

## THE HIGH COURT

[2016 No. 185 MCA]

## IN THE MATTER OF SECTION 35(1)(B) OF THE COMMISSION OF INVESTIGATION ACT 2004

BETWEEN

GRÁINNE NIC GIBB

APPLICANT

AND

COMMISSION OF INVESTIGATION INTO THE FATAL SHOOTING BY AN GARDA SÍOCHÁNA OF RONAN MACLOCHLAINN ON THE  
1ST MAY 1998, IN ASHFORD, COUNTY WICKLOW

RESPONDENT

**Judgment of Ms Justice Faherty dated the 16th day of February, 2018**

1. This matter comes before the Court by way of an application pursuant to s. 35(1)(b) of the Commissions of Investigation Act 2004 ("the 2004 Act") wherein the Ms Nic Gibb (hereinafter "the applicant") seeks the directions of the Court in circumstances where it is contended that the respondent herein has not observed fair procedures in relation to her interests in the course of its investigation into the fatal shooting of Ronan MacLochlainn. The background to the application is as follows:

2. Ronan MacLochlainn was a member of the Real IRA (RIRA) who was fatally shot by a member of An Garda Síochána on the 1st May 1998. Mr. MacLochlainn had been attempting to leave the scene of an attempted robbery at the time. The target of the attempt was a Securicor cash-in-transit van. Five other raiders were arrested at or near the scene. The location of the attempted robbery and the shooting was Cullenmore Bends and is close to Ashford, Co. Wicklow.

3. The raiders had parked a blue Transit van and a white DAF van at Heuston Station car park, and both were used to carry out the raid. The gardaí had been following one of the men, and both vans were under surveillance prior to and on 1st May, 1998, by which time the operation had come to be known as "Operation Morrison".

4. The 1st May, 1998 was a bank holiday Friday and was also the day of the "Blue Flu" where many members of An Garda Síochána did not attend for work due to an industrial dispute. On the afternoon of 1st May 1998, the two vans left Heuston Station car park, followed by members of the National Surveillance Unit ("NSU"). Following at a distance were members of the Emergency Response Unit ("ERU") who were supporting the NSU. The vans travelled south from Dublin, eventually stopping north of Ashford where the blue van and a third vehicle, a gold Carina, both parked, waiting for the opportunity to block the road at Cullenmore Bends. When a Securicor van approached, the vehicles blocked the road and the raiders attacked. Members of the NSU and the ERU had spotted and followed the Securicor van and they arrived within seconds. They confronted the raiders and prevented the robbery. Ronan MacLochlainn was shot by a member of the ERU while trying to escape in a hijacked car. Numerous civilians were trapped in the roadblock set up by the raiders, and were in and around the area in which shots were fired by an Garda Síochána.

5. A week previously, on 24th April, 1998, the raiders had carried out an attempt to commit the robbery which was abandoned when the Securicor van arrived earlier than had been expected.

6. In the course of the incident on 1st May, 1998, three officers of An Garda Síochána shot at Mr. MacLochlainn. The man who fired the fatal shot made a statement at the time, but is now deceased. He was then a member of the NSU. Some thirty members of the NSU were at the scene in Cullenmore on 1st May, 1998. Only six NSU members made statements in 1998 which were included in the file sent to the Director of Public Prosecutions after the events.

7. The National Bureau of Criminal Investigation ("NBCI"), a unit of An Garda Síochána, was requested to undertake an investigation into the attempted robbery and the shooting. The investigation took a number of months and resulted in a report dated August, 1998, which recommended prosecutions in relation to the attempted robbery and no prosecution in relation to the shooting. The five raiders who had been apprehended at the scene pleaded guilty to firearms and assault offences and each served a prison sentence.

8. The Coroner's inquest into the death of Ronan MacLochlainn was adjourned on multiple occasions, finally taking place in 2009, with a small number of witnesses who had been involved in the events of 1st May 1998 and in the subsequent investigation. Against the wishes of Mr. MacLochlainn's family, the inquest went ahead in the absence of some witnesses, including the only member of the NSU who had made a deposition. The family also argued that insufficient disclosure was made to them before the inquest.

9. Civil proceedings were taken by the family of the deceased in 1999 which are still in being.

10. In separate proceedings, the applicant, who was the partner and next-of-kin of Ronan MacLochlainn, applied to the European Court of Human Rights ("ECtHR"). She complained that the investigation into her partner's death had not satisfied the requirements of the European Convention on Human Rights ("ECHR"). To settle the case, the State offered to set up a commission of investigation and the ECtHR ruled that this was an appropriate method by which to vindicate the rights of the family and of the public. That settlement resulted in the establishment, pursuant to the 2004 Act, of The Commission of Investigation into the Fatal Shooting by an Garda Síochána of Ronan MacLochlainn ("the Commission"), the respondent in the within proceedings.

11. The Terms of Reference of the Commission were set by the Minister for Justice and Equality, "mindful of the State's obligations to conduct [an] Official Investigation into all deaths arising from the use of force by agents of the State (which obligation derives from Article 2 of the European Convention on Human Rights as developed in the relevant case-law of the European Court of Human Rights)". Accordingly, the Commission of Investigation was set up to undertake a thorough investigation and make a report on:

1. The circumstances surrounding the fatal shooting by An Garda Síochána of Ronan MacLochlainn on 1st May 1998, in Ashford, Co. Wicklow; and
2. All relevant Garda matters, including the policies, practices and procedures of An Garda Síochána relating to the planning and control of the operation which led to the fatal shooting and relating to the training provided to personnel who were detailed for the Garda operation concerned.

12. The Commission was also required to keep the applicant involved in the investigation to the extent necessary to safeguard her legitimate interests.

13. It is apposite at this juncture to refer to Article 2 of the European Convention on Human Rights ("ECHR"). It provides:

*"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

*2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary...in defence of any person from unlawful violence..."*

14. The Commission's formal hearings took place over 48 days between September 2015 and January 2016. More than 100 witnesses gave evidence under oath. Most evidence was heard in public and members of the press were present. The evidence that was privately heard was subsequently read into the public record, in the presence of the applicant, having been redacted to a small extent due to the fact that it involved descriptions of State security measures; the omitted material was privileged and it was appropriate that it not be disclosed publicly. The evidence that was heard in private comprised, largely, of testimony from former or current surveillance gardaí. In two cases, civilians gave evidence in private with the consent of all involved: one for medical reasons, the other for logistical reasons.

15. Lawyers for the applicant were present throughout all hearings, public and private, and had the opportunity to question every witness. They were informed of the name of each member of An Garda Síochána who had been granted anonymity. Serving and retired members of An Garda Síochána were represented in each case by the same legal team. Lawyers for An Garda Síochána had similar opportunity to question every witness. Some of the raiders were represented by legal teams while they gave evidence to the Commission and were given notice of the evidence given to the Commission generally. The remaining civilian witnesses did not request legal representation.

16. At the close of evidence, the Commission requested that the applicant and An Garda Síochána provide written submissions. Extensive written submissions were provided on behalf of the applicant on 1st February, 2016.

The areas of concern identified in the applicant's submissions were: -

- (1) The state of knowledge of An Garda Síochána in the lead up to the events of 1st May 1998;
- (2) The preparation for, training in respect of, and control of the operation;
- (3) Events surrounding the shooting itself; and
- (4) The investigation of the shooting.

17. The Commission provided an initial draft report to interested parties on 18th April, 2016. Following the furnishing of this report, the applicant made submissions to the Commission on 5th May, 2016, pursuant to s. 35 of the 2004 Act. The submissions, in particular, outlined the applicant's concerns that the draft report:

- (a) Fundamentally mischaracterised her submissions;
- (b) Relied on matters not put in evidence before the Commission;
- (c) Ignored relevant evidence;
- (d) Failed to resolve internal conflicts; and
- (e) Failed to draw logical conclusions from findings.

18. In her submissions to the Commission, the applicant expressed concern that lines of cross-examination that were pursued by her legal representatives were characterised as "submissions" in the draft report. This was, it was submitted, against a backdrop where she had been forced to engage in extensive cross-examination to ensure a level of scrutiny was applied to all witnesses. Concern was also expressed in relation to reliance by the Commission on matters not in evidence before it. The applicant pointed, in particular, to Section F of the draft report on "The Psychological Aspects of Memory". It was submitted that "it appears that the Commission is giving evidence to itself about the impact of time, and particularly trauma, on the memories of various witnesses. This psychological analysis, not based on any expert evidence or report, appears to allow the Commission to accept or reject any given witness's evidence without further analysis".

19. It was also asserted that the Commission ignored relevant evidence and/or determined that it was unnecessary to make certain findings. It was submitted that there was a fundamental unfairness in the way the Commission approached the issue of the damage caused to the green Mazda car which Ronan MacLochlainn had hijacked. It was also the applicant's contention that the Commission failed to resolve internal conflicts, including the position and direction of travel of the hijacked green Mazda. It was also asserted that the Commission, in dealing with the question of communications on the day, irreconcilably concluded that they were both inadequate and sufficient. It was also submitted that while the Commission had made a number of findings critical of the behaviour of An Garda Síochána, it had failed to display an appropriate level of scrutiny over the entirety of the garda witnesses' evidence.

20. The applicant also contended that in view of the findings in the draft report as to the failure of An Garda Síochána to have in place a proper command structure or a contingency plan or a formalised system of co-ordination and communication between the NSU and the ERU, it rendered it logical that the Commission should conclude that the operation "was not planned and controlled so as to minimise, to the greatest extent possible, recourse to lethal force". It was submitted that not to make that finding was unfair to the applicant who has been seeking answers for seventeen years.

21. The Commission's position was set out in a letter of 10th May, 2016, to the applicant's solicitor. It accepted some of the submissions made on the applicant's behalf but rejected most of them.

22. Specifically, the Commission did not accept the applicant's contention that matters of memory and trauma were the preserve of expert analysis. It was stated that the kind of analysis of which the applicant complained was carried out by every jury and every

judge in the country in practically every case. It was stated that the Commission set out some basic comments about memory but did not believe that this was controversial material which should be the subject of expert evidence. It was pointed out that no application was made to adduce expert evidence in this regard, although all parties knew that witnesses were giving evidence of factual matters that occurred some seventeen years prior to their testimony.

23. The Commission stated that it was satisfied that the inferences it had drawn from the information, evidence and documentation received were reasonable and that the Commission was entitled to base its findings on common sense and life experience. It was emphasised that the process was not a criminal trial, nor was it an adversarial process but that even if it were, expert evidence was not required in respect of the matters of which the applicant complained.

24. The Commission rejected the submission that it ignored relevant evidence. It was specifically stated that no finding was made in relation to what caused the damage to the green Mazda because no finding could be made. The Commission went on to state: -

"This does not lead to the conclusion that it was an insignificant event, nor however does it lead to the conclusion that it was critical to an understanding of how Mr. MacLochlainn died. It was one of the many circumstances surrounding his death. It would be preferable to have further evidence on this issue but none was available. Its absence does not prevent conclusions being drawn from other evidence. At Ms. Nic Gibb's suggestion, the Commission obtained an expert report and again at the request of Ms. Nic Gibb, called the expert to give evidence. Having considered his evidence, the Commission drew conclusions where possible but found that the issue cannot be resolved."

25. The Commission stated that the fact that it saw fit to call evidence on an issue did not necessarily mean that it had to make a factual finding with regard to it. The Commission went on to reject other examples proffered by the applicant where it was contended that the Commission ignored relevant evidence or failed to make particular findings.

26. The Commission did acknowledge a particular discrepancy in the draft report, as had been pointed out by the applicant in her submissions of 1st February 2016. It was acknowledged, based on the applicant's submission, that it was not possible to resolve the conflict in the evidence on the exact position of the green Mazda vehicle hijacked by Mr. MacLochlainn at a time when a garda jeep driven by D/S Ryan overtook it. The Commission undertook to amend the report to clarify that this particular issue has not been resolved, which duly occurred.

27. As to the applicant's complaint as to the logic of certain conclusions as set out in the Final Report, the Commission stated as follows: -

"The conclusions drawn were logical and preferred some evidence to other evidence. Ms. Nic Gibb may not agree with the findings but this does not render them illogical.

The submission is made that I was critical of some aspects of garda behaviour but did not display an appropriate level of scrutiny over the rest of the Garda evidence. I must note for the record that your submissions do not reflect the nuances of the findings that I have made with regard to garda behaviour."

28. The Commission addressed the applicant's complaint as to the manner in which it dealt with the planning and control of the garda operation in the following terms:

"The findings of deficiencies in terms of the command structure fall short of a finding that the operation was not managed in such a way as to minimise, to the greatest extent possible, recourse to lethal force. The failure to handover made no difference to the management of the operation as regards the use of force against the raiders.

What must be established for the purpose of a finding that a police operation was conducted in violation of Article 2 ECHR is that, in the light of the facts as known to AGS at the time, reasonable arrangements could have been made to avoid killing terrorist or other suspects, without danger to the general population or law enforcement officials. This has not been established so no violation has been identified in this respect. One of the clear distinctions between this and other cases in which a violation of Article 2 has been identified by the ECtHR under the heading of operational failure, is the fact that this was not a planned operation (in the sense of an armed interception) but a surveillance operation".

29. On 13th May, 2016, the Commission furnished the applicant with its amended Final Report. Solely for ease of reference, same is referred to hereinafter as the "Final Report". Any amendments made by the Commission consequent to the applicant's s. 35 submissions were signposted in the Final Report. The applicant was duly advised that any application to the High Court by her pursuant to s. 35(1)(b) of the 2004 Act should be made by 4 p.m. on Tuesday 17th May, 2016.

30. The within application was commenced by notice of motion date 16th May 2016 for an order pursuant to s. 35(1)(b) of the 2004 Act directing that the Final Report prepared by the respondent be amended before submission of the report to the Minister for Justice and Equality.

31. Section 35 of the 2004 Act provides as follows: -

*"(1) A person who receives a draft report or part of a draft report from a commission under section 34 and who believes that the commission has not observed fair procedures in relation to the person may, within the period specified by the commission—*

*(a) submit to the commission a written statement setting out the reasons for the belief and requesting the commission to review the draft in light of the statement, or*

*(b) apply to the Court for an order directing that the draft be amended before the submission of the report to the specified Minister.*

*(2) After considering a statement submitted under subsection (1)(a) and reviewing the draft report, the commission may—*

*(a) amend the report, including by omitting any part of the report based on evidence received without observing fair procedures,*

(b) apply to the Court for directions, or

(c) submit the report to the specified Minister without making any amendments.

(3) After hearing an application under subsection (1)(b) or (2)(b), the Court may make any order or give any directions it thinks fit, including a direction to the commission to do one or more of the following:

(a) submit the draft report to the specified Minister without making any amendments;

(b) give a person specified by the Court an opportunity to give any evidence or make any submission that it considers should, in the interests of fair procedures, be received by the commission before the draft report is finalised;

(c) submit the draft report to the specified Minister after making such amendments as the Court may direct.

(4) Before submitting the report to the specified Minister, the commission shall give written notice of any amendments made under this section to any person who is identified in or identifiable from the report and who is affected by the amendments."

32. At the hearing of the within application, it was indicated on behalf of the Commission, and on behalf of the Commissioner of An Garda Síochána (on whom the papers had been served), that they were not participating in the proceedings.

33. The within notice of motion is grounded on the affidavit of James McGuill, the applicant's solicitor, sworn 18th May 2016. He avers, *inter alia*, as follows:

"I say that while the amendments made to the draft report by the respondent have addressed some of the issues raised by the applicant under s. 35 of the Act of 2004...the applicant is of the view that many of her concerns as set out in [her] submissions have not been addressed and is therefore seeking an order directing that the draft report be amended before the submission of the report to the Minister for Justice and Equality."

#### **The submissions advanced on behalf of the applicant to the Court**

34. A central thrust of the applicant's submissions in the within application is that while the Commission was mandated by its Terms of Reference to inquire into the circumstances surrounding the fatal shooting of Ronan MacLochlainn, it was not mandated to making a finding as to the lawfulness of the killing. It is contended that the Commission should not have made such a finding. The applicant maintains that it did so in circumstances where it failed to take relevant evidence, including expert evidence, into account, and where it separately placed reliance on matters that were not in evidence before it. In doing so, the Commission breached fair procedures.

35. It is the applicant's contention that the material available to the Commission was such that the Commission could not safely conclude that the killing of Mr. MacLochlainn was lawful. This is so because of gaps in the necessary evidence and the failure of memory on part of witnesses. Moreover, the reason why documents were missing remains unexplained. The combination of these factors rendered it impossible for the fact finder to safely conclude as to the circumstances of Mr. MacLochlainn's death.

36. It is also contended that the Commission failed to properly analyse the failure of the gardaí in 1998 to conduct a proper investigation of the events of 1st May, 1998. This failure is not without effect. It is submitted that once the opportunity to conduct a proper investigation was lost in 1998, the factual findings arrived at by the Commission cannot be viewed as sound.

