OUTER HOUSE, COURT OF SESSION

[2009] CSOH 1

SUPPLEMENTARY OPINION OF LORD MACKAY OF DRUMADOON

in the petitions of

ROSELEEN KENNEDY

Petitioner;

against

THE LORD ADVOCATE AND SCOTTISH MINISTERS

Respondents:

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JEAN BLACK

Petitioner;

against

THE LORD ADVOCATE AND

SCOTTISH MINISTERS

Respondents:

____

Petitioners: O'Neill, QC, Caskie; Thompsons

Respondents: Mure; Office of the Solicitor to the Scottish Executive

7 January 2009

Introduction

[1] The background to these petitions is set out in my earlier Opinion of 5 February 2008. As before, I shall refer to Mrs. Roseleen Kennedy as "the first petitioner", to Mrs. Jean Black as "the second petitioner", to the Lord Advocate as "the first respondent" and to the Scottish Ministers as "the second respondent".

[2] On issuing that earlier Opinion, I pronounced interlocutors in the two petitions, which reduced the decision of the first respondent of 15 June 2006 refusing to order a Fatal Accident Inquiry into the deaths of Mrs. Eileen O'Hara and the Reverend David Charles Black. I also ordered that a further hearing be arranged in each petition for the discussion of further procedure. Shortly after 5 February 2008, the Court was advised that the respondents did not intend to reclaim against my interlocutors of 5 February 2008.

Events subsequent to 5 February 2008

[3] On 23 April 2008 the Cabinet Secretary for Health and Wellbeing, Nicola Sturgeon MSP, made the following statement to the Scottish Parliament on behalf of the Scottish Government:

"I am pleased to announce today, under section 28 of the Inquiries Act 2005, a judicially-led public inquiry into the transmission of Hepatitis C from blood and blood products to NHS patients in Scotland. .... [A]lthough much of the public debate around this issue has centred on Hepatitis C, many people also contracted HIV from NHS treatment with blood and blood products. As it would be very difficult to separate the circumstances in which Hepatitis C and HIV were transmitted, I have decided that the inquiry will also investigate the transmission of HIV.

...

[O]n 5 February 2008, Lord Mackay of Drumadoon published his Opinion that the decision of the former Lord Advocate not to hold a Fatal Accident Inquiry into the deaths of the Rev. David Black and Mrs Eileen O'Hara was incompatible with Article 2 of the European Convention of Human Rights.

Lord Mackay also held that both the Lord Advocate and Scottish Ministers have statutory powers under which they could set up public inquiries into the deaths of the Rev. Black and Mrs O'Hara and that such inquiries would satisfy the Convention rights of the deceased.

Following careful discussion, the Lord Advocate, the head of the system of deaths investigation in Scotland, and I decided not to appeal against Lord Mackay's determination. We have also decided that progress towards establishing an inquiry need not await the outcome of the Archer Inquiry and concluded that we should proceed to hold a Scottish public inquiry under section 28 of the Inquiries Act 2005.

....

I can confirm that the inquiry will have a remit to investigate the deaths of the Rev. David Black and Mrs. Eileen O'Hara and will address the terms of paragraph 125 of Lord Mackay's judgment that:

'any practical and effective investigations of the facts, of the nature required by Article 2, must be capable of addressing when each Mrs. O'Hara and Rev. Black became infected with the Hepatitis C virus and whether any steps could have been taken by the Scottish National Blood Transfusion Service or by other individuals and public authorities involved in the NHS in Scotland that might have prevented such infection occurring'.

The inquiry terms of reference will ensure that the inquiry is compliant with Article 2 of the Convention in relation to those deaths and any other deaths which have occurred as a result of the deceased having become infected by the Hepatitis C virus, where given the particular facts and circumstances in relation to the death an Article 2 compliant inquiry should be held."

[4] In the second of the paragraphs I have quoted from the statement of 23 April 2008, the Cabinet Secretary indicated that I had held that both respondents have statutory powers under which they could hold public inquiries into the deaths of Mrs. Eileen O'Hara and the Reverend David Charles Black. She is correct in that assertion. However she also stated that I had held "that such inquiries would satisfy the Convention rights of the deceased". That is not a fully accurate summary of the terms of my earlier Opinion.

[5] In para. [138] of my earlier Opinion, I recorded that it was a matter of agreement between the parties that any Fatal Accident Inquiry ("FAI") under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 ("the 1976 Act"), which was ordered by the first respondent into the deaths of Mrs. O'Hara and Mr. Black, would satisfy any procedural obligation on the United Kingdom under Article 2 of the Convention to carry out an investigation and would meet the minimum standards required of any such investigation. That remains the agreed view of parties. I have no reason to doubt that agreed position is well founded.

[6] However, the position with regard to any inquiry that might be set up by the second respondent is different. In paras. [151] - [156] of my earlier Opinion, I addressed the issue as to whether the second respondent had any statutory powers to hold inquiries into the deaths of Mrs. O'Hara and Mr. Black. I expressed the view that they did. However I also noted that the terms of reference of an inquiry set out by the second respondent under the Inquiries Act 2005 ("the 2005 Act") could not require the inquiry to determine any fact or make any recommendation that was not wholly or primarily concerned with a "Scottish matter" (as defined by section 28(5) of the 2005 Act). It was clear from what I said that an issue might arise as to whether a Scottish inquiry set up by the second respondent under section 28 of the 2005 Act would ensure compliance with Article 2 in respect of the deaths of Mrs. O'Hara and Mr. Black; or whether, if an inquiry was to be set up under the 2005 Act, compliance with Article 2 would only be achieved if the second respondent and a Minister of the United Kingdom Government were to set up a "joint inquiry" within the meaning of sections 32 and 33 of the 2005 Act. Although I did not discuss this in my earlier Opinion, a third possibility might be the setting up of an United Kingdom Inquiry by a Minister of the United Kingdom Government, under section 27 of the 2005 Act, after appropriate consultation with the second respondent.

