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Ref: **WEAC5967**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered: **20/11/2007**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY EDWARD JAMES BRADLEY
FOR JUDICIAL REVIEW

WEATHERUP J

[1] Francis Joseph Bradley was shot dead by the SAS near Toomebridge on 18 February 1986. An Inquest was held into the death in February 1987. The applicant is the next of kin of the deceased. This application is also representative of a number of other applications relating to deaths occurring before the commencement of the Human Rights Act 1998 on 2 October 2000 where the deaths occurred at the hands of the security forces or involved concerns about collusion with security force members. In each case the Inquests into the deaths have already been completed. Mr McDonald QC and Ms Quinlivan appeared for the applicant and Mr McCloskey QC and Mr McMillen appeared for the respondent, the Chief Constable of the Police Service of Northern Ireland (PSNI).

[2] In 2002 the applicant's solicitors, as a result of involvement in investigations into other controversial shootings, raised with the PSNI concerns about the extent of disclosure of documents made by the police to the Coroner for the purposes of the Inquest into the death of the deceased in 1987. It was suggested that not all information available to the police had been forwarded to the Coroner.

[3] The applicant then applied for judicial review of the decisions made by the police in relation to the disclosure made to the Coroner. The relief sought may be summarised as follows –

(1) A declaration that the Chief Constable's failure to provide the Coroner with all documentation in the possession of the police concerning the death was a

breach of Sections 8 and 17 of the Coroners Act (Northern Ireland) 1959.

(2) A declaration that the Chief Constable's failure to provide the Coroner with all such documentation meant that the inquest was conducted in breach of the terms of the 1959 Act.

(3) An order of mandamus compelling the Chief Constable to provide the Coroner with all such documentation.

(4) An order of mandamus compelling the Chief Constable to provide the applicant with all such documentation, subject to any claim for public interest immunity.

[4] Section 8 of the Coroners Act (Northern Ireland) 1959 provides –

> "Whenever a dead body is found, or an unexpected or unexplained death, or a death attended by suspicious circumstances, occurs [the police]........ shall give or cause to be given immediate notice in writing thereof to the coroner within whose district the body is found or the death occurs, *together with such information also in writing as he is able to obtain concerning the finding of the body or concerning the death."*

Section 17(1) of the 1959 Act provides –

> "Where a coroner proceeds to hold an inquest, whether with or without a jury, he may issue a summons for any witness whom he thinks necessary to attend such inquest at the time and place specified in the summons, for the purpose of giving evidence relative to such dead body and shall deliver or cause to be delivered all such summonses to a constable who shall forthwith proceed to serve the same."

[5] The application for judicial review was adjourned pending the decision of the House of Lords in McCaughey v. Chief Constable of PSNI [2007] UKHL 14. The issue concerned the extent of the duty of the Chief Constable under section 8 of the 1959 Act to provide documents to the Coroner. Lord Bingham, with whom the other members of the House of Lords agreed, concluded at paragraphs 44 and 45 –

> "Plainly, section 8 requires the police to give immediate notice to the coroner in the

> circumstances specified, and to give the coroner such information as they are then able to obtain. But the coroner has to decide not only whether to hold an inquest (for which purpose he must make his own investigation: section 11), but also whether a jury is necessary or desirable, and what the inquest should investigate. It would so plainly frustrate the public interest in a full and effective investigation if the police were legally entitled, after giving the initial section 8 notice, to withhold relevant and perhaps crucial information coming to their notice thereafter, that I cannot accept that the Senate and the House of Commons of Northern Ireland intended such a result. It is clear that the police have regarded the function of continuing to supply information gathered after the initial notice as the performance of a duty and in my opinion section 8, on a purposive construction, requires no less.
>
> I would accordingly allow Mr McCaughey's appeal on this point, and declare that section 8 of the 1959 Act requires the Police Service of Northern Ireland to furnish to a coroner to whom notice under section 8 is given such information as it then has or is thereafter able to obtain (subject to any relevant privilege or immunity) concerning the finding of the body or concerning the death."