37. The applicant contends that the analysis of the psychological aspects of memory is not based on any expert evidence or report and appears to allow the Commission to accept or reject any given witness's evidence without further analysis. Moreover, the Commission's analysis was conducted in the absence of any of the parties and thus facilitated a "result oriented" conclusion on key issues without any or any adequate scrutiny. It is submitted that the difficulty with the Commission's approach is that it allowed the Commission to accept or reject different witnesses' accounts of what they remembered about events that happened seventeen years ago. In purporting to deal with the psychology of trauma and poor recollection, the Commission effectively gave evidence to itself.

38. It is submitted that the approach of the Commission was in effect an apology for the absence of recall on the part of garda witnesses rather than something which should have more properly impacted on their credibility. More fundamentally, the Commission did not advise anyone, including the applicant, that it itself was going to employ a psychological approach to the analysis of evidence. When this was raised by the applicant in her submissions of 5th May, 2016, the Commission's response was to the effect that the applicant herself never applied to the Commission to call such expert evidence even when she knew that witnesses giving evidence before the Commission were doing so in relation to events which occurred some seventeen years previously. It is submitted that it is not sufficient of the Commission to dismiss the applicant's complaint on the basis that the applicant did not apply to call expert evidence on this issue. As a matter of fair procedures and in accordance with the principles of natural and constitutional justice, if the Commission was going to analyse evidence having regard to psychological factors, before so doing, the applicant should have been invited by the Commission to comment on this methodology. In any event, it is not the function of the Commission to carry out such an analysis. It is submitted that by embarking on such a course of action, the Commission took irrelevant matters into account.

39. There was evidence before the Commission from the Commission's own expert, Mr. Bailey, who was highly critical of the gardaí in matters of planning. While the Final Report concludes there were serious deficiencies in this regard, it appears that these deficiencies are excused by the Commission on the basis of resources issues. It is submitted that the gardaí never made the case to the Commission that the lack of proper planning was due to a lack of resources. It is contended that had the Commission taken on board the expert evidence, it would have concluded that it could not be safely stated that Mr. MacLochlainn's killing was necessary. The applicant's submission to the Commission was that a primary finding should be that the objective on 1st May, 1998, should have been to contain and control the scene, particular in circumstances where no shots were fired by Mr. MacLochlainn, or any other raider, which, unfairly, the Commission did not address.

40. While the Commission acknowledged the importance of establishing "islands of fact", it remains the case that objective factors, which should have informed the Commission, were ignored, discounted or explained away in the Final Report. It is contended that the

Commission allows a headcount of witnesses saying the same thing to substitute for “islands of fact”. This frailty is of particular concern to the applicant because of the vested interests of An Garda Síochána witnesses in their own evidence. The applicant submits that the Garda Commissioner was obliged to satisfy the Commission to what occurred on 1st May, 1998 but failed to do so in light of the poorly prepared and executed garda operation in 1998 and the deficiencies in the subsequent 1998 investigation into the events of 1st May, 1998, coupled with collective amnesia on the part of garda witnesses at the Commission.

41. Accordingly, it is the applicant’s case that the Commission should have exercised anxious scrutiny over the evidence given by garda witnesses and distinguished such evidence by reference to objective factors. Yet, this was not done and the Commission resorted to explaining away difficulties in the evidence of its own volition. This is especially evident in the approach of the Commission to the damage of the hijacked green Mazda driven by Mr. MacLochlainn. All of these frailties undermine the Commission’s finding as to the lawfulness of Mr. MacLochlainn’s killing.

42. It is submitted that the Commission closed its mind to the alternative proposition that, on the state of the evidence, and in light of an investigation in 1998 that was flawed and compromised from the outset, no conclusion on the lawfulness of the killing could properly be made and the Commission could not be satisfied beyond reasonable doubt as to the lawfulness of the killing. It is further submitted that the Commission has deliberately misunderstood the test to be applied as set out in Article 2 ECHR.

43. The applicant contends that the Court has a broad jurisdiction to make any order or give directions following the hearing of the application. The applicant states that she is not asking the Court to direct the Commission to delete the sections of the report about which she complains, rather she requires the Court (based on the submissions made to the Court) to direct the Commission that it was not required to make a finding as to the lawfulness of the killing of Mr. MacLochlainn. Furthermore, given that the Commission has made such a finding, the Court should find that the Commission did not arrive at its conclusion in the proper manner due to the failure to acknowledge the extent of missing evidence, the extent of conflicting evidence and by virtue of the Commission having ignored relevant evidence.

44. The applicant says that she is not canvassing for a finding by the Commission of an unlawful killing as it is accepted by her that there is a dearth of evidence which prevents such a finding, as it prevents a finding that the killing was lawful. It is submitted that the Court has discretion under s. 35 of the 2004 Act to completely review the evidence and materials and to give such directions to the Commission as the Court sees fit.

#### **Did the Commission unfairly take upon itself the task of establishing the lawfulness or otherwise of the shooting of Mr. Maclochlainn?**

45. The first issue to be addressed is whether, as contended by the applicant, the Commission acted *ultra vires* its Terms of Reference and/or breached fair procedures in addressing the question of whether the shooting of Mr. Maclochlainn was justified, as contended by the applicant.

46. It seems to me, having regard to the Commission’s Terms of Reference, that it was the function of Commission to make assessments and reach conclusions following upon the investigation it conducted into the circumstances surrounding the of Mr. MacLochlainn. In so doing, I see no reason why it was not open to the Commission to pronounce on the lawfulness or otherwise of the shooting, if it found itself in a position to do so on the evidence available and applying the requisite standard to arrive at such a conclusion. Accordingly, in so far as it has been argued that the Commission acted outside its Terms of Reference in pronouncing on the lawfulness of the shooting, that argument is rejected.

47. It is, I believe, noteworthy that on 1st February, 2016, the applicant made extensive submissions to the Commission under various headings, already referred to. I note that she did not suggest at that juncture that it was outside of the Commission’s Terms of Reference to address the issue of the lawfulness or otherwise of the shooting. The submission that was made was that the applicant “[did] not believe that the Commission can make a positive finding either way [as to whether Mr. MacLochlainn was pointing a gun], in light of the wholly unsatisfactory nature of the evidence, and, it follows, cannot arrive at a conclusion as to whether the shooting was, in fact, justified, or otherwise”, a submission that is referred to in the Final Report.

48. It is also the case that, following the circulation of the draft report on 18th April, 2016, the applicant’s s.35 submissions of 5th May, 2016, while taking issue in substantial regard with many of the findings made by the Commission, and with the basis upon which the Commission arrived at its conclusion that the shooting was justified, do not allege that the Commission acted outside of its Terms of Reference in addressing the lawfulness of the shooting. I note also that in the expert reports of Mr. Alan Bailey, an expert witness on policing retained by the Commission, the lawfulness and or justification for the shooting of Mr. MacLochlainn is touched upon, as it is by Mr. Burdis (the applicant’s expert) in his reports. Furthermore, in his cross- examination of Mr. Bailey on Day 48, counsel for the applicant’s questioning of the witness certainly appeared to envisage that an adjudication of whether or not the shooting was justified was within the remit of the Terms of Reference.

49. In all of those circumstances, I am satisfied that it cannot have been a surprise to the applicant that the lawfulness or otherwise of the shooting would be addressed by the Commission. Accordingly, I perceive no unfair procedures in the Commission having addressed the question of whether the shooting of Mr. MacLochlainn was necessary or justified. As already stated, I am satisfied that there is no basis for the suggestion that the approach of the Commission was *ultra vires* its Terms of Reference. There remains of course the question of whether the applicant was afforded fair procedures by the Commission.

50. It is, I believe, axiomatic, given the serious issue which the Commission was investigating, namely the fatal shooting of a citizen by the forces of the State, that the applicant, whose interest in the conduct of the investigation by the Commission was recognised in the Terms of Reference, would be afforded fair procedures by the Commission. To this end, I note that the applicant was fully represented at the Commission’s hearings, including by senior counsel. It was important that the Commission would consider the point of view advocated by the applicant, be that articulated by the opportunity to adduce or call evidence, cross- examine witness or make submissions. This was not just to protect her legitimate interests but to assist in a qualitative outcome of the investigation process.

51. In the within application, the applicant asserts that she was denied fair procedures. The applicant’s complaints of unfairness in the manner or process by which the Commission arrived at its various findings, including its finding that the shooting was “proportionate and necessary”, are set out and addressed in the course of this judgment. It is important to point out that the Court’s powers pursuant to s. 35(3) of the 2004 Act come into play if the Commission is found to have breached fair procedures. This is the scope of the Court’s remit or review pursuant to the section.

#### **Alleged specific instances of unfairness and breach of fair procedures**

52. Effectively, the applicant alleges unfair procedures on the part of the Commission by its failure:

1. To draw objective logical conclusions from the evidence;
2. To address the damage to the green Mazda driven by Mr. MacLochlainn;
3. To address the conflict in relation to the location of Mr. MacLochlainn's firearm at relevant times;
4. To adequately assess the importance and scale of lost evidence;
5. To accept compelling evidence from experts;
6. To properly address the issue of the planning of the garda operation; and
7. To properly address the debriefing issue.

The applicant put eighty three extracts from the Final Report before the Court, said to highlight the aforementioned frailties.

53. In the context of addressing the heads of complaint as set out at 2, 3, 4, 5 6 and 7 above, the Court has, where necessary, addressed those instances where it is contended by the applicant that the Commission unfairly failed to draw logical conclusions from the evidence.

**The alleged failure to address the damage to the hijacked green Mazda**

54. It is acknowledged that upon the arrival of the gardaí, the raiders, including Mr. MacLochlainn, attempted to flee the scene. Mr. MacLochlainn was armed and he sought and succeeded in hijacking a car –a green Mazda.

55. The relevant findings as regards the hijacked green Mazda are as follows: At p. 117 of the Final Report, the Commission found that seconds after the shots were fired by DS-06, the hijacked green Mazda, which was by then travelling northwards, collided with a southbound red car driven by DG-41. The Commission noted that the Mazda travelled only about two to three feet after the two shots before this collision occurred. It is noted that the collision was slight.

56. At p. 118, the Final Report records as follows: -

"As is now clear, a number of events happened at great speed within a matter of seconds. Ronan MacLochlainn hijacked a Mazda, did a U-turn and drove north. He pointed a gun out the window of the Mazda at Insp Hogan who fired shots at him. DS-06, DG-32 and DG-41 entered the scene from the north in convoy. Ronan MacLochlainn turned the gun in the direction of DS-06, who fired two shots at him. DG-41 then crashed into the hijacked Mazda, stopping it.

Simultaneously, D/G Ryan had driven around the hijacked Mazda by mounting the ditch. As noted above, the Commission heard conflicting evidence as to whether he passed the Mazda on its passenger side or on its driver's side. At this remove, it is not possible to resolve the conflict about the exact position of the Mazda on the road when the jeep passed it. However, this is a single instance in a series of events which, while it would be ideal to know every particular, are not capable of resolution as regards every detail. A coherent and convincing narrative as to what happened to both vehicles next has been established from the facts that are known. Returning back onto the road, D/G Ryan swung the ERU jeep right, parked across the road to block the path of the northbound Mazda. His door was facing the scene, as the jeep straddled the road. By that time, Mr. MacLochlainn had already been shot and the Mazda had collided with a red car. When he stopped, D/G Ryan saw a red car right in front of the green Mazda, nose-to-nose with it. He knew that the red car was a Garda vehicle because of where it was positioned. He did not perceive it to be a danger so he did not pay attention to it but focused on the hijacked Mazda.

D/Garda Ryan has no recollection of seeing a green Mazda GLX [the vehicle driven by DS-06] or NSU-DS-06 at the scene. However, the only reasonable interpretation of the evidence is that DS-06, DG-32 and DG-41 entered the scene from the north just before D/G Ryan swung the jeep across the road. From the timeline described by most witnesses, it is likely that DS-06's Mazda drove by as D/G Ryan was negotiating his way around in the ditch; it was certainly before the jeep stopped in its blocking position, and it is not surprising that D/G Ryan did not see the three NSU vehicles enter the fray as his first opportunity to observe what was going on outside his immediate path was after he had swung the jeep into position. This also explains why he does not recall seeing Alice M's car heading north; he was focusing on his path along the hard shoulder.

In trying to determine the sequence of events, Insp Hogan said he thought that the ERU jeep had passed the Mazda in what he described as a forceful manoeuvre on the ditch, before the Mazda collided with the red car. He did not see where the jeep ended up. He also thought that the green Mazda GLX driven by NSU-DS-06 had already passed and shots had been fired before the collision with the red car.

I am satisfied by the evidence of the red car's driver (DG-41), the driver directly in front of him (DG-32), Insp Hogan and D/S Gantly, all of whom witnessed this, that there was a collision, however slight, between the red car, probably a Seat, and the hijacked Mazda. It is clear that the Mazda also collided with something else at the scene, but given that a gunshot caused the death of Mr. MacLochlainn and not any injuries related to a collision, it is not necessary to determine exactly how the hijacked Mazda came to be so badly damaged."

57. The applicant has a major criticism of the manner in which the Commission deals with the issue of the damage to the Mazda. In particular, she takes issue with the finding that there was no need to assess how the damage to the vehicle occurred since the evidence established that Mr. MacLochlainn died from a gunshot wound and not from any other injury. Her principal submission however is that in the absence of a conclusive finding as to how the damage to the Mazda occurred, the Commission could not fairly conclude that Mr. MacLochlainn's killing was lawful.

58. The damage to the Mazda was the focus of much evidence at the Commission, including evidence given by an expert witness, Mr. Nangle.

59. The Commission also had access to a garda report of the events on 1st May, 1998, compiled by Supt Kelly on 2nd June, 1998 and which makes reference to *collisions* between the car driven by Mr. MacLochlainn and garda vehicles, namely a garda car and a garda jeep.

60. Mr. Nangle however discounted the theory put forward by garda witnesses that the damage to the green Mazda driven by Mr. MacLochlainn was caused by the red Seat garda vehicle or indeed by the garda jeep said to be the vehicle referred to in Supt Kelly's report. In his report, Mr. Nangle, opined as follows:

"The mark to the front bumper of Seat Cordoba... in our opinion is not consistent with having damaged the front of Mazda: 95-D-16466 [the Green Mazda driven by Mr. MacLochlainn] as one would expect that a greater area of damage sustained would be evident on the front of the Seat... particularly on the lower edge of the front bumper, had the Mazda... dipped under the front of the Seat... Our inspection of the Mazda found no evidence of paint transfer from either colours of [the garda Jeep] nor Seat".

Mr. Nangle confirmed this in evidence. The garda vehicle which caused the damage to the Mazda was never identified or located.

61. In her submissions to the Court, the applicant appeared to suggest that the Commission's finding as to the green Mazda having collided with the red Seat was not supported given that the scientific evidence established that the principal damage to the hijacked green Mazda was not cause by the red Seat. I am satisfied however that the very fact that it was established that the red Seat did not cause the principal damage to the hijacked Mazda did not render it unfair to the applicant for the Commission to have concluded that this vehicle collided with the Mazda. Such a finding had an evidential basis as the above quoted extract from the Final Report shows. Moreover, the Commission undoubtedly accepted that there were two collisions and that the damage to the Mazda was not caused by the red Seat but rather by the unidentified garda vehicle. The Commission also accepted that the red car was removed from the scene before any photograph or note was taken to show its position. The removal of the vehicle was the subject of strong criticism in the Final Report.

62. The applicant contends that since the Commission had an almost contemporaneous account of the fact that the hijacked green Mazda was in collision with two garda vehicles, and expert evidence that neither the red Seat (which the Commission also found collided with the hijacked green Mazda) nor the jeep driven by D/G Ryan caused the damage, the garda witnesses should have been pressed regarding the unidentified other vehicle which caused the substantial damage to the hijacked Mazda. It is submitted that the unexplained damage to the green Mazda is one of the "island of facts" to which the Commission ought to have had regard as the fact of such damage was an independent fact, capable of independent examination. The applicant contends that for the Commission to have called evidence on the issue of the damage to the hijacked Mazda but then to say that it was unnecessary to make a finding on how the damage came about given that Mr. MacLochlainn was killed by a bullet wound is unfair. It is submitted that the damage to the Mazda is of critical importance, because, if it was caused by another unidentified vehicle, as the Commission has itself found, it is therefore significant that this collision was not mentioned by any other witness, especially in circumstances where there is a contemporaneous reference to "collisions" in Supt Kelly's report. The applicant asks how any forensically minded person could take the view that they could be satisfied, to the criminal standard, as to what occurred on 1st May, 1998, in the absence of any explanation for the damage to the Mazda. The applicant makes the point that garda witnesses recall Mr. MacLochlainn brandishing a gun but no garda witness can account for the damage to the hijacked Mazda.

63. The applicant submits that the unaccounted for damage to the hijacked green Mazda should have alerted the Commission to the fact that it would be unsafe for it to conclude whether the fatal shooting of Ronan MacLochlainn was lawful.