[7] In the first instance, as least, the decisions involved as to the setting up of an inquiry under the 2005 Act lie with the second respondent, no doubt after appropriate consultation with the first respondent, in her role as Lord Advocate, and the United Kingdom Government. In my earlier Opinion, I expressed no conclusion, nor did I make any ruling in either petition, that an inquiry under section 28 of the 2005 Act would be sufficient to ensure compliance with Article 2. Equally, I did not indicate that a joint inquiry within the meaning of sections 32 and 33 of the 2005 Act would be required. When I drafted my earlier Opinion, I took the view that such questions were for the second respondent and the United Kingdom Government to determine. There was insufficient information before me to do so. In my opinion, the decisions involved when an inquiry is set up under the 2005 Act are not for the Court to take. On the contrary, they are decisions for others, albeit decisions the Court might require to review, if called upon to do so. For reasons I elaborate upon later, that remains my position.

[8] In her statement to the Scottish Parliament, the Cabinet Secretary for Health and Wellbeing announced that the second respondent intended to hold an inquiry under section 28 of the 2005 Act. It was also announced that Lady Cosgrove would chair the proposed inquiry. Lady Cosgrove is no longer in a position to chair the proposed inquiry. Her replacement has not yet been identified. The proposed inquiry has not yet been set up. No instrument of appointment of the chairman of the inquiry has been granted in terms of section 4 of the 2005 Act. Furthermore, and very importantly, the second respondent has not specified the setting-up date for the inquiry, nor has it determined the terms of reference, under the provisions of section 5 of the 2005 Act.

[9] Since the making of the statement to the Scottish Parliament, the petitions have come before me at a number of hearings, including a two day continued first hearing at which I was addressed by counsel on behalf of both petitioners and both respondents on a number of orders the petitioners invite me to pronounce.

[10] In advance of this two day hearing, I requested that the parties lodge written submissions. They did so. These written submissions were carefully prepared. They are in clear terms. I am very grateful to all who were involved in their preparation.

Orders sought by the petitioners

[11] The written submissions lodged on behalf of the petitioners in advance of the hearing indicate that the remedies now sought by each petitioner are as follows:-

Declaratory Orders

(i) Declarator that the petitioner is entitled to an independent, effective and reasonably prompt inquiry into the death of [her late mother Mrs. Eileen O'Hara / her late husband David Charles Black], at which the deceased's next of kin can be legally represented, have access to and be provided with the relevant material

and evidence, and be able to cross-examine the principal witnesses; that a failure to provide such an inquiry is incompatible with Article 2 of the European Convention on Human Rights; and that the refusal or failure of the first respondent to do so is accordingly ultra vires of section 57(2) of the Scotland Act 1998;

(ii) Declarator to the effect that "an inquiry which was to be held under and in terms of Section 28 of the Inquiries Act 2005 alone would not, in fact, be compatible with the requirements of providing an effective remedy for the established breaches of the petitioners' Article 2 rights";

(iii) Declarator that "an Article 2 compliant inquiry in the circumstances of the present petition would require the inquiry, at the very least, to be empowered: to investigate the deaths of Mrs. Eileen O'Hara and the Reverend David Black, including the circumstances in which each of them became infected with the Hepatitis C virus with a view to identifying: the reasonable precautions, if any, whereby their deaths, and the Hepatitis C infection which resulted in or contributed to their deaths, might have been avoided; the defects, if any, in any system of working which contributed to their deaths; the public officials and authorities who were responsible for the systems that were in place for the collection of blood donations and the use of the blood thus collected for blood transfusions and the preparation of blood products for clinical use and determining whether any of those public officials or authorities should be held to account; and any other facts which are relevant to the circumstances of the deaths.";

(iv) Declarator that "any *a priori* capping of hours for the work to be done by legal representatives of the families of the deceased in the proposed inquiry is not compatible, in the circumstances, with the requirements of Article 2 ECHR"; and

(v) Declarator to the effect that "a properly Convention compliant inquiry requires that the legal representatives instructed on behalf of the family be paid at rates no less than paid to other publicly funded counsel appearing on behalf of respondents or as counsel to the inquiry *et separatim* that the solicitors for the families will receive public funding at rates which both cover their costs and overheads as well as provide them with a reasonable margin of profit".

Positive Orders

(i) An order on the first respondent to hold Fatal Accident Inquiries under and in terms of the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 into the deaths of the late Reverend Mr. David Black *et separatim* the late Mrs. Eileen O'Hara, and

(ii) An order on the second respondents to waive the financial conditions of eligibility for legal aid which might otherwise apply to the next of kin of the Reverend Mr. David Black *et separatim* of the late Mrs. Eileen O'Hara to allow them to instruct legal representation into the deaths of their relatives at the Fatal Accident Inquiries to be held in terms of Order (i) above."

Each petitioner also seeks an award of the expenses of the petitions against the respondents, taxed on the basis of "agent and client, as if client paying", together with an additional fee under heads (a), (b), (c) and (e) of Rule of Court 42.14.

Minutes of Amendment lodged by the petitioners

[12] During the By Order hearing at which I requested that written submissions be prepared, I also indicated that I considered that the Advocate General's Office should be informed in advance that a further two day hearing was going to take place. He was and I understand that copies of the parties' written submissions were also made available to him. However, by letter dated 6 November 2008, the Court was advised that the Advocate General did not intend to appear or be represented during the hearing, on behalf of the Department of Health.

[13] In the event, at a very late stage during the continued first hearings, the petitioners tendered a minute of amendment in each petition, which seeks to convene the Advocate General as an additional respondent to the petitions. The amendments proposed include, in respect of each petition, the deletion of the words "and accordingly *ultra vires* section 57(2) of the Scotland Act 1998" from paragraph 2(c); the insertion of a new paragraph 2(d); the insertion of a new paragraph 17; and the renumbering of the subsequent sub-paragraphs.

[14] The new paragraph 2(d) proposed is in the following terms:

"2(d). Declarator that the petitioner is entitled to an independent, effective and reasonably prompt inquiry into the death of [her late mother Mrs. Eileen O'Hara / her late husband David Charles Black], at which [her/his] next of kin can be legally represented, be provided with the relevant material and be able to cross-examine the principal witnesses, and that a failure of the first respondent to provide such an inquiry is incompatible with Article 2 of the European Convention on Human Rights and accordingly ultra vires of section 57(2) of the Scotland Act 1998."

