book of Evidence from An Garda Síochána, went through it and decided what witnesses were relevant to the terms of his inquiry. It has not been demonstrated that in so acting he erred in any respect. He did not purport to indicate that these were the only witnesses whose evidence he would entertain. It is clear that had he engaged in the exercise of collecting statements himself rather than leave same to the gardaí to assemble, he would have had to engage in much the same exercise.*
>
> *It is clear that certain of the documentation furnished by the respondent to the applicants was furnished very late in the day. In particular, this relates to the full report of the State pathologist, Dr. Harbison. In his affidavit he acknowledges this fact and I must assume that he was prepared to act in a fair manner in the conduct of his inquiry by giving to the applicants' sufficient time to consider this report.*
>
> *The applicants have not established to my satisfaction that the failure to furnish the documentation sought at the time of the inquest, which has subsequently been furnished in the context of these proceedings, has resulted in a failure to carry out an effective, fair and independent investigation into the death of the applicants' son and represents accordingly a failure to vindicate his right to life.*
>
> *I am satisfied that, insofar as the inquest was not an adversarial contest and was not a lis inter partes, the mere fact that the Garda Commissioner and individual gardaí had access to the documentation in question is irrelevant to the issues before this court.*
>
> *With regard to the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, while it is the case that at no time relevant to these proceedings did it form part of the domestic law of the State, I am satisfied that I can have regard to the jurisprudence of the European Court of Human Rights insofar as it may assist this court in examining the issues before this court in the context of Irish law, in particular, the Constitution. I am satisfied that the provisions of article 2 of the Convention dealing with the right to life afford no greater protection than the provisions of the Irish Constitution in Article 40.3.2., which arguably provide an even greater protection to the right to life. On this basis I am prepared to accept as representative of the state of law in this jurisdiction, the observations of the European Court of Human Rights in the cases cited to me and in particular in Hugh Jordan v. United Kingdom (4th May, 2001). I am satisfied that the question must be asked whether the failure to furnish the documentation in question in this case can be said to have resulted in a situation where the applicants have been deprived of "materials necessary to examine the facts". I am satisfied that the applicants have failed to establish such a situation in this case and I am satisfied in the circumstances that no breach of the constitutional protection of the applicants' rights has resulted from the conduct complained of in this case."*

145. I am satisfied that the approach of O'Caoimh J. is relevant to the within proceedings in circumstances where the applicants have been clearly apprised by the Coroner that further evidence will be entertained at the inquest, if deemed to be relevant.

146. In his affidavit, the Coroner avers that he prepared such draft depositions as he considered relevant and furnished them to the applicants. In this regard, therefore, the applicants' circumstances can be distinguished from those in *Ramsayer*. The applicant in *Ramsayer* succeeded in her claim because the documents she was seeking were the draft depositions which had been prepared by the coroner and which reflected the evidence likely to be given at the inquest. As can be seen, draft depositions were provided by the Coroner to the applicants in the within proceedings following upon his receipt of the Garda file.

147. It is also the case that he made further draft depositions available to the applicants following representations made on their behalf. Presumably, the Coroner acceded to such requests on the basis that the further depositions furnished to the applicants were considered by him to be relevant to the inquest. Relevancy is of course a matter for the Coroner to determine.

148. The nub of this case is that the applicants maintain that there is other material necessary to ensure that a comprehensive narrative as to the circumstances of their brother's death is forthcoming from the inquest. It is the case that the applicants are not, to this juncture at least, in a position to adduce the information which they believe is contained in the Garda file (and which they say is relevant for a proper narrative of the circumstances of their brother's death). No one disputes, however, that the applicants should be able to make the case to the Coroner that other materials may be relevant to a proper determination of the four matters with which the Coroner is concerned under the 1962 Act, subject always to the Coroner's exclusive remit to decide on relevancy.

149. Both the Coroner and AGS contend that the applicants have not said to the Court why the documents are relevant. The applicants concede that they cannot maintain the case as to the likely relevance of the information in the Garda file as they have not seen the documents.

150. They assert, however, that in order to make a case for the admission in the inquest process of information in the Garda file which they believe to be relevant, they require sight of the documents in the Garda file, which the Coroner has not provided to them because of AGS's public interest privilege claim which the Coroner has no power to decide. That is the dilemma in this case, according to the applicants.

151. It is the case that where a statute or rule of law does not provide a remedy for the violation of a right of a citizen the citizen is entitled to rely on the provisions of the Constitution, and the principles which flow from it, as affording him or her a remedy for the alleged breach of his or her rights. (*Carmody v. Minister for Justice and Equality* [2009] IESC 71, 2010 I I.R. 635 refers). That being said, however, to my mind, leaving aside the issue of relevancy for the moment, the fact of the matter is that in the absence of any statutory procedure in the 1962 Act for the determination of a claim of public interest privilege (which, the Court has found the Coroner properly recognised as a *prima facie* claim), the Court cannot direct the Coroner to act outside of the 1962 Act, even for the purpose of fashioning a constitutional remedy for the applicants.

152. While the courts require that statutory bodies exercise their powers in accordance with the Constitution and Convention standards, I am satisfied that neither of those general principles imposes an obligation on the Coroner to act outside of the 1962 Act. The Coroner cannot act outside of the remit of the 1962 Act even where, were he to do so, it would be consistent with Article 40.3. of the Constitution and Article 2 of the Convention.