64. The applicant asserts that the fact of an earlier collision with an unidentified garda vehicle raises the potential that Mr. MacLochlainn was contained and disabled by this collision which, it is submitted, would have given rise to a wholly different scenario. From the applicant's point of view therefore, this was an area of central relevance to "the circumstances surrounding the shooting", which under the Terms of Reference required investigation. The applicant's principal contention is that if the Commission did not know how the vehicle driven by Mr. MacLochlainn came to be damaged, then it was not in a position to make a finding as to the lawfulness of the shooting. This is so because if, as was in fact the case, the Mazda was seriously damaged by another unidentified garda vehicle (and it can only be a garda vehicle as all civilian vehicles were accounted for), then it is possible that the Mazda was static following this collision, thereby rendering Mr. MacLochlainn's escape potentially impossible. Accordingly, a possible permutation is that by reason of the damage caused by the collision with the unidentified garda vehicle, Mr. MacLochlainn may have become disarmed and accordingly he would not have been a threat to the gardai. While the applicant is not contending that this is what occurred, it remains a possibility, such that the Commission should have exercised more anxious scrutiny. It is thus contended that there was a failure of correct forensic analysis on the part of the Commission in failing to grasp the issue of the damage to the Mazda. Consequently, it is the applicant's case that this failure renders the Commission's conclusion as to the lawfulness of the killing a legal and forensic impossibility.

65. *I am not persuaded that the Commission breached fair procedures in the manner in which it dealt with the unaccounted for damage to the green Mazda. In the first instance, a reading of the Final Report (and the underlying transcripts which were put before the Court) establishes that the question of the damage to the vehicle, and the possibility that the situation had been contained by the collision between the Mazda and the unidentified garda vehicle thus rendering the shooting of Mr. MacLochlainn unnecessary, was fully explored at the Commission hearings, including by evidence given by Mr. Bailey and Mr. Burdis, and indeed in cross-examination of garda witnesses on the applicant's behalf. I also note the following exchange in Mr. Bailey's cross-examination on Day 48:*

"Q. And if in fact Mr. MacLochlainn was contained when the shot was fired, it is relevant as to the necessity for firing that shot?

A. It is a factor however for me the more significant factor is whether or not Mr. MacLochlainn actually pointed a gun at DSgt-06. If he pointed a gun at DSgt-06 irrespective of whether or not the car was blocked in DSgt-06 to my view has a right to respond to that threat and that is what I have consistently said."

66. I am also constrained to agree with the Commission's view, as outlined in its response dated 10th May, 2016 to the applicant's s.35 submissions, that while accepting that the damage to the hijacked Mazda was not an insignificant event, that did not lead to the conclusion that it was critical to an understanding of how Mr. MacLochlainn died if there was other evidence from which the Commission could draw conclusions as to the lawfulness or otherwise of his shooting.

67. Overall, I perceive no unfairness in the Commission's consideration of the damage to the Mazda. In reaching its conclusions, the Commission relied on the expert evidence of Mr. Nangle and other evidence which included, *inter alia*, the testimony of DG-41, Insp Hogan and D/Gantly who witnessed a collision between the green Mazda and the red Seat after shots were discharged by DS-06, and whose evidence was presumably a factor in the Commission's recounting in the Final Report that the green Mazda was moving up until the shots were fired by DS-06.

Indeed I note that the question of whether or not the Mazda was in motion at the time of the fatal shot was explored with Insp Hogan on Day 8 by counsel for the MacLochlainn family and was addressed in some detail in the direct and cross-examination of Mr. Burdis.

68. At p. 216, the Commission refers to the evidence of Mr. Nangle who concluded that the damage to the hijacked green Mazda was likely to have been caused by the Mazda colliding with the back of another vehicle. He opined that if in a tight line of cars, the damage could have been sustained while the Mazda was doing a U-turn. The Commission noted that both Patrick O. and Mr. MacLochlainn were involved in attempts to do a U turn but no witnesses had reported any collision between the Mazda and any other vehicle while it was turning, nor was there evidence to the car in front of the Mazda having been damaged. The Commission found however that the "most likely theory" was that the damage had been caused during a U turn but that there was "no further evidence on this point to assist".

69. The applicant takes issue with the Commission's finding. It is submitted that this suggestion was not raised by the Commission with any witness. It is submitted that the Commission's conclusion is implausible given that there was no evidence tendered that the hijacked green Mazda was stuck in a line of traffic. Accordingly, the applicant maintains that the Commission had no entitlement to advocate its theory as to how the damage was caused in light of the garda's failure to identify the garda vehicle which had caused damage to the Mazda. The applicant contends that it is fundamentally unfair that an untested supposition as to how this damage occurred is included in the Final Report.

70. I note that in its response of 10th May, 2016, to the applicant's submissions on the earlier draft report, the Commission rejected the submission that its theory as to the most likely cause of the damage to the hijacked Mazda had no evidential basis. I am satisfied that there was no unfairness to the applicant in the Commission so doing in circumstances where the Commission's tentative theory as to the cause of the damage was in keeping with the evidence given by Mr. Nangle who testified that he had never seen damage such as that caused to the hijacked Mazda from a head on collision and that such damage could possibly arise by an attempted U turn in a tight line of cars, and in circumstances where there was evidence that the vehicle was involved in a U turn.

71. At p. 124 of the Final Report, the Commission accounts for D/G Ryan's failure, *inter alia*, to see Mr. MacLochlainn turn the hijacked green Mazda to face north, his shooting, or DS-06's vehicle parked near the hijacked green Mazda as due to the "perceptual distortion described by his ERU colleagues as occurring at a live scene". It is the applicant's contention that the Commission effectively invents a concept of memory in order to iron out and explain away shortcomings in the garda evidence.

72. I am not persuaded by the applicant's submission in this regard. The Court is satisfied that this concept was not invented by the Commission. In Section F of the Final Report, headed "Reliability Issues – Time, Trauma, Trust", the Commission clearly states that it heard evidence that trauma affects both perception and memory. It noted that the effect of time and trauma on perception was part of ERU training scenarios. It reprises the evidence of several ERU witnesses as to the effect of situations of high stress on perception, including evidence tendered by D/G Michael Walsh, D/G Peter O'Brien, Insp Hogan, D/G Daniel O' Driscoll and D/S Sears. It noted D/G O'Driscoll's evidence that "everyone who is facing a traumatic situation will experience perceptual distortion, which can have a variety of permutations such as tunnel vision". The Commission also heard from civilian witnesses "who described similar distortions to those often experienced by the ERU witnesses".

73. At p. 124, it states:

"The evidence confirmed that gardaí trained for armed intervention concentrated on the task in hand, whether it was a person being chased, or a gun being pointed, to the exclusion of other matters which did not affect their task. Awareness of the position of their colleagues and civilians and other threats at the scene was part of that task. Many ERU witnesses were able to describe with impressive accuracy roughly where other operatives were during this very short incident, as this informed what actions they took and where they directed their attention."

74. In its response of 10th May, 2016, to the applicant's s.35 submissions, the Commission rejected the applicant's argument that matters of trauma and memory must be the preserve of expert analysis and equated the analysis it carried out to that "carried out by every jury and every judge in the country in practically every case." I am minded to agree with the Commission in this regard. Moreover, the Commission made reference to *DPP v. CC* [2012] IECCA 86, where O'Donnell J. rejected the argument that because a witness had blanked various events from his mind, there was a requirement that the jury receive expert evidence. The learned Judge stated:

*"In truth the whole concept of recovered memory introduced by the defence was something of a misnomer and potentially misleading. This was not the type [of] case which gave rise to the dispute in the expert professions, to which counsel for the defendant had referred in his application. It has not been suggested that the complainant had undergone any process of therapy, as a result of which he believed he had recovered a memory which had been lost. Instead he was merely saying that he had put these matters out of his mind and had only remembered them when asked about them by the gardaí. That is not a concept that required expert evidence, or indeed was something upon which there was any expert debate in the field of psychiatry. It was a matter well within the preserve of the jury to consider and assess."*

75. In her written submissions to the Court, the applicant referred to the decision of Finlay-Geoghegan J. in *A.M.T. v. RAT* [204] 2 IR 607 in support of her contention that the Commission placed reliance on matters not in evidence before it. In *A.M.T.*, the learned Judge found that reliance on factors in respect of which there was no relevant material before it rendered the decision of the Refugee Appeals Tribunal invalid. I am satisfied however that as this Court has found that the Commission did hear evidence from various witnesses about the effect of time and trauma on memory, that the decision in *A.M.T v. RAT* has no particular applicability.

76. Accordingly, I find no unfairness to the applicant in the Commission's rejection of the argument that the Commission was giving evidence to itself on this particular issue. I would also add that I note that the concept of "perceptual distortion", as referred to in the Final Report, was a concept upon which Mr. Bailey opined in the course of his evidence on Day 48. For example, in the context of commenting on the lack of memory of certain members of the gardaí as to the arrival of DS-06 at the scene, Mr. Bailey stated:

*"...I don't know why they don't see the vehicle other than I did in an attempt to try to explain some of the things that happened in critical incidents I did include some comment on perceptual distortion in the secondary report because it does have those effects that people do not see things and in less contentious cases than this where the thing they don't see is not contentious but they don't see it. Some do, some don't, whole groups of people sometimes do not see it and that goes for police as well as civilian witnesses."*



77. All in all, as regards D/G Ryan's evidence, I do not accept that the Commission based its conclusion on its own opinion of memory; rather it arrived at its conclusion having regard to its assessment of the evidence it had from ERU witnesses as regards perceptual distortion and, moreover, it found that "a coherent and convincing narrative as to what happened to [D/G Ryan's jeep and the green Mazda driven by Mr. MacLochlainn after D/S Ryan passed Mr. MacLochlainn]" had been established.

78. At p. 125 of the Final Report, the Commission records D/G Michael Walsh's "coherent evidence on memory issues" and concluded that "[t]he traumatic nature of the scene was clearly a factor in his loss of specific memories." Again, the applicant alleges unfairness, maintaining that the Commission's conclusion was an acceptance of its own preferred theory of memory loss over the possibility that there was agreement among garda witnesses to disremember certain matters.

79. For the reasons already stated, I am not persuaded that the Commission's analysis was tantamount to it giving evidence to itself. Moreover, I am satisfied from a reading of the Final Report overall that the Commission was more than alive to the possibility that garda witnesses might consciously have sought to disremember matters, or indeed collude to conceal certain matters. By way of example, at p.134, the Commission finds that D/G Harrington effectively tried to conceal the gratuitous assault that was perpetrated on another of the raiders, Saoirse Breatneach, and that other members of the gardaí colluded in doing the same.

80. Moreover, the Commission was conscious that truth may be distorted "so as to protect the whole unit". At p. 135, the Commission states: -

"Recognising that bias may play a part in certain accounts of events does not justify a conclusion that garda witnesses have invented or concealed other accounts of what occurred on that day on a much wider scale. Invention would not only be far beyond loyalty, but would be far more difficult to achieve on the scale alleged and would have no obvious purpose in light of my strong views on prior knowledge of these events. Nor does this finding necessarily affect the credibility of individual witnesses, many of whom gave strikingly direct and impressive evidence. It would be illogical to allow such a finding to affect the credibility of all other garda witnesses without a connecting or rational link to enable such an inference to be made."

81. In circumstances where the Commission makes findings as to garda collusion and indeed other findings adverse to the gardaí (for example including that the failure to preserve the scene had a "toxic" effect), I am not persuaded by the applicant's argument that the Commission unfairly displays its preference for the evidence of garda witnesses, or that the Commission went to some considerable lengths to reconcile conflicting evidence in the teeth of contradictions.

82. At p. 303, the Final Report states:

"NSU-DG-41's red car (into which the Mazda collided) was used to transport a prisoner and had probably left even before Supt Blake ordered that all cars remain in place. However, NSU-DG-32's departure from the scene (in a car that had been directly behind NSU-DS-06 at the moment of the shooting) may have been as a direct result of this order. NSU-DG-32 recalls receiving a direction to leave after uniformed guards had arrived. These cars should have been left where they were."

83. In Section H of the Final Report, the Commission analyses what occurred in the immediate aftermath of the shooting. Ultimately, it found that there was a "breach of the hierarchical rules of AGS and of basic scene preservation" the overall result of which was "toxic", including the removal of cars "which was one of the main factors that led to suspicion on the part of Mr. MacLochlainn's family as to what happened in the Cullenmore Bends". It rejected the claim of An Garda Síochána that the investigation was thorough and found that it was not.

84. At p. 185, the Commission concluded, *inter alia*, that the removal of all garda vehicles involved with the hijacked green Mazda, the failure to preserve or treat the gun Mr. MacLochlainn had "as the crucial evidence it clearly was", and the leaving of the scene of immediate witnesses to the shooting of Mr. MacLochlainn, together with the leaving of the scene by DG-06, meant that photographs taken of the scene, "no longer reflected the scene in any meaningful way". The Commission noted the advice of the expert to the Commission, Mr. Bailey: -

"It appears illogical to keep the civilian owned vehicles at the scene, Garda vehicles are moved, losing key reference points and potentially destroying evidence moving material around the scene. It is possible that no damage to the integrity of the scene was done by moving the vehicles, but we can never know, and it allows allegations of wrong doing to be made that cannot be disproved because the scene had been dramatically changed by removing Garda vehicles."

The Commission went on to state:

"I will add only that while such allegations of wrongdoing have at least been dispelled in this case, clearly such errors made it more difficult to explore the allegations and much of the Commission's work has comprised considering and explaining anomalies that would never have arisen had the investigation been adequate."

85. The applicant submits that the Commission ought to have applied greater scrutiny to the issue of evidence having been removed from the scene. She contends that the removal of the red Seat car driven by DG-41 meant that there was an absence of "islands of facts" necessary to ground a reliable conclusion. The applicant thus maintains that in light of the evidence of the Commission's own expert, it did not have cogent evidence to conclude that allegations of wrongdoing had been dispelled.

86. Overall, I have not been persuaded by the applicant's argument that there was any breach of fair procedures by the manner in which the failure of the gardaí to preserve the scene was investigated or analysed by the Commission. What the applicant takes issue with is the Commission's effective conclusion that notwithstanding the abject failings of the gardaí in the preservation of the scene, it was nevertheless possible for it to opine as to the lawfulness or otherwise of the shooting of Mr. MacLochlainn. To my mind, this was a judgment call for the Commission to make on the evidence before it. Aspects of such evidence and the Commission's treatment thereof, as put in issue by the applicant, are considered elsewhere in this judgment.

87. In summary, the Court finds no unfairness, errors of fact or other unfair procedures in relation to how the issue of the hijacked Mazda has been addressed in the Final Report.

**The fatal shooting of Mr. MacLochlainn and the alleged failure of the Commission to address conflicting accounts of the location of the Mr. MacLochlainn's firearm at relevant times:**

88. The applicant contends that the location of Mr. MacLochlainn's firearm at relevant times was central to the issue of whether it

was necessary for DS-06 to shoot at Mr. MacLochlainn. It is stated that three time periods are of relevance as regards the location of the firearm. The first is the location of the gun during the currency of the hijacking of the Mazda by Mr. MacLochlainn. The second issue is the location of the firearm subsequent to the hijacking, and thirdly the location of the firearm subsequent to the shooting of Mr. MacLochlainn.

89. In the first instance, the applicant takes issue with the manner in which the Final Report deals with Mr. MacLochlainn's movements following the hijacking of the green Mazda. Based on witnesses' accounts, the Report describes Mr. MacLochlainn pointing the gun out of the window of the Mazda. While the Commission bases this analysis on witness evidence, the applicant submits that it fails to come to the objective logical conclusion that it could not be properly determined that Mr. MacLochlainn had his hand out of the car window brandishing a gun.

90. Section G of the Final Report addresses "The Lawfulness of the Fatal Shooting". At pp. 140-142, the Commission states:

"The next tranche of evidence on this issue is in the testimony of the direct witnesses. Ms. Nic Gibb submits that, at this stage, it is not possible for the Commission to make a finding that Ronan MacLochlainn was pointing a gun at DS-06 when he was shot and, as a result, that the Commission cannot arrive at a conclusion as to whether the shooting was justified or otherwise. I disagree. While it is true that the description of the gun in DS-06's statement is very brief and, as Ms. Nic Gibb points out, cannot be tested by cross-examination, it is fully supported by eyewitnesses who have been cross-examined at length what they saw and they all give very similar accounts, as follows:

Insp Hogan saw one of the four raiders running ahead of him point a small handgun at D/S Gantly and, subsequently at the head of a man whose car was hijacked. After that raider had commenced driving the hijacked car, Insp Hogan saw the man point the same gun, a black handgun, at him, out of the driver's window of that car. The man's arm was extended out the window of the car. Insp Hogan was in no doubt that the gun was pointed at him. Insp Hogan saw a second green car approaching and he "saw the driver again point the revolver up the road". He said "the green car approached me from the north side as I was running up, and the driver of the hijacked Mazda pointed his gun at this car and I heard two shots from the green [DS-06's] Mazda."

D/S Gantly described seeing Ronan MacLochlainn turn towards him and point a gun; "he turned and deliberately pointed his weapon towards me....he pointed it at me". He said he feared for his own life and the lives of his colleagues and members of the public. He subsequently saw a gun being pointed towards Insp Hogan from the hijacked car. He could see the barrel of the gun at the driver's window but he did not see an arm coming out of the window. His view of the gun was partial and dictated by his position on the road. This is not inconsistent with the account given by other witnesses and is supported by the fact that the window in the Mazda was rolled down completely.