[15] The new paragraph 17 proposed is in the following terms:

"17. The Third Respondent also has a responsibility to ensure that the Petitioner obtains an independent, effective, and reasonably prompt public inquiry into the death of [her late mother Mrs. Eileen O'Hara / her late husband David Charles Black], at which [her/his] next of kin can be legally represented, have access to and be provided with the relevant material and be able to cross-examine the principal witnesses. The United Kingdom Government has the power to order and establish such an Inquiry. Reference is made to Sections 27 and 32 of the Inquiries Act 2005. The power that the Second Respondents have *(sic)* under S.28 of The Inquiries Act 2005 is insufficient to provide the Petitioner with an effective remedy. In particular an inquiry established under section 28 has:

(i) no power as to require any evidence, document or other thing to be given, produced or provided by or on behalf of Her Majesty's Government in the United Kingdom (Section 28(4));

(ii) has no power to determine any fact or to make any recommendation that is not wholly or primarily concerned with a Scottish matter (Section 28(3)), for example matters concerned with the licensing of blood and blood products as this falls within the subject matter of the Medicines Act 1968 and is therefore a non-Scottish matter reserved to the United Kingdom Government by virtue of paragraph J(4) of Schedule 6 to the Scotland Act 1998; and

(iii) has no power to require any person:

(a) to attend the inquiry to give evidence or to provide evidence to the inquiry panel in the form of a written statement;

(b) to provide or produce any documents in his custody or under his control that relate to a matter in question at the inquiry; or

(c) to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel (Section 28(3)).

except where in respect of evidence, documents or other things that are wholly or primarily concerned with a Scottish matter or for the purpose of inquiring into something that is wholly or primarily a Scottish matter.

These limitations would not apply to an enquiry brought by the United Kingdom Government whether alone (*qua.* S. 27 of the Act) or jointly (*qua.* S. 32 of the Act). The failure of the Third Respondent to have established such an Inquiry to date is incompatible with Article 2 of ECHR and accordingly in breach of section 6 of the Human Rights Act 1998."

[16] When the minutes of amendment were tendered, senior counsel for the petitioners moved that they should be received and that I should order that the existing pleadings and the minutes of amendment be served on the Advocate General. It was submitted that such a procedure would be competent (Rule of Court 58.9. - (2) (b)(ii)). Senior counsel indicated that if I was minded to order service of the minutes of amendment on the Advocate General, I should then defer issuing my Supplementary Opinion until the Advocate General had decided whether or not he intended to enter the process as a respondent. If the Advocate General did enter the process, I should then allow him to make submissions, but only on the issue of whether the orders sought against him should be pronounced. In other words, the Advocate General should not be allowed to make submissions in respect of at least some of the issues I had addressed, expressed conclusions on and decided when my earlier Opinion was issued and the interlocutors of 5 February 2008 pronounced. Senior counsel for the petitioners also argued that convening the Advocate General as a party would afford the United Kingdom Government the opportunity of giving assurances and undertakings to the Court that it and its officials would cooperate with any inquiry set up by the respondents and provide any written or oral evidence requested. As I understood what was being suggested, once I had heard any submissions from the Advocate General, and any further submissions in response on behalf of the petitioners and the existing respondents, I should issue my Supplementary Opinion.

[17] Counsel for the respondents opposed the motions to allow the minutes of amendment to be received and intimated to the Advocate General. It was submitted that the proposed amendments came too late. Allowing the minutes of amendment to be received would lead to serious delay in the conclusion of these proceedings. The respondents were trying to push matters on. Delaying the conclusion of these proceedings would lead to consequent delay in the setting up of an inquiry. In any event, it was premature for the Court to be asked to adjudicate on most, if not all, of the issues which the minutes of amendment sought to raise. The respondents had made their position quite clear. The second respondent intends to proceed by setting up an inquiry under section 28 of the 2005 Act. It is intended that inquiry will be compliant with Article 2. If, for whatever reason, the second respondent fails to establish an inquiry under the 2005 Act, then the first respondent would order FAIs, which the parties are agreed would ensure compliance with the petitioners' convention rights under Article 2. Moreover, if, following the setting up of the proposed inquiry under the 2005 Act, and the publication of its terms of reference, any party, including the petitioners, wished to challenge whether the inquiry would satisfy the convention rights of the petitioners (or of any other individuals), further proceedings could be raised in which the United Kingdom Government could be involved as a respondent.

[18] I have reached the conclusion that I should not allow the minutes of amendment to be received, or order service of the minutes of amendment on the Advocate General. In my opinion, the further procedure the petitioners propose comes very late in the day. The possibility of convening the Advocate General (or some other Minister of the United Kingdom Government) as a party to the action has been available since these proceedings were first raised. It would have been competent for the petitioners to have done so, when the petitions were raised, and to have sought to do so in advance of the first hearing before me. Indeed, the action the Court itself took to ensure that the Advocate General was advised of the first hearings, and the continued first hearings, after diets for them were scheduled, might have caused the petitioners' advisers to consider whether any amendment of the petitioners' pleadings was required.

[19] The suggestion that the Advocate General could now be convened as a party to the proceedings, in which he would be accorded the right to participate, but only on a restricted basis, is a novel proposition. It is not likely to be acceptable to the Advocate General. For that and other reasons, I am quite satisfied that were the Advocate General to be convened as a party to these proceedings at this stage, that would inject significant delay into these proceedings, delay brought about by the need to revisit various issues that I have already heard full submissions on, during this and the previous hearing. Further delay in these proceedings would almost inevitably lead to further delay in the second respondent taking the decisions necessary to set up the public inquiry that the Cabinet Secretary announced on 23 April 2008.

[20] For the reasons I set out later in this Opinion, in paras. [37]- [41], I consider there is force in the submission that until the second respondent has taken the decisions involved in setting up an inquiry under

section 28 of the 2005 Act, in particular the appointment of a chairman, the specifying of a setting-up date and the setting out of the terms of reference, it would be premature to address the question of whether a section 28 inquiry could ensure compliance with the petitioners' convention rights under Article 2. If, after the second respondent has set up an inquiry under section 28 of the 25 Act, any of the decisions it has taken are challenged, the Advocate General could, if necessary, be convened as a party to any proceedings in which such a challenge was mounted. Similarly, were the second respondent to depart from its commitment to set up an inquiry under section 28 of the 2005 Act, one can envisage the Advocate General would be involved in any further proceedings that might ensue. However, such possibilities lie in the future. Their existence does not persuade me that at this late stage in these proceedings the Advocate General should be convened as a party.