153. Insofar as the applicants contend that there is a lacuna in the 1962 Act in that there is no procedure contained therein for the Coroner to adjudicate on issues of privilege, it is important to note that they have not challenged the Act in the within proceedings. Thus, the Court is left with the position that the Coroner can only conduct the inquest within the bounds of the 1962 Act.

154. The applicants maintain that the argument advanced by the Coroner and AGS, namely that it is open to them to apply to the Coroner to admit draft depositions, that they can make submissions at the inquest and that accordingly they should await the outcome of the inquest before advancing the contention that they are being treated unfairly, is without merit. They argue that the *modus operandi* advocated by the respondents cannot assist them in circumstances where were they to again seek to have sight of the Garda file during the inquest process, they would invariably meet with the same objection from AGS.

155. Counsel advances the following reasons for the applicants' stance:

The various responses of the Coroner and AGS have resulted in the applicants not knowing whether or not there is material relating to the threats made to their brother's life in the Garda file. It is accepted that the inquest is not an adversarial process and that the panoply of fair procedures available to the applicants are more limited as a result. However, the Rubicon which the respondents cannot cross is to maintain a state of affairs in circumstances where the applicants believe that there is material in the custody of the Coroner which relates to threats made to their brother's life. Therefore, for the respondents to invite the applicants to make submissions on material that they cannot ever see is not a sufficient solution to the applicants' dilemma. The applicants are thus left in the position whereby they do not know whether they should have commenced the within proceedings: that is a very corrosive state of affairs for any citizen. If the applicants do not succeed in the within application, they will be met with the same responses from the Coroner and AGS as heretofore. While it has been said that the applicants can apply to the Coroner to admit such depositions as they might make, it remains the case that they do not know what documents are in fact on the file, or their relevance. Without sight of the documents they are not in a position to address the issue of relevance or propose solutions to allay the concerns of AGS. Thus, to simply invite the applicants to continue to engage in the inquest process is very unfair because at the conclusion of the process their remedy will again be judicial review proceedings. A citizen should not have to wait until a disaster occurs to have an entitlement to seek judicial review. It is thus submitted that for the applicants to have to wait until the completion of the present unsatisfactory process before mounting a challenge is not a vindication of their constitutional right to fairness.

156. Overall, notwithstanding the applicants' submissions, I find no unfairness to them in the manner in which the inquest process has been conducted to date, or in respect of what is proposed by the Coroner. To put the within application in context, I note that the inquest has not yet taken place; there has been no ruling as of yet by the Coroner on whether further evidence is necessary, over and above what has been already been circulated by way of draft depositions together with the post mortem report. Furthermore, as provided for in s. 26 of the 1962 Act, the Coroner can subpoena witnesses at any time, including during the inquest, if such a course of action is deemed by the Coroner as necessary. Moreover, the applicants have been invited to submit a deposition which they can apply to put before the inquest.

157. It is clear from the correspondence exhibited in the first applicant's grounding affidavit, and the submissions advanced on the applicants' behalf, that the applicants possess some knowledge of the threats made to their deceased brother in 2006 and 2009. While it is argued that this knowledge is incomplete, I perceive no reason why the applicants cannot depose to same and then make application for such deposition to be admitted. The inquest process is fluid and not static.

158. Moreover, the applicants will have the opportunity to cross-examine witnesses and make submissions in relation to the adducing of further evidence in the course of the inquest.

Thus, I find it difficult to comprehend how the Court can grant the applicant any relief which is predicated on an assertion that relevant material will not be admitted.

159. More particularly in this case, there is no evidence put before this Court that the applicants will be prejudiced by the position adopted by the Coroner in relation to AGS's public interest privilege claim. Even if I was convinced that the inquest process to date has been conducted unfairly (which I am not), the absence of any evidence of prejudice is sufficient to refuse the declaration sought by the applicants in the within proceedings. In this regard, I rely on the *dicta*, respectively, of Kelly J. in *Northern Area Health Board v. Geraghty* and Fennelly J. in *Ramseyer*, as cited above. I also rely on those cases in finding that no unfairness arises in the present

case solely by virtue of the fact that the applicants have not seen material which both the Coroner and AGS have seen. In this regard also, I refer again to O'Caoimh J. in *Morris*. He stated:

> *"I am satisfied that, insofar as the inquest was not an adversarial contest and was not a lis inter partes, the mere fact that the Garda Commissioner and individual gardaí had access to the documentation in question is irrelevant to the issues before this court."*

160. As set out above, it is open to the applicants to pursue their interest in the Garda file by way of an application for discovery, as already discussed herein. In my view, therefore, the opportunities that remain open to the applicants in the inquest process itself, which is yet to get underway, together with the option to seek discovery in the High Court of the Garda file and by so doing secure a hearing in the High Court on AGS' claim of public interest privilege (in the absence of the Coroner being unable to adjudicate on such matters), constitute sufficient protections for the applicants so as to render the inquest process compliant with constitutional and Convention standards.

161. Thus, for the reasons set out above, the Court finds that the challenge to the Coroner's ruling has not been made out. Nor have I found any basis to grant any declaratory order in respect of the position adopted by AGS before the Coroner.

162. In summary, what the applicants essentially seek in the within proceedings lies outside of the 1962 Act. This is so irrespective of whether the applicants call in aid their constitutional rights or cite Convention standards.

163. The reliefs claimed in the notice of motion are thus denied.