D/S Sears also saw that the raider who turned had a handgun; he specifically said it was a revolver. The raider with the gun was the "back marker" of the four northbound raiders. He "faced" or pointed the gun down the road towards D/S Sears, Insp Hogan, and D/S Gantly. D/S Sears did not fire because D/S Gantly was in front of him and would have been in danger but D/S Sears feels that if his colleagues had not been there and he had a clear shot, he would have fired at the raider.

Behind Insp Hogan, D/S Gantly and D/S Sears, D/S Shanahan also saw Ronan MacLochlainn holding a handgun in his right hand; he stopped and pointed the gun down the road before going to a green car and pulling a man out of it, all the while with a gun in one hand. D/S Shanahan did not know if it was a revolver or a pistol.

DG-41 was driving behind DS-06 when he saw a car coming north against them. He said "I then saw as we were coming closer, the individual driving the car was wearing a balaclava and then I saw that he had a gun out the window and he was coming towards me, he was driving towards me". He clarified that the man was holding the gun in his right hand out the driver's window. He demonstrated how the man was leaning forward in the driver's seat with his right arm stretched out.

The evidence of the civilians was largely consistent in identifying one of the raiders as carrying a handgun: -

Michael H. saw a man running towards the first car in his line of traffic. The man was holding a pistol, which he was waving with his right hand.

The Securicor driver, Mr. R., described five raiders running towards the Securicor van at the start of the attack. He said one had a small gun, a handgun, and he also described an AKM assault rifle, a rocket launcher, a weapon like a shotgun and a lump hammer.

Michael S. told the Commission that he saw a man come north from the Transit van brandishing what looked like a machine gun or a sub-machine gun. He was reminded that in his statement made in 1998 that he had described the weapon as a revolver and he said his memory is now hazy but the man certainly had a gun.

Alice M. described a man pointing a gun into a green Mazda.

Dorcas O'N. said the man running to their car was carrying a small handgun in his right hand; it may have been silvery or grey at the barrel ("the point where the bullets would come out").

Patrick O'N. described how the raider put a small handgun to his head.

There was also evidence from those who considered themselves good friends of DS-06 and who discussed this incident with him, however briefly. This illustrates the extent to which they discussed these events afterwards and what, if anything, he said about these events. For example, D/S Gantly said he knew DS-06 and he knew the shooting did not sit well with him and that DS-06 was troubled by the event. However, he did not discuss the shooting with him at any length as it was not something they would discuss in those terms. There were no big discussions going on about how it happened. NSU witnesses agreed that the mechanics of the shooting were not discussed openly afterwards, out of respect for DS-06. For instance, NSU-DS-08 said it was not openly discussed within the NSU in due deference to DS-06 as it was a traumatic thing to be involved in (sic).

There was also evidence from those who considered themselves good friends of DS-06 and who discussed this incident

with him, however briefly...For example, D/S Gantly said he knew DS-06 well and he knew that the shooting did not sit well with him and that DS-06 was troubled by the event...There were no big discussions going on about how it happened. NSU witnesses agreed that the mechanics of the shooting were not discussed openly afterwards, out of respect for DS-06...

This evidence leads me to the view that DS-06 had been troubled by the events of that day, as described, in a way that was natural in circumstances where a man had lost his life. What was notably absent was any evidence that he had agonised over whether or not he was right to shoot, whether or not he had really seen a gun. The certainty of the investigators that there was no wrongdoing and nothing to be investigated probably emanated from the view of the actor himself there was a genuine risk and that he had to act for his own safety. The general view appears to have been that the shooting had been regrettable, but necessary. It did not appear from any witness that there was an alternative view that the shooting had been unlawful. Nobody at the scene appeared to consider this possible, having either seen the shooting itself or the events that led to it. Nobody who spoke to him afterwards appeared to notice any hint that DS-06 was concerned that he had been wrong, or even mistaken."

91. While acknowledging that the evidence showed that Ronan MacLochlainn had a gun, and that he hijacked the green Mazda, the applicant claims that the Commission's conclusion that Mr. MacLochlainn was pointing a gun at DS-06 at the time he was shot was arrived at in the teeth of conflict as to the exact location, at various times, of the firearm. The applicant submits to the Court that the controversy which the Commission had to resolve was what occurred as between Ronan MacLochlainn, as he went northward, and DS-06, as he came southwards in his vehicle. It is submitted that this controversy could not be safely adjudicated on by the Commission without it applying anxiously scrutiny to the issue of the contradictory accounts of the location of Mr. MacLochlainn's firearm.

92. The applicant points to the evidence given to the Commission by DG-41 in relation to the position of the gun, as follows:

"Basically, as I say, the car was coming up, we were coming together, obviously I was proceeding south, the car was coming north, I then saw as we were coming closer the individual driving the car was wearing a balaclava and then I saw he had a gun out the window and he was coming towards me, he was driving towards me, obviously intent on escaping the scene.

Q. Commissioner: In which hand was the gun?

A. In the right hand"

93. Albeit his reliability was called into question by the applicant, at pp. 145-146, the Commission found no inconsistency in DG-41's evidence that while he saw that Ronan MacLochlainn had a gun out of the window of the hijacked green Mazda as that vehicle was coming towards DG-41, and that the gun was pointed at DS-06, he did not see DS-06 (who was in the vehicle in front of DG-41) fire the shots at the hijacked Mazda driven by Mr. MacLochlainn. The Commission found no inconsistency and stated that "it is much easier to see something coming towards you than to see the actions of a man sitting in a car in front of you".

94. Contrary to the applicant's submission to the Court, there is no basis for the Court to find that this conclusion was solely the surmise of the Commission and thus unfair to the applicant. I perceive no unfairness in the Commission applying a measure of logic and commonsense in assessing this evidence. Moreover, the Commission had expert evidence (and its own experience at the firing range of An Garda Síochána) to the effect that "if one is behind the person with the gun, or, if one does hear a shot being fired, it is next to impossible to know where the sound is coming from." There is no suggestion from the applicant that such evidence was not tendered or that the applicant was deprived of an opportunity to test this evidence.

95. It is common case that while the Commission accepted DG-41's evidence that he saw Mr. MacLochlainn point a gun out of the car window, it rejected as unreliable his account of having assisted Mr. MacLochlainn after the shooting. The applicant submits that if the witness was found to be unreliable about whether he removed Mr. MacLochlainn from the car, then a question must arise as to the reliability of his memory of Mr. MacLochlainn pointing a gun.

96. As to this argument, while any fact-finder must proceed with caution where a witness is found to be unreliable as regards certain parts of his or her evidence, I am in agreement with the Commission's position, as set out on 10th May, 2016, that the findings on one issue do not necessarily require a rejection of a witness's evidence or that of an entire body of witnesses. Accordingly, I perceive no unfairness in the Commission's reliance on DG-41's testimony that he saw Mr. MacLochlainn point a gun out of the window of the Mazda, particularly in circumstances where this testimony was effectively corroborated by the testimony of others and more particularly, where the applicant had opportunity to cross-examine witnesses at length, as noted in the Final Report.

97. DG-32's statement to the Commission was to the effect that he saw "a male in the Mazda wearing a balaclava. That attracted his attention. The witness thinks the driver was holding on to the steering wheel of the Mazda with both hands... the witness was focused on the balaclava. He thinks the driver was seated in the driving position, though he does not have a clear mental image of much more than the balaclava". His evidence to the Commission was that he could not recall seeing Mr. MacLochlainn's hands at all.

98. The Commission addressed DG-32's evidence in the following terms:

"NSU-DG-32, who was approaching from the north behind DS-06, did not see a gun out the window of the hijacked Mazda. However, I am satisfied that he explained this by noting that his attention was drawn to the driver's balaclava, DS-06's brake lights and the ERU Jeep on the ditch all at the one time. In terms of seeing a gun, DS-06's car also hindered his view.

There was some doubt as to what exactly DG-32 saw. When he first met counsel to the Commission he was asked where the raider's hand had been, and he said that they were on the wheel. However, when he was asked to confirm the accuracy of a note taken at the meeting, he acknowledged that he had said that both of the driver's hands were on the wheel, but, upon reflection, he was not sure if that was correct. When this was brought to my attention, I was concerned that the change may have occurred when DG-32 was alerted to the fact that his evidence might prove awkward for a conclusion about the justification of the shooting. However, I found his sworn evidence at the Commission's hearing to be compelling. As a result, his earlier equivocation on this point does not raise a doubt in my mind about what occurred in the hijacked Mazda on 1st May.

In arriving at this conclusion, I note that DG-32 did not make a statement in 1998. The initial meeting with the Commission was the first time he had addressed the issue, and at the meeting the witness had also said he did not have a

clear mental image much more than the balaclava. His response at the meeting it is likely to have been made both without thinking about it carefully, and wanting to be helpful. In most situations, when asked where a driver's hands were, the impulsive answer is "on the wheel". Many witnesses who in fact do not know, because they were not looking at his hands, will say that the driver's hands were on the wheel without thinking too much about it. This is not a question of honesty, but of care and reflection about one's answers.

If his first statement was correct, and Mr. MacLochlainn was driving with both hands on the steering wheel, then either DG-32 glanced at his hands at a time before Mr. MacLochlainn picked up and pointed his gun, or all of the other relevant witnesses were wrong and continue in their error. The latter is not only highly unlikely, but it also requires that his colleagues, in the immediate aftermath of a highly dangerous and volatile operation (before arrests had even been made and as medical treatment was being administered), made an identical error in which they had persisted for 17 years. It is even less likely, in my view, that the accounts given were deliberately false. Again, I look at the opportunity to confer, which was minimal, the sheer length of time involved, the demeanour of the witnesses, the fact that the window of the hijacked Mazda was rolled fully down. I do not think any one of the other explanations for DG-32's evidence in this regard is reasonably possible."

99. At p. 145 of the Final Report, the Commission noted the applicant's submission which was to the effect that that DG-32's failure to see the gun "is a difficulty compounded by the fact that the 1998 statements are in extraordinarily truncated and abbreviated form, that they made *patently questionable assertions*, and that they were never subject to any proper independent scrutiny." The Commission considered the submission, as follows:

"I agree that an adequate and effective investigation would have involved asking questions of other witnesses arising from the statements made by DS-06, Insp Hogan and D/S Gantly. As the European Court of Human Rights has held, *"Failing to following an obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible"*. The statements were indeed truncated and were not subjected at that time to any scrutiny. However, I do not accept that matters in the statements of 1998 were *"patently questionable"*, as submitted by Ms. Nic Gibb. The sum of the evidence includes not only all the witnesses' testimony, but also the physical and forensic evidence from the scene, and the 1998 statement of DS-06. These establish, beyond a reasonable doubt in my view, that a gun was pointed out the window of the hijacked Mazda. The fact that DG-32 did not see it does not detract from the evidence of those who did."

100. It is the applicant's contention to the Court that the Commission unfairly disregarded DG-32's statement that Mr. MacLochlainn's hands were on the steering wheel and that it is not logical for the Commission to accept that DG-32 was focused on the balaclava rather than a person with an arm out of the window of a car with a gun. Furthermore, the theory that DG-32 could not see the gun required more analysis than the Commission applied to the issue. It is contended that the Commission's analysis is an example both of the Commission itself giving evidence and the Commission explaining away the shortcomings of the garda evidence to the latter's advantage.

101. I cannot find any breach of fair procedures in the manner in which the Commission addressed the evidence of DG-32 or the manner in which its findings were arrived at. The fact that the Commission took a view on the evidence contrary to that advocated by the applicant does not to my mind constitute a breach of fair procedures, in the absence of it being established that the applicant's submissions were ignored, or that due regard was not taken of matters established by cross-examination of the witness or that relevant evidence was not weighed or scrutinised. I do not find this to be the case. I note that on Day 10, DG-32 was cross-examined by counsel for the applicant on the issue of the rectification of his statement concerning the position of Mr. MacLochlainn's hands. He was questioned about "the process...involved in that rectification".

102. It is also clear to the Court from the extracts cited above that the Commission was alert to the potential difficulties that the change in DG-32's recall gave rise to. However, at the end of the day, the judgment call was for the Commission to make, having regard to the evidence before it. The adjudication of the evidence is not a matter for this Court in the absence of any unfairness, which I do not find.

103. At pp. 159-160 of the Final Report, reference is made to the submission made by the applicant to the Commission with reference to "The Garda Code". The Code refers to the discharge of firearms being justified "if an assailant is seen by a member pointing or discharging a gun at the member or at a member of the public". The Commission categorised the applicant's contention that *"it is therefore not surprising that DG-06's statement needed to state that Ronan MacLochlainn's gun was pointing at him when he discharged shots"* and it was not possible for the Commission to make a finding that Mr. MacLochlainn was pointing a gun at a member of An Garda Síochána, as illustrating that the approach taken on behalf of Ms. Nic Gibb "has been steered by a bias of itself own", albeit the Commission found it to be an understandable bias arising, in its view, from the approach taken by An Garda Síochána to the applicant's queries and allegations over seventeen years. The Commission goes on to state:-

"Contrary to what has been submitted, it is, in fact, possible to make a finding that Ronan MacLochlainn was pointing a gun as described. The Commission has established the facts as follows. Insp Hogan and D/S Gantly were chasing the hijacked Mazda as D/G Ryan drove up to block it. D/G Ryan was still completing this manoeuvre when the three NSU cars arrived from the north. The hijacked Mazda had just moved off when Mr. MacLochlainn pointed his gun at Insp Hogan and the Inspector shot at the hijacked Mazda. Mr. MacLochlainn accelerated forward. Seconds later, Mr. MacLochlainn pointed his gun again, this time at the oncoming unmarked Mazda driven by DS-06. Two more shots were fired by DS-06 and the hijacked Mazda collided with a car coming against it, landing in the position where it was later photographed. The incident developed with extraordinary speed. Many of these events were almost simultaneous."

104. The Commission was satisfied "beyond a reasonable doubt that Ronan MacLochlainn had a gun and was pointing it at the driver of the oncoming Mazda when DS-06 fired at him". The Commission goes on to conclude:-

"There are numerous surviving eyewitnesses to this fact and it is in line with the behaviour of Mr. MacLochlainn in the preceding minutes when he had he pointed the same gun at two other officers who were chasing him, and had forced an elderly civilian from his car, by holding the gun to his head. The gun was found in the hijacked car. It was loaded. Mr. MacLochlainn showed a determination to flee the scene; even the pleas of an elderly woman to spare her infirm husband fell on deaf ears. Pointing a gun at the driver of the car driving towards him was consistent with Mr. MacLochlainn's conduct throughout this episode. Whether confronted by a garda or civilian obstacle, his reaction was the same..."

105. At p. 299, the Commission states:-

"It is certain that Ronan MacLochlainn was carrying a revolver, not only by a process of elimination ... but also by assessing other evidence of what occurred, including events at the Mazda".

106. In her submissions to the Court, the applicant contends, in the first instance, that the Commission should not have been reduced to selecting bias on the part of the applicant versus bias on the part of the gardaí. It is submitted that the Commission could not resolve the issue of the necessity for DS-06 to fire his gun as the evidence was not there. Furthermore, the test for the lawful discharge of a firearm by An Garda Síochána was whether it was absolutely necessary to do so. This should have involved a consideration as to whether the scene could have been contained, which in light of the expert evidence of Mr. Burdis it could. It is also argued that, forensically, the car driven by Mr. MacLochlainn was not moving, as can be established from the presence of glass on the ground. It is thus submitted the Commission wrongly concluded that the shooting was lawful in circumstances where the conclusion should have been that a finding as to lawfulness beyond a reasonable doubt cannot be made given the unexplained circumstance of a collision between the green Mazda and an unidentified garda vehicle.