Discussions between parties since the statement by Cabinet Secretary on 23 April 2008

[21] During the hearing I was informed by counsel that since the Cabinet Secretary's statement a number of meetings had taken place between officials of the Scottish Government and representatives of the petitioners. During those meetings and in correspondence, the position of the first respondent had been made clear. It had been confirmed that she accepted that the State's investigative obligations under Article 2 are engaged. It had also been explained that Crown Counsel took the view that it was unlikely that any Fatal Accident Inquiry would be required in addition to the proposed inquiry under the 2005 Act. Counsel for the respondents confirmed that remained the position of the first respondent. However, the situation would be kept under review.

[22] The discussions had also focused on the particular statutory framework under which the proposed inquiry should be set up, the terms of reference of the proposed inquiry and procedures for the inquiry, including the remuneration of legal representation for the petitioners. Amongst the documents discussed has been the draft of a determination the second respondent is minded to make in exercise of its powers under section 40(4) of the 2005 Act. I understand that similar discussions have taken place between officials of the Scottish Government and patient groups and others, who have an interest in, and may wish to participate in, the proposed inquiry.

Declaratory orders sought by the petitioners.

(i) *Declarator that the petitioner is entitled to an independent, effective and reasonably prompt inquiry into the death of [her late husband David Charles Black /her late mother Mrs. Eileen O'Hara], at which the deceased's' next of kin can be legally represented, have access to and be provided with the relevant material and evidence, and be able to cross-examine the principal witnesses; that a failure to provide such an inquiry is incompatible with Article 2 of the European Convention on Human Rights; and that the refusal or failure of the first respondent to do so is accordingly ultra vires of section 57(2) of the Scotland Act 1998.*

[23] Having considered the submissions I received during the previous and the more recent hearings, I am prepared to grant a declarator, in each petition, to the effect that the petitioner is entitled to an independent, effective and reasonably prompt inquiry (in the case of the first petitioner into the death of Mrs. O'Hara and in the case of the second petitioner into the death of Mr. Black). However, I am not prepared to grant a declarator in the precise terms sought. I have reached those conclusions for a number of reasons.

[24] In the first place any inquiry, whether a FAI under the 1976 Act or one set up under the Inquiries Act 2005, would fall to be conducted under the statutory regimes relevant to such types of inquiry. It will be for the sheriff presiding over any FAI, or for the chairman of any inquiry set up under the 2005 Act, to determine, under reference to the relevant statutory regime, matters relating to legal representation, access to and the provision of relevant and material evidence, and the scope of cross-examination of "principal witnesses".

[25] If it was the ordering of a FAI by the first respondent that was being mooted, the petitioners would have the right to be legally represented during the public hearing that would take place before the Sheriff.

Moreover, they would be given access to, and provided with copies of, any written productions or evidence that was to be placed before the Sheriff. They would also have the right to cross-examine the witnesses who gave oral evidence in court.

[24] Were an inquiry to be established under section 28 of the 2005 Act, such an inquiry would also be a public inquiry and would be conducted by an independent person. The second respondent is proceeding with the intention that such an inquiry would comply with the petitioners' convention rights under Article 2.

[26] The enactment of the 2005 Act and the Inquiries (Scotland) Rules 2007 has resulted in significant development of the statutory framework under which inquiries can be set up, since the situation that prevailed when Hooper J. issued his declaration, at first instance, in *R (Amin)* v *Secretary of State for the Home Department* [2004] 1 AC 653.

[27] If an inquiry is set up under section 28 of the 2005 Act, it is reasonable to assume that each petitioner would be designated as a core participant (Rule 4); that each petitioner could appoint a qualified lawyer to act on their behalf during the inquiry; and that the chairman of the inquiry would recognise the petitioner's lawyers as their recognised legal representatives in respect of the proceedings of the inquiry (Rule 5(2)).

[28] In these circumstances, I have reached the conclusion that there is no reason why I should not grant a declarator that provides that the petitioners have a right to an inquiry in which the deceased's next of kin may be involved to the extent necessary to ensure compliance with their rights under Article 2 of the European Convention on Human Rights, and during which they can be legally represented. Such a declarator would cover issues that have been central to the submissions I heard during both the earlier hearing and the more recent hearing.

[29] However, the statutory regime under which any inquiry under section 28 of the 2005 Act would take place allows for an inquiry to be of an inquisitorial nature. It allows the chairman of the inquiry discretion as to the procedure to be followed, in the recovery of evidence (section 21 of the 2005 Act), in the taking of oral evidence (section 17 of the 2005 Act and Rule 9 of the 2007 Rules), and in the regulation of public access to the evidence and documents before the inquiry (section18 of the 2005 Act and Rule 11 of the 2007 Rules). In such circumstances I do not consider that it would be appropriate for me to pronounce, <u>at this stage</u>, any declaratory order that might circumscribe the discretion of the chairman of the proposed inquiry, under section 28 of the 2005 Act; or otherwise seek offer guidance, let alone prescribe how he should discharge his statutory powers and duties. I have some reservations as to whether it would be competent to do so. In any event, it would be entirely premature for the Court to do so.

[30] It will be for the chairman of the proposed inquiry under the 2005 Act to take his own decisions as to the recovery of evidence and material and as to which evidence and material should be copied to the petitioners and other parties. In reaching such decisions, it may be necessary for the chairman to have regard not only to the issue of the relevance of the evidence and material to the terms of reference, but also to the rights of others (see section 22 (1) of the 2005 Act). In my opinion, such considerations render it inappropriate to include in any declarator a reference in the terms sought by the petitioners to their entitlement to evidence and material.