107. I am not persuaded that the Commission unfairly failed to advert to the issue of the broken glass. I note the evidence of Mr. Mastaglio, a forensic firearms expert retained by the Commission, who accounted for the position of glass on the ground at two locations by stating that when the rear door of the Mazda was struck by a bullet the glass in the rear door window "can remain in the frame until another impact knocks it out" and that *"the first part or the first area of glass may have been caused by that initial [shot] and when the car came to a stop if by impact or it hit anything more glass would fall out."*

108. Moreover, the issue of glass at two locations was also addressed in Mr. Burdis' evidence on Day 43. He states:

*"A. It's at that place that Mr. Hogan fired his three shots and he fired them into the back of the car. Originally I was of the opinion that the shots that broke the window were at the place where the Mazda is eventually seen to stop, that's not true. The glass came from the actual shattering of that window*

*With one of the bullets that Mr. Hogan fired and the car has then moved on probably 30 to 40 feet to a position where it is eventually stopped. Either the violence of that stopping or the explosion of the bullets hitting the windscreen et cetera has caused the rest of the glass in that window to fall out. So you have actually got two places of glass fragments on the road and they both relate to the same window being smashed and I didn't understand that, Mr. Mastaglio helped me with that, I have got to say, because of the way the fragments are contained and held within the glass. It's part of the safety feature I think in the way the glass is manufactured.*

*Commissioner: I see.*

*A. That shows that Mr. Hogan fired from a position Mr. Mastaglio will explain much more clearly than I from a position stood behind the Mazda as he was trying to stop it but it continued on for another distance until that car was stopped and the rest of the glass fell out."*

109. The damage to the hijacked Mazda has been addressed earlier in this judgment. In so far as the submissions to the Court suggest that the green Mazda was not moving at the time DS-06 opened fire, the applicant has not persuaded the Court that the Commission unfairly failed to consider evidence which suggested that the hijacked green Mazda was stationary at the time of the actual shooting. Undoubtedly, the issue of whether the hijacked Mazda was moving or stationary was a factor in the hearings before the Commission, in particular in the context of whether Mr. MacLochlainn was pointing a gun at DS-06 at the time of the shooting. As I have said, it was pursued in the direct and cross-examination of expert witnesses, including Mr. Burdis. In particular, counsel for the applicant pursued the issue with Mr. Bailey on Day 48. It was also pursued with Supt Hogan on Day 7. DG-32 was also cross-examined as to whether the hijacked Mazda was stationary or moving at the time DS-06 approached from the north, as was DG-41. I note that in the course of his cross-examination by counsel for the Commission, it was put to Mr. Burdis (the applicant's expert) that *"there appears to be evidence that the [hijacked Mazda] wasn't stationary when...[DS-06] discharged his weapon, that it was still approaching him?"* Mr. Burdis' response was as follows:

*"I think it is something that the Commissioner will need to take account of in reaching a conclusion is whether the Mazda and Mr. MacLochlainn were actually moving forward and did they present a threat and a danger to people at the time when DSgt-06 decided to fire his shots. That is the simple, and it is the proportionality of whether that was the right thing to do."*

110. As noted by Mr. Burdis, the assessment of all of the evidence and the weight to be attributed to same was a matter for the Commissioner. A reading of the various findings in the Final Report shows that the Commission addressed the issue of whether the hijacked green Mazda was moving with a gun pointed out of the car window at the time DS-06 discharged his shots.

111. Mr. Mastaglio, the firearms expert, conducted a detailed examination of the firearms and ammunition which had been preserved. He also had an opportunity to examine the hijacked Mazda in consultation with Mr. Burdis, the policing expert retained by the MacLochlainn family.

112. At p.211 of the Final Report, under "Forensic Evidence Conclusions", the Commission states:

*"Mr. Mastaglio's forensic examination of the spent cartridge cases and bullets recovered from the scene, body and Mazda confirmed the findings made by D/S Quinn in 1998. Mr. Mastaglio and Mr. Burdis agreed that the forensic firearms evidence suggests that Ronan MacLochlainn was shot and killed whilst he was sitting in the driver's seat of the hijacked Mazda... Since photographs taken on 1st May show the driver's sun visor in the hijacked Mazda was down, it is likely he was sitting low in the seat. It was possible for him to have his arm outstretched, as if holding a gun, in the direction of the trajectories through the wing mirror and rear offside door.*

*The fatal shot was fired by DS-06 who discharged his revolver as his car approached the hijacked Mazda...The nature of the damage caused by the bullets indicates that both shots were fired slightly downwards, from offside to nearside and from front to back...The cars would have been within a few metres of one another". (Emphasis added)*

113. The Court cannot find unfairness to the applicant in the approach of the Commission since it is not suggested that the applicant did not have opportunity to challenge evidence in this regard by cross-examination or otherwise. Indeed, I note that Mr. Mastaglio was available for cross-examination by counsel for the applicant. No significant issue was taken with his evidence. I also note that the Commissioner, in questioning Mr. Mastaglio on Day 44, was particularly anxious to establish whether what was said by DS-06 in his statement, namely that Mr. MacLochlainn was pointing a gun at him, was possible given what had been established as to the physical

position of Mr. MacLochlainn in the car prior to the shooting which, to my mind, demonstrated anxious scrutiny.

114. The applicant also contends that the Commission attributes to her a submission that was never made by her, namely that Mr. MacLochlainn was not armed and that the hijack did not take place at gunpoint. Nor did the applicant contend that DS-06 was never at the scene.

115. I am not persuaded that the Commission mischaracterised the applicant's submissions in the manner suggested. I do not find that the Commission suggests that the applicant challenged the fact of Mr. MacLochlainn having a firearm, rather, it responds to the submissions made by the applicant on the issue of the Garda Code, as referred to above.

116. At pp. 272-273, the Commission found that the intervention of DS-06 "was necessary and reasonable in all the circumstances". The Commission did not accept the proposition put on behalf of the applicant in cross-examination that had DS-06 not driven to the scene when he did, Mr. MacLochlainn would not have been shot- the thrust of the applicant's cross-examination being to query whether or not DS-06 should have been at the scene at all. (I should add a note of caution here. The relevant paragraph in the Final Report refers to "DS-04". However, I am satisfied to regard this as a typographical error and that what was in issue was DS-06's arrival at the scene).

117. The applicant's proposition that had DS-06 not arrived at the scene the applicant would not have been shot was rejected by the Commission on the basis that it was "largely a matter of chance that Mr. MacLochlainn was killed by a member of the NSU" and that two members of the ERU "had already, justifiably, shot at [Mr. MacLochlainn] and missed him by small margins; they might easily have killed him". The Commission went on to state, at p.273:

"Mr. MacLochlainn had multiple opportunities to surrender, as Mr. Carney did, in which case he would not have been shot. Mr. MacLochlainn did not do so and chose instead to hijack a civilian car, and point his gun for a third time at an approaching guard. The shooting was justified and his own conduct led directly to his death.

Neither do I agree that had DS-06 not entered the scene, this would necessarily have resulted in Mr. MacLochlainn leaving the scene unharmed in the hijacked Mazda. Not only is it possible that he would have injured an NSU operative at the Cullenmore Hotel, a member of the approaching ERU team, or a civilian, in his efforts to flee the scene, but it is likely, in my view that he would have been shot at by one or more members of AGS on his way out of the scene had he greeted them as he did every other guard who challenged him."

118. The applicant submits that the Commission's finding in this regard cannot be legally sound. It is contended that if the gardaí had the first option to open fire at every armed raider, that is contrary to the jurisprudence of the ECtHR. Moreover, the applicant asserts that it is not correct for the Commission to say that Mr. MacLochlainn could have escaped, since there were gardaí positioned on the Dublin side of the Cullenmore Bends.

119. With regard to the applicant's submissions, I am satisfied that, in opining as it did, the Commission was not making a generalised statement about the what might or might not be permissible in situations where gardaí are confronted by armed raiders; rather the Commission was expressing a view as to what might conceivably have occurred having regard to the factual matrix which presented on 1st May, 1998.

120. At p. 308, the Commission finds that NSU-DS-06 had assisted appropriately and effectively on 1st May, 1998 and that one of the reasons for this was that he had been highly trained both in the use of firearms and with ERU operatives in intervention and firearms incidents. The Commission also found that it was not the fact that DS-06 transferred from the ERU to the NSU that led him to shoot Mr. MacLochlainn, rather "it was the fact of Mr. MacLochlainn pointing a gun at him that caused DS-06 to shoot".

121. It is also submitted that the Commission used the wrong test for the purpose of determining the lawfulness of the shooting of Mr. MacLochlainn. I am satisfied however that the Commission was aware of and applied the requisite test. In section G of the Final Report, entitled "The Lawfulness of the Fatal Shooting", the Commission refers to the test applied by the ECtHR in *McCann v. United Kingdom* (1996) 21 EHRR 97, at para. 200:

*"[T]he use of force by agents of the State in pursuit of one of the aims delineated in Article 2(2) of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others"*

122. The Commission noted that the existence of "good reasons" should be determined subjectively and that there were three issues to be resolved, namely;

*"(i) When he fired the fatal shot, did NSU-DS-06 honestly and genuinely believe that Ronan MacLochlainn was pointing a gun at him and/or at others?*

*(ii) If the answer is yes, did he have good reasons for that belief?*

*(iii) If yes, was it absolutely necessary for him to shoot at Ronan MacLochlainn in defence of any person from unlawful violence?"*

123. In accordance with the case law of the ECtHR, the Commission noted that it "was required to consider the events from the point of view of the person who fired the shots". Accordingly, I find no basis to the allegation that the Commission was not mindful of the Article 2 ECHR requirements for a lawful killing.

#### **The location of the firearm post the shooting**

124. As stated in the Final Report, the Commission received inconsistent evidence from witnesses who saw the gun before it was removed from the Mazda by the ballistics team. Some witnesses place the gun in the Mazda, and at different places within the vehicle, others place it outside of the vehicle. A photograph taken on the evening of 1st May, showed the gun on the passenger seat of the Mazda, "jutting out over the edge of the seat, across the handbrake."

125. In his evidence, D/S Comiskey placed the gun on the ground outside of the car. Sergeant Gerard Walsh (who was called to assist at the scene after the shooting) observed the gun at the driver's feet in the footwell of the vehicle. This is consistent with a

statement he gave to counsel for the Commission. Insp Castles, also called to the scene post the shooting, saw "a firearm in the well [of the car]...on the floor". DG-11 saw the weapon between the two front seats, beside the handbrake. Insp Hogan saw it between the two seats in the front of the car. D/S Gantly remembered seeing the gun between seats and clearly visible. An ambulance man, James C., described seeing a silver gun on the handbrake. Detective Sergeant Carney's evidence was that the gun was in the footwell area of the Mazda and that he did not recall seeing it on the car seat. Two members of the Garda Technical Bureau made statements in 1998 that they saw the revolver on the driver's seat with the muzzle facing the door, as seen in contemporaneous photographs.

126. Altogether, the several witnesses who testified on the issue put the gun in different locations at different times.

127. Having considered the multiplicity of different accounts, the Commission concluded that the gun "came to rest at some stage after the shooting in the driver's footwell at one point, near the handbrake" and that "the gun was probably moved by someone who is now unwilling to admit this". While deploring the moving of evidence, the Commission found however that its views of the facts of the case were not affected by this issue. It stated as follows:

"...the crucial evidence, it seems to me, is that the handgun seen by D/S Gantly, Insp Hogan, D/S Sears, D/S Shanahan, Patrick and Dorcas O, Alice M, Michael H, NSU-DG-41 and NSU-DS-06 – in more or less that order- in the right hand of Ronan Mr. MacLochlainn was found in the car which he had been shot. It was in the front of the car, where he had been sitting.

Although it is unnecessary to be sure of its exact position, in my view the gun probably came to rest at some stage after the shooting in the driver's footwell at one point, near the handbrake. By footwell, I mean the area of the car in which feet usually rest. NSU-DG-11 and D/S Carney remember it on the floor – she between the seats, he in the footwell. More tellingly, Sgt. Walsh recalls it being in the footwell also, albeit with some reservation as to whether it might alternatively have been beside the car. *Ms. Nic Gibb submits that at an informal meeting with counsel, Sgt. Walsh suggested that revolver might have been on the ground. In fact, he said at that meeting that "There was a handgun either in the footwell of the car or on the ground beside the car."*

Any honest and careful witness will of course admit of the possibility that he may be incorrect. My strong impression of his sworn evidence was that he recalled that it was in the car and that he started his evidence with the detail that it was on the floor, at the driver's feet.

With regard to the evidence of D/S Comiskey, he agreed that his recollection had changed after he had been told following his meeting with the Commission that a Smith and Weston was in the car and not near the Securicor van. He said that, when he received material which specifically contradicted the recollection expressed at the meeting, he realised the importance of his error and sought to correct it. He is adamant that he was at the northern end of the scene and that the order in which he noted the items makes it clear that he saw the gun in the vicinity of the Mazda not near the Securicor van at the southern end of the Bends. I note in support of this claim that the order of the exhibits listed in his statement does reflect the order of items marked on a map prepared by the garda mapper in 1998, south to north. I do not consider D/S Comiskey's evidence to be a pointed refusal to place the gun in the car, as has been submitted on behalf of Ms. Nic Gibb. His evidence was not that of someone who was now lying but unwilling to go that extra mile. The witness was hugely embarrassed and appeared very earnest. He could not recall the exact location and would not say it was in the car when he could not specially picture that. My impression of his evidence was that he was acutely aware of how his mistake had given air to a new theory of the case for the first time since 1998, and he was not going to say anything else of which he was not absolutely certain.

In fact, the error was less important than he realised, given the numerous people who confirmed that the handgun was indeed in the hijacked Mazda. The gun was seen there by many of the witnesses, noted above, before D/S Comiskey was anywhere near the Mazda. One these witnesses was D/S Carney, to whom D/S Comiskey was pointing out these items. He too was certain the gun was in the footwell of the car. A lengthy submission has been made on behalf of Ms. Nic Gibb about for the nature of D/S Carney's evidence. I find that, while not a particularly forthcoming witness, this was after lengthy cross-examination. The witness's somewhat guarded attitude is perhaps owing more to the dynamic of the cross-examination than any attempt to lie, in my view. The same witness preferred not to reveal to the Commission what he was doing prior to being called to the scene, neither did he want to reveal his diary or details of his meetings as he could not see their relevance or questions of whether or not he was someone how coaching D/S Comiskey. I do not mean, by these comments, to suggest that I have found D/S Carney to be unhelpful generally but to highlight he was not a particularly compliant individual by nature. This is not a criticism. I do not believe that he coached D/S Comiskey. I am satisfied that D/S Comiskey made an understandable error in his first discussion of these events in 17 years.

I am sure that the gun shown in the photograph, whatever its original position in the car, was the same gun that had been used by Ronan MacLochlainn that day. The evidence of his associates confirms that his weapon was a revolver, both directly and by a process of elimination. It was the only revolver used by the raiders, and he had it. The evidence of numerous witnesses was that he had a gun and there was no other gun at the scene which could be attributed to him. This was not a garda issue weapon, as the evidence makes clear; AGS use regulation weapons of particular makes and calibres.

The alternatives are that somebody not only predicated the robbery, but also the shooting, and he took the precaution to bring a spare gun to plant at the scene. This scenario is obvious implausible. In fairness to the parties, nobody has suggested such a thing. I merely point it out as the logical conclusion if the evidence in fact raised a doubt as to whether there was a second gun at the Securicor van. It does not raise such a doubt in my view.

As noted above, Ms. Nic Gibb has suggested in her final submissions that there might have been concern as to whether the gun was pointing out the window of the Mazda, thus leading to a deliberate repositioning of the gun. This would have been an entirely unnecessary course of action as it is equally plausible that a gun would land in the footwell as on the seat or between the two seats or on the handbrake, following a scuffle. It is inconsistent to suggest that, on the one hand, that gun was carefully repositioned to support a particular narrative, while the vehicle into which the Mazda had crashed (a fact mentioned as part of that narrative) was removed. The only reasonable conclusion from the evidence is that the handgun was within or beside the Mazda. Either is consistent with Mr. MacLochlainn having possession of it and pointing it out the window."

128. In her submissions to the Court, the applicant contends that since various contemporaneous accounts place Mr. MacLochlainn's firearm, post the shooting, variously on the roadway or inside the green Mazda, either across the handbrake or in the footwell of the

vehicle, these accounts are potentially consistent with Mr. MacLochlainn having become disarmed by reason of the collision with the unidentified garda vehicle, albeit it is acknowledged that he could have dropped the firearm after he was shot. The applicant's case is that the differing accounts of the location of the firearm are factors which the Commission should have taken particular account of, but did not. The applicant points in particular to contemporaneous photographic evidence which shows the gun lying across the handbrake of the green Mazda, yet in the account of several witnesses, the gun was seen in the footwell of the Mazda. It is submitted that the matter becomes more problematic when one has regard to the evidence of Supt Basil Walsh. In his direct evidence, he placed the gun in the footwell of the vehicle. He described the footwell as located "where the handbrake is". In cross-examination, he stated that he understood the area between the driver seat and the front passenger seat to be the footwell. He professed that he did not know that the area where the brakes and the accelerator are located was called the footwell. The applicant describes Supt Walsh's suggestion that the footwell of a vehicle equates to the area where the handbrake is located as a preposterous explanation and an attempt to tailor the evidence, and maintains that it showed contempt for the investigative process being conducted by the Commission. The applicant contends that the Commission failed to apply sufficient anxious scrutiny to this evidence. It is submitted that the Commission's description of this evidence as "a careless throw away remark" as opposed to "a deliberate lie" demonstrates the failure of the Commission to exercise anxious scrutiny of the garda evidence in circumstances where such evidence should have put the Commission on alert given the Commission's own acceptance that any finding as to the lawfulness of the killing of Mr. MacLochlainn must be beyond reasonable doubt. It is submitted however that the Commission failed to live up to its own standard. I cannot conclude that there was a breach of fair procedures for the applicant in the conclusion arrived at by the Commission. To my mind, this was a judgment call for the Commission to make, in the round, having considered all relevant evidence.

129. The applicant also highlights the evidence of D/S Comiskey who gave evidence to the effect that he observed Mr. MacLochlainn's firearm on the road, at the southern end of the scene. In his meeting with the counsel for the Commission, D/S Comiskey stated that he saw the gun and a number of live cartages on the roadway in the vicinity of the Securicor van but made a later statement in which he put the gun in the vicinity of the Mazda. The applicant submits that despite attempts by others to get him to alter his evidence, D/S Comiskey did not alter his account that he observed the firearm outside of the car in the aftermath of the shooting. Accordingly, in his direct testimony to the Commission, while he retracted his statement to the extent that he saw the gun near the Securicor van, testifying that "it was never really there", he nevertheless remained steadfast that his recollection of the firearm was as being on the roadway, in the vicinity of the hijacked Mazda.