[31] Likewise it will be for the chairman of the proposed inquiry to decide which witnesses should be called to give oral evidence and to determine the scope of any cross-examination of their evidence, which he is prepared to allow. Until the chairman has decided which witnesses are to be giving evidence during the proposed inquiry, what topics their evidence will cover, and which witnesses, and to what extent, the petitioners are to be allowed to cross-examine, any reference to the petitioners being "able to cross-examine the principal witnesses" would be relatively meaningless. That is particularly so since the jurisprudence of the European Court of Human Rights does not require that the right to cross-examine witnesses is an essential element of compliance with Article 2 (see *R (on the application of D)* v *Secretary of State for the Home Department* [2006] HRLR 24, paras. 37 - 42). In any event it will be for the chairman of the proposed inquiry under the 2005 Act to reach his own decisions on such issues, decisions which could be made the

subject of further judicial review proceedings, if any party to the inquiry, including but not limited to the petitioners themselves, deemed that to be an appropriate course of action to follow.

[32] In reaching the decisions he has to take, the chairman of the proposed inquiry will be aware that it is now accepted by all parties to these proceedings that following upon the deaths of Mrs. O'Hara and Mr. Black Article 2 was engaged. In this regard, I was also addressed on the Court's power to ensure that any violations of convention rights under Article 2 are being remedied (see *R (Hammond)* v *Secretary of State for the Home Department* [2006] 1 AC 603).

[33] However, I am not prepared to qualify the declarator I intend to pronounce by inclusion of the words "insofar as it is within their respective powers to do so". As far as the first respondent is concerned, it is a matter of agreement between the parties that she has power to order a FAI and that a FAI would achieve compliance with the obligations of the United Kingdom which arose under Article 2 following the deaths of Mrs. O'Hara and Mr. Black.

[34] The second respondent can only act within its statutory powers. The second respondent has had ample time since I issued my earlier Opinion to decide whether its statutory powers are sufficient to set up an inquiry that would ensure compliance with the convention rights of the petitioners. Nothing has been said publicly on behalf of the second respondent, whether to the Scottish Parliament or in submissions before me, to suggest that, since the issue of my earlier Opinion, or indeed since the statement made by the Cabinet Secretary on 23 April 2008, the second respondent has reached the conclusion that its own statutory powers are insufficient to convene an inquiry that would ensure compliance with the petitioners' convention rights. On the contrary, it was contended in second respondent's written submissions for the recent hearing that it is unlikely that full compliance with article 2 would also require steps to be taken by others. If a different view was now to be taken, and the second respondent was to reach the conclusion that its own statutory powers under the 2005 Act are insufficient, I am confident that the petitioners would be so advised. I would certainly expect that to be done.

[35] Nor, having regard to what the Cabinet Secretary told the Scottish Parliament about the decision taken by the second respondent to set up an inquiry under section 28 of the 2005 Act, and what I have been informed is the position of the first respondent in light of that decision, would I be prepared to include in the declarator a specific provision relating to any refusal or failure of the first respondent being ultra vires of section 57(2) of the Scotland Act 1998. In my opinion, standing the second respondent's commitment to hold an inquiry under the 2005 Act, it would be inappropriate to include such a specific provision directed solely against the first respondent and based on an allegation of failure on her part alone.

[36] In these circumstances, I am prepared to grant a declarator in the following terms:

"Declarator that the petitioner is entitled to an independent, effective and reasonably prompt inquiry into the death of [her late mother Mrs. Eileen O'Hara/her late husband David Charles Black], in which the deceased's next of kin may be involved to the extent necessary to ensure compliance with their rights under Article 2 of the European Convention on Human Rights, and during which they can be legally represented; and that any continuing failure to hold such an inquiry is incompatible with Article 2."

(ii) Declarator to the effect that "an inquiry which was to be held under and in terms of Section 28 of the Inquiries Act 2005 alone would not, in fact, be compatible with the requirements of providing an effective remedy for the established breaches of the petitioners' Article 2 rights".

[37] Although they did not seek to do so in their written pleadings, or during the earlier hearing before me, the petitioners now assert that the setting up of a section 28 Inquiry would not amount to compliance with the duty to investigate the deaths of Mrs. O'Hara and Mr. Black which arise under Article 2. Such an assertion was included in their written submissions, lodged in advance of the recent hearing. In advancing this branch of his arguments, senior counsel for the petitioners indicated that a joint inquiry under sections 32 and 33 of the 2005 Act would meet the United Kingdom's obligations under Article 2. His submissions as to the alleged

incompatibility of any section 28 Inquiry with Article 2 amount to a development of some significance from what had been argued on behalf of the petitioners during the original hearing. As is clear from para.[32] of my earlier Opinion, what the petitioners invited me to do at that stage was to rule on the question of whether or not the actings of the respondents since the deaths of Mrs O'Hara and Mr. Black had been compatible with the obligations on them under Article 2. In the event, having regard to the issues raised by the respondents (para.[31]) and the orders sought by the petitioners in their written pleadings (para.[32]), I addressed a number of other questions.

[38] I am not prepared to grant any declarator along the lines sought. If an inquiry under the 2005 Act is to be set up, which I understand from the Cabinet Secretary's statement and counsel for the respondents is what is proposed, it is for the second respondent to decide, on their own or after discussion with the United Kingdom Government, whether the inquiry should be a Scottish Inquiry under section 28 or whether a Joint Inquiry under section 32 and 33 is required. It is only once such a decision has been reached, the chairman has been appointed in terms of section 4, *and* the terms of reference for the inquiry have determined and made public under section 5, that a Court might be in a position to review whether the inquiry, set up under section 28 or sections 32 and 33, would be capable of ensuring compliance with the convention rights of the petitioners under Article 2. In my opinion, consideration of the detailed terms of reference would be an important element of such a review. So also might be clear information from the United Kingdom Government as to the evidence and level of co-operation that would be provided to the chairman of the inquiry.

[39] In my opinion, it would be premature for the Court to make any ruling as to whether a section 28 Inquiry could meet in full the obligations on the United Kingdom that arose under Article 2 following upon the death of Mrs. O'Hara and Mr. Black. Addressing that question would involve the Court considering, amongst other issues, not only the possible scope of the terms of reference of a section 28 inquiry, but the procedure that the chairman of the Inquiry might follow, and the arrangements that might be made by (a) the chairman of the Inquiry in regulating the role that could be played during the inquiry of any legal representatives instructed by the petitioners, and (b) the chairman of the inquiry and the second respondent for the funding of any such representation. Certain of these issues could equally well arise in the context of a joint inquiry. For similar reasons, it would be quite inappropriate for the Court to provide detailed guidance, whether to the respondents or for the benefit of others, as to the setting up and conduct of a joint inquiry into the deaths of Mrs. O'Hara and Mr. Black.

[40] In reaching my decision in respect of this proposed declarator, I have taken full account of the views I expressed in paras. [114], [115], [125], [155] and [156] of my earlier Opinion. I am also conscious that the respondents have available to them the judgments in cases such as *Jordan* v *United Kingdom* (2001) 37 EHRR 656 and *R (Amin)* v *Secretary of State for the Home Department* [2004] 1 AC 653, which discuss and set out the general principles that are applicable to inquiries that are required to comply with the procedural aspect of Article 2. However, I am also conscious that the decision as to whether any inquiry under the 2005 Act should be set up under section 28 or sections 32 and 33 is not a decision for me to take, any more than it is for me to frame the terms of reference for such an inquiry. These are decisions for the second respondent, in the taking of which the United Kingdom Government may have a significant role to play. Such decisions have to be taken by the second respondent, and others, in the light of all the information to which they have access, which includes a substantial body of information relating to the contamination of blood and blood products with the Hepatitis C virus and HIV that is not before me.

[41] Once such decisions have been taken, and the proposed inquiry has actually been set up, a chairman appointed and terms of reference determined, it will be for any party who considers that they have title and interest to challenge such decisions, and that there are grounds for doing so, to decide whether they wish to initiate further proceedings and seek judicial review of those decisions. Were further proceedings to be initiated, parties other than the parties to the present proceedings might be convened as respondents to the proceedings or seek leave to enter the proceedings, if they had any title and interest in doing so. If the argument was that an inquiry set up under section 28 the 2005 Act, into deaths resulting from infection with the Hepatitis C virus, would not comply with Article 2, whether on account of the scope of the terms of

reference decided by the second respondents, the procedure laid down by the legislation, or the procedure being followed by the chairman, such other parties would have as much right to be heard on the issues involved as the petitioners have. That reinforces my view that it would be inappropriate for the Court to intervene in the manner sought by the petitioners in advance of the relevant decisions having been made. In judicial review proceedings, the Court has the power, which is provided for in Rule of Court 58.4 (b), to make such orders, as it thinks fit, in relation to the decision under review. However, such power requires to be exercised with discretion. On occasion that may involve the Court having regard to the wider public interest, including the interests of others who are not parties to the proceedings, in addition to paying due attention to the interests of the parties themselves.

(iii) Declarator that "an Article 2 compliant inquiry in the circumstances of the present petition would require the inquiry, at the very least, to be empowered: to investigate the deaths of Reverend David Black and Mrs. Eileen O'Hara including the circumstances in which each of them became infected with the Hepatitis C virus with a view to identifying: the reasonable precautions, if any, whereby their deaths, and the Hepatitis C infection which resulted in or contributed to their deaths, might have been avoided; the defects, if any, in any system of working which contributed to their deaths; the public officials and authorities who were responsible for the systems that were in place for the collection of blood donations and the use of the blood thus collected for blood transfusions and the preparation of blood products for clinical use and determining whether any of those public officials or authorities should be held to account; and any other facts which are relevant to the circumstances of the deaths".

[42] For similar reasons, I am not prepared to grant declarators in these terms. Here again, I am being invited by the petitioners to grant an order which could be construed as (a) amplifying upon the provisions of the 1976 Act, which would be relevant to any FAI that might be ordered, or (b) prescribing, at least in part, the terms of reference for any inquiry under the 2005 Act. In my earlier Opinion, I discussed some of the questions that may arise following upon the deaths of Mrs. O'Hara and Mr. Black. I have little doubt that the terms of my earlier Opinion and of this Opinion will be available to any Sheriff who holds a FAI into the deaths of Mrs. O'Hara and Mr. Black or to those responsible for setting up and conducting any inquiry under the 2005 Act. It is a matter for such individuals to decide what regard they should have to the terms of those Opinions. It is not for me to add to the statutory framework within which any inquiry might be held, to prescribe any part of the remit or terms of reference of any such inquiry, to lay down the details of any procedure that any inquiry must follow or to place any limitations on the exercise of any statutory powers and duties by anyone setting up or conducting such an inquiry. Not only are these issues on which parties other than the parties to these proceedings may have a right to be heard at the appropriate time, it would be contrary to the public interest if the person conducting such an inquiry considered he had been restricted by a ruling made without any reference to him. The provisions of Section 6 of the 1976 Act set out the scope of the determination that the Sheriff is required to make at the conclusion of a FAI. Those provisions include certain of the issues set out in the proposed declarator. More importantly, they entitle the Sheriff to set out in his determination "any other facts that are relevant to the circumstances of the death" being inquired into. As far as the setting up of an inquiry under the 2005 Act is concerned, the primary legislation provides that it is for the minister setting up the inquiry to set out the terms of reference and that he must consult the person he proposes to appoint as chairman before he does so (section 5). In such circumstances, it would an error for the Court to prescribe the detailed terms of any parts of the terms of reference.

(iv) Declarator that "any a priori capping of hours for the work to be done by legal representatives of the families of the deceased in the proposed inquiry is not compatible, in the circumstances, with the requirements of Article 2 ECHR".

[43] Section 40 of the 2005 Act provides as follows:

"Expenses of witnesses etc.

(1) The chairman may award reasonable amounts to a person -

(a) by way of compensation for loss of time, or

(b) in respect of expenses properly incurred, or to be incurred, in
attending, or otherwise in relation to, the inquiry.

(2) The power to make an award under this section includes power, where the Chairman considers it appropriate, to award amounts in respect of legal representation.

(3) A person is eligible for an award under this section only if he is -

(a) a person attending the inquiry to give evidence or to produce any document or other thing, or

(b) a person who, in the opinion of the chairman, has such a particular interest in the proceedings or outcome of the inquiry as to justify such an award.