130. The applicant contends that D/S Comiskey's evidence renders problematic the contemporaneous photographic evidence which shows the firearm as placed on the handbrake, which in turn does not tally with statements which placed the gun in the footwell of the Mazda. It is submitted that the Commission discounts D/S Comiskey's evidence as to the location of the gun and simply draws her own conclusions.

131. The applicant also submits that having made the finding that the firearm allegedly pointed by Mr. MacLochlainn out of the window of the Mazda was moved by a person "who is now unwilling to admit this" and that it was impossible to say whether the gun was moved twice, the logical conclusion for the Commission should have been that it was impossible to say where the gun was originally found. It is contended that this is clearly an issue of crucial importance given that it raises the question as to whether Mr. MacLochlainn was armed when he was shot. It is submitted that if Mr. MacLochlainn had his hand out of the window at the time of impact with the unidentified garda vehicle, the gun would have fallen out of the window.

132. The applicant thus contends that the Commission's finding that it was constrained to conclude that the firearm had been moved within the vehicle and that whoever did so did not wish to admit to so doing cannot be sufficient in all the circumstances, and that in light of the overall difficulties in ascertaining the exact location of the firearm at relevant times, the Commission could not safely conclude whether Mr. MacLochlainn had a gun in his hand at the time of the fatal shot by DG-06. It is thus submitted that the Commission could not conclude as to the lawfulness of the shooting of Mr. MacLochlainn.

133. I find that I cannot hold that, in holding as it did regarding the location of Mr. MacLochlainn's firearm post the shooting, the Commission acted unfairly towards the applicant. I am satisfied that having regard to the evidence which it had, the conclusions arrived at were open to the Commission. In arriving at its conclusions, the Commission gave due consideration to arguments and hypotheses advanced by the applicant. In particular, while it found as a fact that the gun came to rest in the footwell of the Mazda after the shooting, it also accepted that "the only reasonable conclusion from the evidence" was that the gun "was either in or beside the Mazda" and that "[e]ither is consistent with Mr. MacLochlainn having possession of it and pointing it out the window." It follows from this that the Commission did not find that the inconsistencies as regards the location of the firearm post the shooting impacted on its finding that DS-06 was justified in firing at Mr. MacLochlainn. Having regard to the contents of the Final Report, it is clear that the applicant was afforded every opportunity to test the relevant witness testimony in cross-examination, and that the submissions advanced on her behalf were considered. I note that the Commission took particular note of the submissions advanced by the applicant regarding the evidence given by D/G Comiskey and D/S Carney. As fact-finder, it was for the Commission to form a view on this and other evidence. I find no basis upon which the Court should direct that the Commission should hear further evidence or submissions on the issue or that the Court should direct that the Final Report be amended on foot of this particular complaint.

#### **DS-06's movements in the immediate aftermath of the shooting and related matters**

134. In his 1998 statement, DS-06 stated that immediately after the shooting he stopped his car and went to assist D/I Hogan and D/S Gantly in removing Mr. MacLochlainn from the green Mazda. No witness recalled seeing DS-06 in the vicinity of the Mazda after the shooting or recalled his presence at the Mazda at the time. At pp. 116-118 of the Report, under the heading "NSU-DS-06 fires the Fatal Shot", the Commission finds that having fired his shots, DG-06 stopped his car and went to the crashed hijacked Mazda driven by Mr. MacLochlainn and that it was likely that DG-06 remained at the scene for a short time, albeit no witness testified to seeing him in the vicinity of the crashed Mazda.

135. In her submissions to the Commission the applicant highlighted the disappearance from the scene of the man who fired the fatal shot as an issue of huge concern, especially in light of DG-06's own statement which placed him at the scene of the crashed Mazda in the immediate aftermath of the shooting. The applicant queried why no garda officer, including Insp Hogan and D/S Gantly (who were involved in removing Mr. MacLochlainn from the Mazda post the shooting), could recall DS-06's presence in the immediate aftermath of the shooting. Accordingly, the Commission was requested not to give any weight at all to DS-06's statement in its entirety.

136. At pp. 147-148, the Commission notes "at that time, most witnesses did not know, and could not have known that DS-06 fired the fatal shot". The Commission disagreed with two aspects of the applicant's submission. Firstly, it observed that the fact that essential elements of a statement may be contradicted, did not necessarily lead to a rejection of the entirety of the statement, where, as the Commission found, other essential elements are substantiated. The Commission also found that essential elements of DS-06's statement were not contradicted: the Commission found, *inter alia*, that DS-06's actions in Killinskey "have been fully corroborated" as had his account of arriving at the scene and firing two shots at the oncoming hijacked green Mazda.



137. In her submissions to the Court, the applicant contends that the Commission acted unfairly in not calling the entirety of DS-06's statement into question. Furthermore, the applicant takes issue with the Commission's willingness to accept that DS-06 might have been in the vicinity of the Mazda after the shooting in circumstances where it was prepared to disregard evidence tendered by DS-41 that he had assisted Mr. MacLochlainn at the scene. The applicant also contends that the Commission's finding that DS-06 assisted at the scene in the aftermath of the shooting is suspect given that the statement made by DG-06 in 1998 is at odds with the evidence of other gardaí who do not recall seeing DG-06 at the site of the crashed Mazda. Accordingly, the applicant's principal submission is that it was unsafe for the Commission to draw any conclusions based on any part of DS-06's statement, particularly in circumstances where the 1998 garda investigation into the shooting was substantially deficient, which, it is submitted, should have raised concerns for the Commission.

138. I am not persuaded that the applicant's complaint is evidence of a breach of fair procedures on the part of the Commission. The weight to be given to DG-06's statement was a matter for the Commissioner as fact-finder. The Court has already opined that an inconsistency in a statement or evidence given by a witness may not deprive the fact-finder of reliance on other parts of that statement or evidence if there is credible evidence which corroborates the part on which reliance is placed.

139. The applicant also takes issue with the Commission's finding, at pp. 163-164, that Mr. MacLochlainn struggled with gardaí, in light of the medical evidence which was to the effect that his capacity to struggle was one to two minutes, up to a maximum of three minutes.

140. The Commission found that two to three minutes allowed "ample time for a brief struggle", as had been described in evidence by the garda witnesses, and concluded that such a struggle did ensue notwithstanding that a civilian witness, Tom B., did not observe the struggle. The Commission preferred the evidence of the other witnesses and noted that Tom B. had clarified that after observing Mr. MacLochlainn being dragged out of the vehicle he had been told to get back into his car and so did not see what happened next.

141. I can perceive no unfair procedures on the part of the Commission in determining as it did in circumstances where the medical evidence heard by the Commission (including medical evidence called on behalf of Mr. MacLochlainn's family), together with eyewitness evidence of a struggle, allowed for such finding to be made and where the applicant had opportunity to test such evidence, which certainly occurred as far as Supt Hogan and D/S Gantly's evidence was concerned.

142. At pp. 270-270, the Commission concluded, *inter alia*, that when DS-06 entered the scene he did not know the ERU had engaged or, if so, to what extent they needed his assistance. The Commission found that DS-06 was likely to have known that the ERU sent north would take time to arrive. As there was a clear risk to life, and in the absence of any order to stay back, the Commission found that although an NSU officer, it was appropriate for DS-06 to intervene. The Commission also found that as DS-06 had trained with the ERU, he would not pose a risk as others might and that DS-06 knew that he would be recognised by most if not all ERU members present. Effectively, for the myriad reasons set out, the Commission found DS-06's intervention fully justified.

143. With regard to this finding, the applicant submits that the NSU members should have stayed away from scenes controlled by the ERU. Moreover, the NSU members had incomplete information. It is contended that the Commission shied away from this issue. It is the applicant's contention the Commission should have concluded that the actions of DS-06 were evidence of mismanagement. Moreover, the Commission refers to the three NSU vehicles (including DS-06's) arriving at the scene in convoy. It is submitted that the Commission does not conclude, as it should have, that this arrival meant that the scene was effectively contained.

144. There is no evidence put before the Court to suggest that the Commission relied on testimony in respect of which the applicant did not have an opportunity to test, or otherwise make submissions on. In the absence of such evidence, I am constrained to find that the applicant's submission contends for a direction by the Court to the Commission to arrive at a different finding, without establishing that the findings already made arise because of some defect in process before the Commission or through a failure to heed specific conclusive evidence contrary to that relied upon by the Commission.

145. At p. 300, the Final Report states:

"It has not been established that the State could reasonably have organised this operation in such a way as to avoid killing Mr. MacLochlainn, without danger to the general population or specifically to DS-06. I am not satisfied that, in light of the facts as known to the authorities at the time, such reasonable arrangements could have been made. In fact it would have been extremely difficult for the State to avoid the outcome of this operation, given what its agents then knew. "

146. The applicant has serious criticisms of this passage. It is submitted that the Commission suggests that the applicant bore the onus of proof to establish that the killing of Mr. MacLochlainn could have been avoided. The applicant contends that there is no onus of proof on any party before the Commission – the purpose of the Commission was to establish the facts. The applicant also argues that the purpose of the Commission was not to ascertain whether the killing of Mr. MacLochlainn was lawful but, having chosen to do so, the Commission was constrained to find that the killing was absolutely necessary, as required by the jurisprudence of the ECtHR. It is also submitted that in assessing the absolute necessary criterion, the Commission should not have just focused on the one or two minutes before the shooting, but rather on what happened earlier. In this regard, the applicant submits the facts of the case were so hopelessly ill-defined that the Commission could not safely arrive at a conclusion as to the lawfulness of the killing. Thus, the Commission was not obliged to arrive at the conclusion it did, or in the manner in which it so concluded.

147. I have not been persuaded by the applicant's argument that in using the language it did, that the Commission conveyed or intended to convey that the onus rested with the applicant to establish that the shooting of Mr. MacLochlainn could have been avoided. In so far as any person or entity is identified in the above quoted passage as bearing a burden, it is the State and certainly not the applicant. The Court has already determined the applicant's fair procedure arguments concerning the ill-defined nature of the evidence of a collision between the hijacked Mazda and the unidentified garda vehicle and her complaint regarding conflicting accounts as to the position of Mr. MacLochlainn's firearm. As to the applicant's other major argument, namely that the Commission founded its determination as to the lawfulness of the killing without having regard have to the expert evidence tendered by Mr. Bailey and Mr. Burdis, and thus breached the applicant's rights to fair procedures, this complaint is addressed later in the judgment.

#### **The alleged failure to address the issue of missing evidence**

148. At p. 292 of the Final Report, the Commission states that much of the contemporaneous material from 1998 was not available due to inadequate systems and management within An Garda Síochána. It goes on to state, however, that numerous witnesses had been able to substantiate the matters in issue and that it had been possible to be satisfied beyond a reasonable doubt of the main issues of fact set out in the Final Report.

149. The Commission found that while it was poor practice that the relevant duty reports were not placed on the appropriate hard copy intelligence files, it was not sufficient to raise a doubt as to whether there was a conspiracy surrounding the events of 1st May, 1998. Following multiple reviews conducted by the Commission of original files, together with the comparison of the files with the electronic reports generally, the Commission was satisfied beyond a reasonable doubt "that there was no doctoring of files, no deliberate removal of duty reports and no malicious tampering with the material relevant to this case".

150. At p. 294, the Commission alludes to the fact that it did get hold of "vital information ... contained in the original ballistic file", the "Wicklow Box", found in Wicklow Garda Station, and the hijacked green Mazda. The Commission was "conscious of how galling it must be for Ms. Nic Gibb to have sought much of this material since 1999, to have obtained an order for much of it in 2006 and to see it emerge nearly ten years later in a different forum. It must be hard for her to reach any conclusion other than that material had been deliberately withheld from her". The Commission went on to state:-

"While I do not think it was deliberate, the failure to maintain and disclose the relevant material was careless management to such a degree as to be culpable. The impression is also strongly given that no section of AGS has control over any other and few know what material is stored in other sections. The loss of so much documentation and the lack of communication between sections as regards records certainly deserve criticism, but it does not lead me to suspect a deliberate attempt to suppress documents. It is too wide-ranging a loss to have been specifically engineered for this case alone."

151. At p. 295, the Commission found that the evidence before it did not sustain a conspiracy theory that there had been an unlawful killing, or that An Garda Síochána knew of the plan to rob the Securicor van and incompetently managed the operation instead of safely intercepting the raiders before the attack began. It found however that there was "a systemic failure to maintain careful records rather than to deliberately destroy suspicious documents."

152. At p. 27 of the Final Report, the Commission makes reference to duty reports in respect of the garda surveillance of a number of persons which were furnished to the Commission by way of floppy disk. This was so because the ledgers (akin to Day Books in a Garda station) in which the NSU duty reports were first entered were not available. Ordinarily, duty reports were returned to the NSU offices. The Commission heard evidence that the reports compiled by the NSU team leaders "were generally handwritten or pasted in a ledger". The reports were then typed and three copies of each report was printed, one of which was sent to the "Intelligence Section" where it was placed on the relevant files. A back up system operated in the "Intelligence Section" whereby on a monthly basis, batches of these typed duty reports were put on a floppy disk.

153. Because neither the original NSU ledgers nor any paper copy duty reports for 1998 could be found, the Commission viewed and received hard copy intelligence files pertaining to the persons concerned and found that no printed version of the more significant duty reports were attached to the relevant intelligence file, or if they were, they were no longer there. In order to ascertain whether the information on the floppy disk could be relied on, the Commission viewed duty reports not relevant to the investigation under the Terms of Reference, in order to ensure the chronological sequence of the reports of the floppy disks was correct, and in order to satisfy itself that there had not been tampering with the paper files or the floppy disks in order to hide material or alter the contents of any report. Ultimately, the Commission found that the missing ledgers did not impede it unduly and was satisfied that the contents of the floppy disks could not have been altered since May 1998 and thus relied on the digital records of the duty reports as being an accurate record of the original reports.

154. The Commission ascertained that there was no NSU duty report outlining any events at Heuston Station between Saturday 25th April, 1998 and Thursday 30th April, 1998. The Commission noted the concern of the MacLochlainn family about the absence of documents relating to that period *"and about the truth behind non-availability of so much evidential material. They ask the Commission to consider who stands to gain from its non-availability. They query why there were no duty reports outlining a lack of activity and pursued this line of inquiry in cross-examination."*

155. The Commission found that "there were mixed responses to this line of inquiry. Most NSU witnesses agreed they would expect to see some reference to the lack of activity in a duty report, such as "no activity," because that was part of the intelligence; that is the ideal." At p. 45, the Commission stated:

"It may be best practice to meticulously record every event, including non-events. However, I am satisfied the absence of duty reports – in circumstances where two vehicles were fitted with tracking devices and it is not suggested by anybody that they moved – either reflects some team leaders' habit of not reporting a lack of activity or more likely the administration sergeant's habit of not creating a typed report where the ledger contained a "no activity" report. The evidence of NSU-DG-08 was decisive in this regard."

156. At p. 40 of the Final Report, the Commission found that no fault attached to the NSU members for not obtaining CCTV footage from Heuston Station for the week between 15th and 24th April, 1998, in order to ascertain who had removed the Transit van, when it had turned blue or when it returned. The Commission found that "any surveillance unit must make decisions based on resources and effectiveness". The Commission also found that it was a valid decision to keep the two vans under surveillance from 24th April, 1998 "rather than backtracking to see what, if anything, had happened in the past."

157. At p. 270, the Commission found that CCTV footage from Heuston Station on 24th April, 1998 and 25th April, 1998 was viewed by NSU operatives. It was not located for the Commission. The absence of this CCTV footage, and the absence of duty reports for the week of 24th April, 1998, was pursued in cross-examination on behalf of the applicant at the Commission hearings. In the Final Report, the Commission rejected any suggestion of a conspiracy to conceal the CCTV footage and was satisfied that the footage was not stored carefully enough to be available seventeen years later.

158. The evidence to the Commission also established that on 1st May, 1998, the NSU took to the air in a spotter plane. At p. 53 of the Final Report, the Commission found that the primary function of the spotter plane deployed on 1st May, 1998 to support the NSU "was to assist with communications rather than providing technical or visual assistance". There was however a video of the aircraft support of the NSU operation in Ashford on 1st May, 1998 which was handed over to the NSU at the time and viewed by two NSU operatives. Despite searches, the video was not found and was thus not available to the Commission. At p. 290, the Commission found that the video should have been stored in the photographic section of the NSU offices. The Commission accepted the evidence of DG-17 that the aerial footage was not of evidential value owing to the height at which the aircraft was flying and thus it would not have been possible to make out individuals or to distinguish vehicles one from the other on the ground. Accordingly, it would not have assisted in ascertaining what happened at the Cullenmore Bends.

159. In the course of the hearings before the Commission, the applicant submitted that it was inconceivable that all of the documents

surrounding the events of 24th April, 1998, and the following week, would be missing, particularly in the context where a fatal shooting had occurred. She queried as to whether this could be a coincidence. At p. 292 of the Final Report, the Commission's consideration of the issues raised by the applicant was as follows:-

"The difficulty with that question is in its premise that all of the documentation *relating to the shooting of Mr. MacLochlainn*, and no other documentation, is missing. That is not the case. The general process whereby records in AGS are identified as relevant, maintained and stored in an organised system, and are thereby easily recovered and disclosed, is very weak. The evidence has revealed that there is little original documentation of any sort available for the time period before 2001. The earliest ledger available dates from 2009. It is not just the records relevant to this particular incident that are missing; large amount of documentation covering a wide time span have been destroyed."

160. At p. 292, it states as follows:

"It is unfortunate and disappointing that much of the contemporaneous documentation or evidence, which might have assisted me in this investigation, is not available. However, the fact remains that numerous witnesses have been able to substantiate the matters which might have been set out in the missing reports but ultimately it has proved possible to be satisfied beyond a reasonable doubt the main issues of fact set out in this report".

161. Accordingly, the Commission did not accept the applicant's submission that the unexplained absence of important documents was fatal to any conclusion that might be arrived at regarding the events of 1st May, 1998.

### **The applicant's submissions to the Court**

162. The applicant takes specific issue with regard to the lack of any explanation from the relevant authorities for the failure of the gardaí to produce the NSU ledgers. It is contended that there was a failure on the part of the Commission to forensically analyse why they were not available particularly when they contained sensitive information regarding this case and other cases. Given the physical size of such ledgers, the applicant contends that it is inconceivable that they should go missing. Accordingly, an explanation should have been forthcoming from the gardaí, even as a matter of State security. It is also the applicant's submission that the Commission had excessive reliance on the floppy disks, particularly in circumstances where there was no explanation why the original duty reports were not available.

163. Furthermore, the absence of the video footage from the spotter plane was not subjected to sufficient criticism by the Commission. It was not sufficient that the Commission was unduly prepared to accept the garda witness's assertion that the video showed nothing. Accordingly, the Commission engaged in inadequate anxious scrutiny regarding the absence of the video, particularly when the footage included what took place in Ashford on 1st May, 1998.

164. It is contended that inadequate scrutiny was afforded to the fact that CCTV footage in Heuston Station dating from 24th to 25th April, 1998, was not retained by the NSU. Equally, the applicant submits that the Commission should have been concerned about the absence of any record of events at Heuston Station in the week following 25th April, 1998. It is also contended that the fact that the Commission found that the vans under surveillance were fitted with tracking devices did not absolve the lack of a duty report. This is all the more so given that documentary evidence of the placing of tracking devices on the vans was itself not available.

165. It is thus urged on the Court that approach of the Commission to the issue of missing documentation and the established failure of the gardaí to preserve documentation was cavalier. The unexplained absence of relevant documentation and materials should have set alarm bells ringing for the Commission.

166. It is argued that the Commission should have been on alert, given the absence of probative objective documentary evidence, that it would be unsafe to rely on subjective Garda witnesses' accounts in circumstances where the said witnesses have demonstrated incapacity to recall certain matters. It is the applicant's contention that from the beginning, the gardaí immunised themselves from the consequences of their actions. The applicant contends that the Commission should have looked at the issue of the missing documents and materials from the perspective of the gardaí wanting to immunise themselves from investigation. Accordingly, the case is made that the Commission should have entertained a considerable doubt as to what the material might have contained and whose interest its absence served.

167. It is further contended that given the findings it itself made with regard to the absence of relevant materials, the Commission could not have been satisfied that there was not a deliberate policy of suppression of documents and information. It is submitted that there had to be a point where the Commission should say that it was not happy with the explanations tendered for the absence of contemporaneous documentation and the Commission should have found the absence of documentary evidence suspicious to the extent that the necessity for the fatal shooting of Mr. MacLochlainn gave rise to reasonable doubt. Accordingly, the applicant posits that the Commission should have concluded that it could not be satisfied beyond a reasonable doubt as to the lawfulness of the killing of Mr. MacLochlainn in light of the significant absence of contemporaneous material.

168. It is also submitted that contrary to what is set out in the Final Report, the applicant never contended for a conspiracy regarding the missing documents. Rather, the case made by the applicant was that the absence of so much contemporaneous material amounts to unfairness to the applicant. It could not be said that the missing material could have been viewed by the garda authorities as unnecessary or irrelevant in circumstances where the applicant had commenced civil proceedings within a year of the events of 1st May, 1998. It is the applicant's case that the Commission should have considered the scale of the missing material as a matter of importance and applied a proper forensic approach to the issues to be decided by asking why the gardaí should be believed when so much documentation was missing or lost. It is argued that this is particularly so when the Commission itself acknowledged that the lawfulness of the killing of Mr. MacLochlainn had to be established beyond reasonable doubt.

### **Was there a breach of fair procedures in the manner of the Commission's handling of missing documentation and materials?**

169. Having reviewed the Commission's findings in light of the applicant's submissions to the Court, I find that I cannot agree that the applicant's right to fair procedures was infringed. There is no suggestion that the applicant's submissions on the issue of missing documents and materials were not considered or weighed by the Commission. It is also clear to the Court that the Commission was conscious of the type of scrutiny the absence of certain materials and documents warranted. To my mind, careful scrutiny was afforded to this and to the theory put forward by the applicant that there was a conspiracy surrounding the events of 1st May, 1998. Ultimately, the question whether or not the absence of documents or materials rendered the Commission unable to reach certain conclusions as to the circumstances surrounding the death of Mr. MacLochlainn was for the Commission to consider in light of all of the evidence it had. It is not for the Court to intervene in the in this decision-making process, absent an unfair process, which the Court does not find.

### **The Commission's failure to address the planning issue and to heed compelling evidence from experts**

170. A key matter explored by the Commission was the concern of the MacLochlainn family that the gardaí knew or ought to have known that an attempted robbery was about to take place at the Cullenmore Bends on 1st May, 1998. After a consideration of all available evidence, the Commission found that "the evidence overwhelmingly suggests that AGS had no information as to what was planned as regards the two vans [under surveillance], or when it might happen" and that they had "no information that weapons had been placed in a van or removed or that they had been collected from Clondalkin..."

171. The Commission was satisfied upon "a combination of sworn testimony, contemporaneous records and computer files which do not appear to have been edited since May 1998, all of which taken together establishes to my satisfaction, and to the extent that I have no reasonable doubt on the issue, that AGS did not have prior knowledge of the plan to rob the Securicor van in Wicklow in 1st May 1998. Nor did AGS have cogent evidence that either of the vans contained weapons as they left Heuston Station on the afternoon of 1st May. The evidence as to what AGS predicted centred on Heuston Station..." The Commission goes on to state that "it makes sense that the minds of the NSU and the intelligence operatives were guided by the activities of the RIRA at the time" and that "[t]he most likely scenario at the time... was the movement of explosives."

172. Although satisfied that the relevant authorities did not know that a robbery was planned, the Commission concluded that "AGS should have identified a commander for this operation to lead a more thorough briefing in which contingency plans for various different scenarios were considered."

173. The Commission opined:-

"As to whether AGS should have predicted the plan in advance, after much scrutiny, I must conclude in the negative. It would be to impose too high a standard on an analyst to expect, without the benefit of hindsight, that he should add nine-year old information from a list of garda escort vehicles, to multiple trips around various venues and a sports bag in a suspect van, and combine those to produce a theory about an armed robbery of an unescorted security van somewhere in Ireland. Had the aborted attempt on 24th April been observed, this might have alerted AGS to a robbery plot, but otherwise a robbery was one of the least likely of the several possibilities open on 1st May.

...

There was a high level leadership meeting of the RIRA on 20th April. It makes sense that the Intelligence Section focused on this, rather than on a few lower-level members moving in and out of vans in a car park. The leadership meeting was also far more significant than a trip by Pascal Burke to Killinskey on 7th April. Only in hindsight did that trip become important. When one considers the daily activities of Mr. Burke, who often travelled to destinations outside Dublin, AGS cannot be faulted for failing to predict this robbery at an early stage.

As to whether a greater analysis would have assisted in predicting robbery, while the information that these people had firearms that had been significant, the information that a forensically aware person removed one or two bags from a suspect vehicle did not amount to information that he had firearms...

The information on file as regards Pascal Burke does not change my view in this regard. Given what AGS knew of him and his associates, the fact of his having been connected to a list of garda escort vehicles nine years previously, particularly in light of the evidence about the IRA intelligence routinely collecting such information, did not suggest and should not have suggested to the NSU, the Intelligence Section or the ERU that they should consider an unescorted security vehicle as a target...

To make contingency plans is a perfectly sensible proposal and it is regrettable that this did not happen. I also accept, however, that there are resource issues for AGS that it is difficult to prescribe how these should be resolved, and even more so to try to assess now, with the benefit of hindsight, which should have been resolved in 1998. Therefore, while I agree that the ideal position would have been for the analyst to obtain and assess all of the information available and that there should have been a contingency plan, I cannot make any finding to whether or not there was a culpable failure in terms of allocation of resources to this particular operation and in my view it would be unfair to AGS to criticise them on that account in light of the multiple issues they faced at the relevant time. Nor do I accept that the information available to AGS in advance lead inexorably, or even as a matter of probability, to the conclusion that a robbery was planned."

174. Noting and agreeing with the evidence of Mr. Bailey that "*there could have been a number of contingency plans drawn up to deal with foreseeable events*", and while satisfied that there was an absence of any command structure, the Commission goes on to find that "AGS did not know that an armed robbery was planned, and cannot be faulted for not predicting it".

175. The evidence before the Commission established that on 1st May, 1998, all thirteen members of ERU, from whom the NSU had requested assistance, gathered at Hunters Hotel. At p. 83 of the Final Report, the Commission refers to the overwhelming evidence given by ERU members to the effect that it was not expected or imagined that a robbery was on the cards, or that the suspects were going to hijack a Securicor cash-in-transit van. The Commission concluded that a robbery was "one of the least likely of the several possibilities on 1st May."

176. The applicant asserts that the Commission unfairly dismissed the expert evidence that the gardaí should have predicted that a robbery was being planned and that they should have known that the raiders were armed. She points to Mr. Burdis' report where he opined:

"This gang of known members of a proscribed terrorist organisation would always had been expected to carry lethal weapons and so it was in this case, members of the Crime and Security branch (who also carried firearms) called upon the Special Detective Unit to assist specifically because of their expertise in dealing with incidents where lives may be endangered; because firearms can reasonably be expected to be used. So there can be no excuse that officers responding to this incident were taken by surprise!"

177. The applicant asserts that it was also known that the white DAF van was fitted with false number plates and had been stolen by Mr. MacLochlainn on 11th April, 1998 and parked at Heuston Station car park on 28th April, 1998 and that a blue transit van had previously been stolen and also parked at Heuston Station. It was known that on 2:30pm on Friday, 1st May, 1998, the blue transit van and white DAF van were observed leaving Heuston Station car park and travelling south on the N11 towards Wicklow. Furthermore, the applicant points to the report of Mr. Bailey where he states:

"The intelligence known to the senior Gardaí in command of Operation Morrison when it was started, is a key determinant of this inquiry. If they knew the target, time and location of the intended robbery, an armed surveillance operation, with an unplanned interception during the commission of the crime, was not an appropriate tactical option. Interception could have been appropriate if, risk reduction measures to protect victims and exclude the public from the scene were put in place. However, if the information was inconclusive, an armed surveillance operation would be appropriate with one method of gaining further intelligence. Even with an armed surveillance option, contingency plans for foreseeable eventualities should have been drawn up and documented. In my opinion, a robbery was a foreseeable eventuality and a contingency plan should have been prepared."

178. The applicant submits that the failure of the Commission to grasp the significance of the gardaí's failure to plan for the contingency that a robbery was to take place impacts adversely on the Final Report. The applicant points again to Mr. Bailey's evidence, as follows:-

*"...I think it would have been of benefit, particularly with hindsight as to what actually occurred, if some form of documentation had been available that would have explained what officers were doing, what they were trying to achieve, and that would explain either the fact that the first part of the operation, the surveillance, was a pre-planned ongoing operation, and that the second part, the armed intervention, was indeed a spontaneous event that occurred. In one sense obviously somebody did think through and say, well, that might occur because the ERU were asked to provide that support in the area that it be needed. I think it is just unfortunate that that wasn't documented in some way, so we and others, before it reached where it has now, would be able to look at the thinking process of those officers that made their decisions."*

179. The applicant contends that a report dated 4th May, 1998 and compiled by Insp Hogan, who was in charge of the ERU on 1st May, 1998, belies the Commission's finding as "lacking in plausibility" the suggestion that the gardaí should have predicted the robbery. This report states as follows: -

"From information in our possession we were aware that five or six members of a paramilitary unit were in the area of Ashford. It is not clear at the outset what they were doing, however it was believed the robbery or kidnapping was to take place."

180. The Commission determined, notwithstanding the belief expressed in the report dated 4th May, 1998 that a robbery or kidnapping was to take place, that the "evidence has overwhelming been that robbery was not discussed by the ERU at Hunter's" and that it was Insp Hogan who alone was of this belief, and that he had "kept this information to himself until writing a report afterwards."

181. The applicant submits to the Court that in light of the near-contemporaneous record compiled by Insp Hogan, and the expert evidence tendered, the Commission unfairly failed to display an objective facility to question the garda evidence that they believed the object of the RIRA exercise on 1st May, 1998 was to transport explosives.

182. The applicant thus expresses severe criticism of the findings of the Commission in respect of the report of 4th May, 1998. It is submitted that these findings run counter to the contents of a report of 2nd June 1998 by Detective Superintendent Kelly, and that the provenance of which report is beyond dispute. It is submitted that that report shows, *inter alia*, that on 2nd June, 1998, Det. Supt. Kelly had no doubt that the Ashford attempted robbery was a first step towards funding a paramilitary group. While it is acknowledged by the applicant that the report of 2nd June, 1998 post-dated events in Ashford, it is submitted that the Commission should have been influenced by this document which, in effect, corroborated the contents of the experts' reports which the Commission had, both of which stated that the most likely objective of the raiders' exercise was robbery or a kidnapping. It is submitted that it was unfair for the Commission to prefer the evidence tendered by ERU members solely on the basis that those ERU members who gave evidence about the raiders' likely objective on 1st May, 1998 all agreed that they had not factored in the prospect of a robbery.

183. I do find that there was a breach of fair procedures in the manner in which the Commission dealt with whether or not An Garda Síochána had prior knowledge of the robbery which the raiders intended to carry out. It is clear from a reading of the Final Report that the experts' opinion that robbery should have been predicted was considered by the Commission. The reports of 4th May, 1998 and 2nd June, 1998, were also considered. However, this was not the only evidence adduced on this issue. Extensive evidence was also heard as to the background and *modus operandi* of the raiders and the activities of the RIRA at that time (see for example pp.22-26 of the Final Report).

184. Ultimately, the Commission determined that the preponderance of evidence militated against a finding that robbery should have been predicted. The fact that it so determined does not, in my view, lead to the inevitable conclusion that this was unfairly arrived at in circumstances where, as decision-maker, it was for the Commission to weigh the relevant evidence, including what weight should be given to the expert evidence, in light of other evidence as to the activities and background of the raiders in the period before the events of 1st May, 1998. It was also solely within the preserve of the Commission to weigh the reports compiled by Insp Hogan and Supt Kelly against other available evidence (including the intelligence files) in determining the state of knowledge of the relevant parties. The Court notes the Commission's finding that "there were hundreds of other potential leads in the duty reports themselves, let alone in the rest of the related files, including files pertaining to other people who attended the [RIRA] leadership meeting, for instance. To cherry-pick the information that so clearly suggested a robbery attempt is to ignore the rest of the intelligence in the possession of the AGS at that time, which did not point to a robbery." It is clear from the Final Report that the Commission reviewed the evidence with the applicant's submission that a robbery should have been predicted in mind. I have already rehearsed my view that the necessary weighing exercise was entirely a matter for the fact-finder, and not the Court.

185. I note that the Commission's finding in respect of Insp Hogan's 4th May, 1998 report was the subject of submission by the applicant to the Commission on 5th May, 2016. In its response of 10th May, 2016, the Commission rejected the applicant's categorisation of its finding, stating that in the Final Report, the Commission "expressly *rejected* the theory that [Insp Hogan] alone had predicted [the robbery] and had then kept it to himself." (emphasis added) This statement appears to me to be a contradiction of what was stated at p. 93 of the draft report of 5th April 2016 and what is indeed set out at p. 83 of the Final Report, which is that the Commission accepted that Insp Hogan predicted a robbery but that he had kept this to himself until he wrote his report. I do not believe that anything turns on this contradiction, given the clear finding in the Final Report. I can only surmise that what is in the 10th May, 2016 letter is a result of a typographical error.

186. Based on the evidence before it, including expert evidence on best practice from Mr. Bailey and Mr. Burdis, the Commission concluded that garda management had failed to clearly identify an officer as being in overall command of Operation Morrison, and failed to identify tactical commanders for the NSU and ERU units. Furthermore, the Commission found garda management had not put

in place any contingency plans and that contingency plans should have been in place. It was also found that there had had not been any formal handover by the NSU to the ERU on the day, which was partially explained by the fact that there was "no overall commander with strategic oversight of events as they unfolded". The Commission found that such a handover should have been effected "when the Securicor van was seen at Glanbia, and communicated to all members".