(4) The power to make an award under this section is subject to such conditions or qualifications as may be determined by the Minister and notified by him to the chairman."

[44] During his submissions in respect of this proposed declarator, senior counsel lodged a draft of a Determination by the second respondents under section 40(4) of the 2005 Act, which the second respondent has prepared. I was informed that the draft had been provided to the petitioners' solicitors during the discussions that followed the statement by the Cabinet Secretary to the Scottish Parliament. I do not intend to rehearse the detailed contents of that document. It is sufficient if I record that it deals with the procedure to be followed in relation to the making off financial awards in respect of legal representation under sections 40(1) and (2) of the 2005 Act. It provides, *inter alia*, that awards can only be made in circumstances in which the chairman considers it necessary, fair, reasonable and proportionate for such an award to be made; that awards can only be made to legal representatives whose involvement in the inquiry has been approved in advance by the chairman; that awards can only be made in respect of work falling within the scope of work which has been agreed in advance; for the agreement in advance of hourly rates, which are subject to specified maximum figures; and for restrictions as to the number of hours that legal representatives can charge for.

[45] Any determination under section 40(4) would be susceptible to judicial review if there were grounds for challenging it. However, I am quite satisfied that I should not grant declarators in the terms sought. The draft determination produced does not cap or limit the number of hours that could be worked by legal representatives of the relatives of the deceased, which is what the proposed declarator is directed against. What a determination in the terms of the draft would do would be to place a limit on the number of hours of work that would be remunerated out of public funds.

[46] In my opinion, it is would be premature for the Court to intervene on the issue as to the level of remuneration that should be paid out of public funds to the legal representatives of the relatives of Mrs. O'Hara and Mr. Black. The making of awards under section 40 of the 2005 Act is a matter for the chairman of the inquiry. No chairman has been appointed. No determination under section 40(4) has been made by the second respondent. No proper assessment could be made at this stage, and certainly not by the Court, as to the nature, scope and extent of the work that will require to be carried out by the legal representatives of the relatives of Mrs. O'Hara and Mr. Black during the proposed inquiry under section 28 of the 2005 Act. The chairman of the proposed inquiry, once he has been appointed, and once he has had the opportunity to consider the work that will be involved in discharging his statutory duties, will be able to make such an assessment. It is only once the chairman has carried out that assessment, and once the chairman and the solicitor to the inquiry have taken the decisions that they will require to take, in accordance with the provisions of section 40 and of any determination made under section 40(4), that the Court would be able to determine whether the funding of the costs of legal representation for the next of kin of Mrs. O'Hara and Mr. Black during the inquiry involved any continuing violation of Article 2 or any violation of Article 14.

[47] More importantly perhaps, if any such decisions required to be brought before the Court once the chairman to the proposed inquiry has been appointed, he could be convened as a party to the proceedings. As such he would be able to provide the Court with a much fuller picture than the parties to the present proceedings would be able to do about how the inquiry proposes to proceed and the scope, nature and extent of any work that it is intended that the legal representatives of the relatives of Mrs. O'Hara and Mr. Black, and the legal representatives of other core participants should be remunerated for. In my opinion, if issues of the nature that the petitioners seek to ventilate under reference to the capping of remuneration, were to be ventilated in court proceedings, it would be important that the Court should have before all the relevant information. It would also be important that the Court was able to hear submissions on behalf of all those who had a statutory role to discharge in the making of the awards of remuneration which would be subject to the capping under challenge.

(v) Declarator to the effect that "a properly Convention compliant inquiry requires that the legal representatives instructed on behalf of the family be paid at rates no less than paid to other publicly funded counsel appearing on behalf of respondents or as counsel to the inquiry et separatim that the solicitors for the families will receive public funding at rates which both cover their costs and overheads as well as provide them with a reasonable margin of profit".

[48] I have no hesitation in refusing to grant a declarator in these terms, which as I construe them would apply to FAIs and inquiries under the 2005 Act. I am unaware of any authority, whether domestic or forming part of the Strasbourg jurisprudence, which requires that in a litigation in which the legal representatives of more than one party are publicly funded, any legal representative (or team of legal representatives), who is being remunerated from public funds requires to be paid at the same rate as any other legal representative (or team of legal representatives) who is also remunerated out of public funds. Within the context of a FAI it is easy to imagine that certain publicly funded counsel might be paid more or less than others. During a long running FAI the procurator fiscal or Advocate depute appearing for the first respondent might earn more, or equally might earn less, than a senior counsel instructed on behalf of relatives of the deceased. In another FAI a different balance might apply, as between the remuneration of the legal representatives of the deceased, paid at legal aid rates, and that of the lawyers acting for public authorities, who had the right to appear and be represented during the FAI.

[49] In the context of an inquiry under the 2005 Act, it is perfectly possible to imagine counsel and solicitors, who are being remunerated out of public funds, having significantly different roles to play. It is possible, to put it no higher, to assume that in the context of the section 28 inquiry, which the second respondent proposes to set up, the role and responsibilities of counsel to the inquiry might be more onerous that those of counsel acting for the relatives of a single deceased, who had died of Hepatitis C or HIV. Likewise as between different public authorities, who might wish to take part in the proposed inquiry, the roles and responsibilities of their respective counsel and solicitors may vary. Were that to be the position, it would hardly be surprising if the rates of remuneration paid out of public funds also varied. In these circumstances, it might be difficult to argue that compliance with Article 2 required a State to ensure that the legal representatives of the relatives of a single deceased were remunerated at the highest rates at which any other lawyer engaged in the inquiry was to be remunerated out of public funds.

[50] The proposed declarator also seeks to deal with the rates of remuneration of the solicitors instructed to act for the petitioners at the proposed inquiry by requiring that the rates "both cover their costs and overheads as well as provide them with a reasonable margin of profit". It my opinion, it would be entirely inappropriate for the Court to grant a declarator in such terms, not least of all because it would constitute detailed interference with the exercise of the statutory powers to be found in sections 40(2) and (4) of the 2005 Act. If the petitioners decided to be separately represented, or if the relatives of other persons who had died from Hepatitis C sought to be separately represented, the declarator sought could theoretically result in certain solicitors being remunerated at higher rates than others, merely because their "costs and overheads" were higher.

[51] What the Strasbourg jurisprudence requires is that the investigation of the death be effective and that the relatives of the deceased whose death is being investigated, should be able to participate in the inquiry to the extent necessary to safeguard their legitimate interests and by doing so make the inquiry effective (see *Jordan* v *United Kingdom* (2001) 37 EHRR 52 and *R (Khan)* v *Secretary of State for Health* [2004] 1 WLR 971).

[52] Consideration of issues involved in funding legal representation may also involve taking account of the financial circumstances of the petitioners about which there is no information before the Court. It is also important to bear in mind that the stated intentions of the second respondent, who of course include the first respondent in her capacity as a Scottish Minister, is that the proposed inquiry is intended to be convention compliant.

[53] In these circumstances, it is, in my opinion, premature for this Court to address questions of the nature that are said to form the factual and legal bases for seeking a declarator in these terms.

Positive orders sought by the petitioners

(i) An order on the first respondent to hold Fatal Accident Inquiries under and in terms of the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 into the deaths of the late Reverend Mr. David Black et separatim the late Mrs. Eileen O'Hara.

[54] Having regard to the position of the first respondent, as I have recorded it in para. [21] of this Opinion, it would be inappropriate for the Court to order the first respondent to hold FAIs into the deaths of Mrs. O'Hara and Mr. Black. The situation might change, but only were (a) the second respondent to decide that it no longer intended to set up an inquiry under the 2005 Act, whether on its own or whilst acting with the United Kingdom Government, (b) the United Kingdom Government to decline to establish an inquiry under the 2005 Act, and (c) the first respondent, in the face of such decisions, to refuse to hold FAIs.

(ii) An order on the second respondents to waive the financial conditions of eligibility for legal aid which might otherwise apply to the next of kin of the Reverend Mr. David Black et separatim of the late Mrs. Eileen O'Hara to allow them to instruct legal representation into the deaths of their relatives at the Fatal Accident Inquiries to be held in terms of Order (vi) above.

[55] I have already explained that at this stage I do not propose to order the first respondent to hold FAIs. In such circumstances it would be inappropriate to pronounce a positive order of the nature sought.

[56] During his submissions in support of the granting of this order, senior counsel for the pursuer referred me to *R (Khan)* v *Secretary of State for Health* [2004] 1 WLR 971, at paras. 86 - 99, and to the provisions of The Community Legal Service (Financial) (Amendment No.2) Regulations 2003 ("the 2003 Regulations"). It is instructive to note that in *R(Khan)* the Court was interested to be informed whether any statutory powers existed which would allow either the Lord Chancellor, in exercise of his legal aid responsibilities, or the Secretary of State for Health to fund legal representation of the immediate family of a 3 year old child who had died in hospital. The hearing was adjourned and during the adjournment the 2003 Regulations were enacted. The provisions of the 2003 Regulations grant the Legal Services Commission a discretionary power, if it considers it equitable to do so, to request the Secretary of State to disapply the eligibility limits in the Community Legal Services (Financial) Regulations 2000, and the Secretary of State a discretionary power to do so, if he thinks fit on receipt of such a request. The order sought by the petitioners goes further. It invites the Court to direct the second respondent (and presumably also the Scottish Legal Aid Board) to waive the statutory provisions relating to financial conditions of eligibility for legal aid, some of which are set out in primary legislation, and to do so in the absence of full information as to the financial circumstances of the next of kin of Mrs O'Hara and Mr. Black. It is extremely doubtful whether that would be a proper course of action for the Court to take.

Expenses
[57] The petitioners originally sought an award of expenses against the respondents taxed on the basis of "agent and client, as if client paying" and an additional fee under heads (a), (b), (c) and (e) of Rule of Court 42.14.

[58] It is now a matter of agreement between the parties that I should find the petitioners entitled to their expenses in the petition, taxed as between party and party, up to and including 5 February 2008 and that I should allow the petitioners an additional fee under heads (a), (b), (c) and (e) of Rule of Court 42.14.

[59] It was also a matter of agreement that I should reserve all questions of the expenses of the petitions since 5 February 2008.

Further procedure

[60] In each petition, I will pronounce an interlocutor that gives effect to the decisions that are set out in this Supplementary Opinion. Having regard to the time that has elapsed since the Cabinet Secretary made her statement to the Scottish Parliament, I have reached the view that I should also fix a further By Order hearing in each petition. These will take place on a date to be afterwards fixed, which will be approximately 4 -5 weeks after the date when this Supplementary Opinion is issued. At those By Order hearings, I will wish to be addressed on behalf of the respondents as to whether the second respondent has taken each of following decisions:

(a) a decision in terms of section 1(1) of the 2005 Act to cause an inquiry to be held under the provisions of section 28 of the 2005 Act into the deaths of Mrs. Eileen O'Hara and the Reverend David Charles Black;

(b) a decision in terms of section 4(1) of the 2005 Act to appoint the chairman of the inquiry;

(c) a decision in terms of section 5(1)(a) of the 2005 Act to specify the date that is to be the setting-up date of the inquiry for the purposes of the 2005 Act; and

(d) a decision in terms of section 5(1)(a) of the 2005 Act to set out the terms of reference of the inquiry.

Assuming such decisions are taken by the date of the By Order Hearings, I expect a further statement will have been given to the Scottish Parliament in compliance with the provisions of section 6 of the 2005 Act. I would wish to be provided with a copy of any such statement and also with copies of any documentation relating to such decisions, which is required by the provisions of sections 4 and 5 of the 2005 Act.

[61] In my opinion each of the four decisions I have identified will require to be taken, before any inquiry under section 28 of the 2005 Act would be properly constituted and be in a position to proceed to consider evidence. If by the date of the By Order hearings the second respondents have not taken each of these decisions, I will expect to be addressed on behalf of the respondents about the further actions which each of them propose to take to ensure that the convention rights of the petitioners under Article 2 are going to be complied with.

[62] I anticipate that once I have been has addressed on these matters, it will be possible to determine what further procedure (if any) will be required in the present petitions.