187. As to whether the raiders could have been intercepted before the events at Ashford, in summary, the Commission's findings are as follows:

- (i) It was not possible to substitute the driver of the Securicor van in advance, or apprehend the raiders as they left home "as the robbery was not predicted".
- (ii) Interception of the van at Heuston Station would have involved a risk to the public. This would have been disproportionate as there was no intelligence to suggest that there were either weapons or explosives in the van.
- (iii) Given the history of the group involved, the best decision would have been to move in as early as possible when the raiders were spotted putting up road signs; there was a window of opportunity of about 20 minutes in which this interception could have been implemented before the Securicor van was spotted and the scenario changed again. The Commission found as a fact that there had been an intention to intercept at this stage but that was interrupted by the arrival of the Securicor van. The Commission stated: "Interception at this point was the ideal option but it was not the only option. I do not find that there was a culpable failing on the part of AGS not to intercept. Even Mr. Burdis agreed that he did not know exactly how he would have acted to intervene at that stage."
- (iv) Interception of the Securicor van, once spotted, before it got to the raiders was not achievable because of risk to members of the public. In this regard, the Commission noted the advice of Mr. Bailey.
- (v) The ideal situation once the Securicor van was spotted would have been to notify the Securicor driver. This was not achievable because even the outside time frame of two minutes was too little time to achieve this.
- (vi) The ultimate conclusion was that "[t]he gardai at Cullenmore and in Glanbia had not guessed what was going on and did not have time to intercept before the Securicor van was passing them by at the Glanbia yard".

188. It is the applicant's case that the Commission's conclusions on the lawfulness of the killing of Mr. MacLochlainn failed to acknowledge expert evidence given by Mr. Bailey and Mr. Burdis, who did not believe that the shooting of Mr. MacLochlainn was the only outcome from the events of 1st May, 1998.

189. It is contended that since both experts concluded that the whole garda operation of 1st May, 1998, was badly planned, the Commission should have factored the poor planning on the part of the gardaí into its assessment of the reasonableness or necessity for the shooting of Mr. MacLochlainn. The applicant queries as to whether the Commission was correct to say the gardaí could do nothing, particularly given the opinion of the experts that a robbery should have been anticipated. It is submitted that the Commissions' approach was too simplistic and that it failed to appreciate the expert evidence it had.

190. It is also submitted that having made the findings with regard to the lack of a command structure, the Commission shied away from making the further finding that ought to logically follow, namely that what took place on the day could not be categorised forensically as absolutely necessary. Specifically, the applicant submits that given that the Commission found that the absence of intelligence to suggest what, if any, event was being planned did not account for the fact that there was no contingency plans at all, including no contingency plan for a suspected transfer of explosives, and given the finding that An Garda Síochána certainly knew that an incident was planned when the raiders got out of the blue van at the Cullenmore Bends and that interception could have then been implemented, the Commission should have found that it was not objectively necessary that the raid would proceed at the point at which the Securicor van came on the scene.

191. The applicant contends that in finding that interception at the point the Securicor van was spotted was the ideal option but that "it was not the only option", the Commission closed its eyes to the reality of the situation and did so in the teeth of expert evidence as to the likely intentions of the raiders on the day.

192. The applicant contends that having found that contingency plans should have been in place, it rendered it imperative that the Commission should state that it was not possible to make a finding as to the lawfulness of the shooting of Mr. MacLochlainn.

193. Having perused the Commission's findings against the backdrop of the expert reports, and the applicant's submissions in respect thereof, the Court has not been persuaded that the Commission's various conclusions have been arrived at without recourse to evidence tendered by the international policing experts and thus in breach of fair procedures for the applicant. As the quoted extracts from the Final Report demonstrate, the Commission accepted the fundamental premise in both experts' reports and evidence, namely that there was a requirement for proper command structures, which were absent both on the day and prior and that contingency plans should have been drawn up, which also did not happen.

194. The applicant's fundamental complaint is that having thus accepted the expert evidence on the necessity for a proper command structure and a contingency plan, together with its acceptance that intervention was an option when the raiders were spotted putting up road signs, the Commission should not have made a finding as to the lawfulness of the fatal shooting of Mr. MacLochlainn, and should have made a finding that the operation was not planned and controlled by the authorities so as to minimise to the greatest extent possible recourse to lethal force.

195. In advancing these unfairness arguments, it seems to the Court that the applicant does not appreciate the nuances evident in Mr. Bailey's report and evidence to the Commission.

196. Mr. Bailey described "Operation Morrison" as:-

"...a surveillance operation with an armed capability attached to it, and that is actually quite a common policing role where it is known that people are conducting criminal activities. They are coming together, they are looking at places, and that is a surveillance job. The intelligence gathering role of the surveillance team finishes when it is suddenly realised in fact there is now a firearms role, and that the firearms team that has been deployed in assistance of a surveillance unit are then brought in to resolve that incident, so, if you like, it is hybrid between the two. From the perspective of the surveillance officers, it is a planned operation. They are observing, they are following, as in this case a group of people, a

number of vehicles, and that can be planned and officers continue to do that until the point where, or up to until the point they realise that during that surveillance unbeknown to them, a criminal act occurs that requires the intervention of an armed team. That is why from the armed team's perspective, it is actually a spontaneous incident. They were unable to plan for the event because they were unaware that it was going to take place on that day and in that place."

197. Mr. Bailey also states:-

"The interventions by the ERU in the robbery as described by the Gardaí can be defined as a spontaneous incident occurred during a planned surveillance operation. This is not an unusual event when suspects are under observations and is why specialist firearm teams are deployed in support of colleagues in surveillance units. As a spontaneous incident it could not be planned as a firearms operation, however, it can be argued that there could have been a number of contingency plans to deal with foreseeable events. An attack on a high value load of some description would be such a possibility and deserve the preparation of a contingency plan."

198. This opinion is directly referenced by the Commission in the Final Report. More particularly, I note that Mr. Bailey's report and evidence was to the effect that if the Commission accepted the accounts, respectively, of D/S Gantly and Insp Hogan, and what was contained DS-06's statement, then the shots fired were appropriate in the circumstances. Mr. Bailey agreed that the conclusions drawn by the Commission would depend on the factual findings that it would make in that regard. Mr. Bailey was also questioned as follows in the course of his evidence, as follows:

*"Q. Well in respect then of each of those officers is the obverse truth, or to what degree must the Commissioner be dissatisfied with their accounts before she were to make a finding that the use, or the firing of shots in those circumstances was not reasonable?"*

*A. In terms of- she would have to-in my view she would have to believe that the descriptions that they had given were inaccurate and potentially that they were potentially inaccurate, as opposed to, as I previously described, their perception, their honestly held truthfully delivered perception of what they believed was happening."*

199. In evidence, Mr. Bailey reprised his opinion as set out in his report, namely that *"if the descriptions of events in the statements of Gardai at the scene are accurate it is the actions of Mr. MacLochlainn in response to the arrival of armed Gardai that was the cause of him being shot"*.

200. Furthermore, in his report, Mr. Bailey also stated:

*"In my opinion criticism of other aspects of Operation Morrison such as the planning process, poor scene management and failure to investigate the shooting do not prejudice the appropriateness of the decision to shoot taken by the three officers who fired. Assuming their statements are truthful recollections of their perception of events their actions are still justified. In my view it is inappropriate to use organisational or personal failing on other parts of the incident as a yard stick to judge the actions of the officers who fired."*

201. In his testimony to the Commission, Mr. Bailey remained of this view. I have earlier alluded to Mr. Burdis' evidence that it was ultimately for the Commission to assess, on the evidence, if Mr. MacLochlainn presented a threat and a danger at the time when DS-06 fired the fatal shot.

202. The Commission, for the reasons set out in the Final Report, arrived at a conclusion as to the lawfulness of the shooting of Mr. MacLochlainn based on a factual matrix of which the Commission was persuaded beyond a reasonable doubt. I am not persuaded that in doing so, it failed to have regard to expert evidence, as contended by the applicant. A reading of the Final Report, against the evidence tendered by Mr. Burdis and Mr. Bailey, satisfies me that the views expressed by the experts on myriad issues were considered by the Commission. As I have said already, the assessment of the relevant evidence, including that tendered by the experts, and the weight to be attached to such evidence, were matters for the Commission and not the Court.

203. In aid of her submission to the Court that the Commission failed to make a finding that the operation was not planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force, the applicant cites the decision of the ECtHR in *McCann v UK* that:

*"in determining whether the force used was compatible with Article 2, the court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti terrorist operation was planned and controlled by authorities so as to minimise, to the greatest extent possible, recourse to lethal force."*

204. This was also a matter of a s. 35 submission to the Commission by the applicant following the circulation of the draft report on 18th April, 2016. As referred to earlier, the Commission responded to this submission by stating that it had not been established that reasonable arrangements could have been made to avoid the killing of Mr. MacLochlainn. The Commission also stated, *inter alia*:

*"In the circumstances of this investigation, however, there was no question of the operation making the use of lethal force more likely...It was a surveillance operation initially. The training of the operatives involved and the careful surveillance of the raiders minimised the risk that force would have to be used at all, let alone lethal force."*

205. The Commission went on to distinguish the circumstances of the present case from those in *McCann* where the ECtHR had found, *inter alia*, that the authorities had taken a deliberate decision not to prevent the IRA suspects from travelling to Gibraltar-even though they could have arrested them at the border, and where the authorities had made the SAS soldiers believe that there was definitely a bomb. As regards the present case, the Commission's response to the applicant's submission was that *"the operation was not run in such a way as to make recourse to force likely, or even more likely. There is no evidence of a failure to minimise recourse to lethal force."*

206. In the within application, the applicant urges the Court to direct the Commission not to make a finding that the shooting of Mr. MacLochlainn was lawful and to make a finding that the operation was not planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. However, for the reasons stated in this judgment, the Court has not found a breach of fair procedures which would merit such a direction, or that the Court should direct that the Commission should hear further submissions concerning the expert evidence.

### **The “resources” issue**

207. In the course of her submissions to the Court, the applicant took issue with the Commission’s finding that no fault lay with the NSU for not obtaining CCTV footage for the week of 15th to 24th April, 1998 and that it was open to the NSU to make such decisions based on resources.

208. The applicant also contends that the Commission breached fair procedures by relying on its own explanations when it proffered that while there should have been a contingency plan, there were “resources issues” for An Garda Síochána. It is submitted that it is not clear what resources would have affected the proper planning and control of the operation on 1st May, 1998. Furthermore, the applicant contends that a resources concern was not expressed by the experts, nor was any such concern put to the experts by or on behalf of the Commission. The applicant maintains this was particularly unfair in circumstances where she was not given an opportunity to respond to the issue of resources.

209. The applicant also submits that there was no basis for the Commission to consider whether resources were in issue in 1998. This is so in circumstances where there were some 42 gardaí deployed on the ground on 1st May, 1998, all of whom were armed save two NSU officers. Furthermore, the evidence of Mr. Bailey was that for every raider likely to be arrested, two officers were necessary. Therefore, given the number of garda personnel on the ground, there were more than sufficient to control and contain the situation. It is thus submitted that the Commission’s conclusion that it was not possible to launch a safe interception of the robbery is not tenable in light of the expert evidence as to the number of garda personnel that would be required. It is submitted that this is borne out by Mr. Burdis’ report where he states:-

“My training in the management of any operation where firearms are involved is to always take control of the situation. In this instance there were a number of opportunities to change an uncontrolled situation into one that was controlled – as the suspects assembled around the Heuston Station; as they gathered near to Ashford on the N11 or after the failed attack when MacLochlainn was making his escape up the N11. In all these situations there were, in my opinion, opportunities for the Gardaí to change an uncontrolled situation – where they claim to have no idea what was happening; and where they and the public were placed in grave danger – into one that was totally under their control.”

210. The applicant also maintains that the Commission’s findings on the resources issue are not in keeping with the expert evidence which was to the effect there should have been someone in overall command. As regards this submission, I note that the Commission itself accepts that resources issues would not account for the failure to appoint “an identifiable commander” or to have a contingency plan.

211. The resources issue was one of the matters raised by the applicant in her s.35 submissions to the Commission on 5th May, 2016. The response of the Commission on 10th May, 2016, was that the reference to resources issues “is not a supposition but an inference based on the evidence and common sense” and that it was based on the Commission taking into account that as a state body, An Garda Síochána, “has limitations on the amounts it may spend and the manpower and technical assistance it can engage”. It was further pointed out that there was ample evidence adduced (and repeated in An Garda Síochána’s written submissions to the Commission) that “resources were extremely stretched at the time and that holidays were cancelled, there being no time between operations.”

212. I note that the issue of the resources available on 1st May, 1998 was something that was addressed in the cross-examination of Mr. Bailey by counsel for the applicant on Day 48 (Questions 201-207). Albeit it was not explored at length, it cannot be said that the matter was not touched upon in the expert evidence.

213. At the end of the day, I perceive no unfairness to the applicant in the Commission’s handling of the issue of resources. I am not satisfied, overall, that the arguments raised by the applicant reach the threshold of a fair procedures issue. Accordingly, I am satisfied that there was no procedural requirement on the Commission to advise the applicant in advance that the issue of resources might be adverted to in the Final Report.

### **The Commission’s failure to properly address the debriefing issue**

214. At p. 232 of the Final Report, the Commission found that, post the events of 1st May, 1998, there was no comprehensive debrief involving both the NSU and the ERU, which should have occurred. The Commission also found that in the lead-up to the Commission’s hearings, some members of An Garda Síochána discussed among themselves not only the issue of whether or not there was any meeting or debrief, but also what occurred at a meeting of 2nd May, 1998. The Commission opined as follows: -

“This may have contaminated the evidence, making it more difficult for [the Commission] to determine what occurred at that meeting. It explains why so many garda witnesses, after 17 years, described the morning in the same way but were unable to provide any detail when pressed”.

215. The Commission did not find however, as queried by the applicant in submission before the Commission, that:

“there was any ...intervention or agreement to hide what occurred [on 1st May, 1998]; such a conspiracy would be singularly difficult to maintain and, more importantly, seen from its own vantage point, AGS did not consider that there was a need to hide anything that happened at that meeting. The submission made by the lawyers for Ms. Nic Gibb is that there was no debrief after the shooting as there was concern that a debrief would reveal a disastrous operation and the total chaos that ensued. That submission ignores the view taken by AGS of these events both then and (sic), to a large extent. I reiterate: the operation was not considered to be a disaster.”

216. In the course of oral submissions to the Court, the applicant suggests, in reliance on p. xxx of the Final Report (the executive summary), that the Commission failed to conclude whether a meeting did take place on 2nd May, 1998, despite a preponderance of evidence to suggest that such a meeting did take place. However, I am satisfied from what is quoted at pp. 224-235 that the Commission did accept that there was such a meeting. It considered in detail the evidence relating to the meeting of 2nd May, 1998 and how the meeting was recorded.

217. In her submissions to the Court, the applicant contends that the failure to hold a proper debrief should have been a matter of great concern to the Commission and it should have queried why there was such a failure. She complains that the Commission does not consider her belief that the debrief was not held because of the damaging information which would have emerged concerning the chaotic scene on 1st May, 1998. It is thus contended that the applicant’s submission as to a culture of “Omertà” within the gardaí was unfairly dismissed by the Commission. In particular, the Commission should have queried why the damage to the Mazda driven by Mr. MacLochlainn and the placement of the firearm were not properly documented, particularly given the criminal standard of adjudication which the Commission had set for itself in relation to the principal issues of the inquiry.



218. While the applicant disagrees with the Commission's findings on the failings of the debrief, she has not convinced the Court as to how it is said that there were unfair procedures adopted by the Commission in reaching the conclusions it did. It is clear that the theory put forward by the applicant as to why there was no comprehensive debrief was considered, albeit ultimately rejected by the Commission for the reasons stated. With regard to the complaint about the failure to properly document the location of the hijacked green Mazda and Mr. MacLochlainn's firearm at the scene, I am satisfied from the contents of the Final Report that the Commission did query in considerable detail the failure on the part of the garda authorities to preserve or document these items; the Commission made numerous findings in respect of these matters. Overall, I am satisfied the submissions of the applicant as to why a more comprehensive debrief did not happen were given due consideration by the Commission, in addition to other factors which the Commission found to be germane to the question of the garda's failings in this regard. In all the circumstances, the Court finds no basis upon which to direct further consideration by the Commission of the debrief issue, or to direct that the Commission should revisit its findings as to the lawfulness of the shooting of Mr. MacLochlainn by reason of the manner in which the debrief issue is handled in the Final Report.

#### **Summary**

219. Having considered the submissions advanced on behalf of the applicant, in light of all of the material put before the Court, the Court finds no basis upon which to direct the Commission to amend the Final Report or that it should receive any further evidence or submissions on behalf of the applicant. Effectively, the Court has found no procedural infirmity of the type complained of by the applicant such as would warrant the directions sought by the applicant in this application.