[6] When evidence was filed in 2003 on behalf of the police in this application for judicial review, David Mercier, the legal adviser of the Chief Constable, produced appendix A, being a list of documents which were provided by the police to the Coroner prior to and during the conduct of the Inquest. He also produced appendix B, being a list of documents from the police investigation file in respect of the death, but which were not included in appendix A. It was explained that at the time of the Inquest there had been no uniform system operated by the police in respect of the provision of materials to a Coroner conducting an Inquest into a death nor had there been any uniform practice among Coroners laying down any prescriptive rules as to exactly what documents had to be provided for the purposes of an Inquest.

[7] After the decision of the House of Lords in McCaughey v. The Chief Constable of PSNI a further trawl of police papers was carried out to identify documents relating to the death of Francis Bradley. Jacqueline Moore, assistant legal adviser of the PSNI, produced appendix C, being a list of documents in the possession of the police that had come to light since Mr Mercier's affidavit

of 2003. It was explained that a trawl of the police estate had been carried out which had been facilitated by the Historical Inquiries Team set up in 2005 and that further enquiries had been made by the legal services branch of PSNI with relevant police stations. It is clear that there is some overlap between appendix A, appendix B and appendix C.

(1) Did the police comply with the continuing duty of disclosure of relevant documents to the Coroner for the purposes of sections 8 and 17 of the 1959 Act?

[8] Mr McMillen on behalf of the PSNI contends that it is not possible to reach a conclusion as to the dates on which documents came into the possession of the police and it is not possible to conclude that any particular document would be relevant to the issues that arose at the Inquest. Consideration of the contents of appendix B and appendix C indicates that many if not all of the documents referred to were, on the balance of probabilities, in the possession of the police before the completion of the Inquest. Further it may be concluded on the balance of probabilities that many if not all of the documents in appendix B and appendix C would have been relevant to the issues at the Inquest. In any event the duty on the police extended to the disclosure to the Coroner of all documents identified by the police as being relevant to the finding of the body or the death, which includes all the documents in appendix B and appendix C that were capable of being produced by the police before the conclusion of the Inquest. The relevance of the documents to the issues at the Inquest was a matter to be determined by the Coroner.

[9] Some of the documents in appendix B and appendix C may have come into the possession of the police after the Inquest, although no particular documents have been identified as being in that category. The position in relation to documents that might have come into the possession of the police after the conclusion of the Inquest will arise during consideration of the third question below. Accordingly the first question is concerned with disclosure by the police to the Coroner up to the completion of the Inquest. In answer to the first question, the police did not comply with the duty of disclosure to the Coroner under section 8 of the 1959 Act, which was a continuous duty to produce such information in writing as the police were able to obtain concerning the finding of the body or concerning the death.

[10] Section 17 of the 1959 Act is concerned with witnesses to be summoned by the Coroner to attend the Inquest. Had the police made full disclosure of documents the Coroner may have issued additional witness summonses. However section 17 empowers the Coroner to summon witnesses and it does

not follow that the action of the Chief Constable in failing to provide documents to the Coroner constitutes a breach of section 17 of the 1959 Act.

(2) Did the failure of the police to provide all information to the Coroner result in the Inquest being conducted in breach of the 1959 Act.

[11] Whether the failure of the Chief Constable to comply with the terms of section 8 of the 1959 Act means that the Inquest that was conducted was itself in breach of the terms of the 1959 Act may depend upon the materiality of the information not furnished to the Coroner to the issues concerning the finding of the body or concerning the death of the deceased. The description of the documents contained in appendix B and appendix C suggests that the contents may have been material to the issues arising at the Inquest but without sight of the documents and a rehearsal of the issues arising at the Inquest it is not proposed to make any determination as to the compliance of the Inquest with the terms of the 1959 Act.

(3) Should the police be ordered to produce <u>to the Coroner</u> the documents referred to in appendix B and appendix C?

[12] The Inquest having been completed, the Coroner is functus officio and has no power to hold a second Inquest, unless the first Inquest has been quashed by the Court. Leckey and Greer on Coroners' Law and Practice in Northern Ireland at paragraph 11-29 cites <u>*R v White*</u> (1860) 3 E&E 137, 121 ER 394 to that effect. In addition a second Inquest may be held if the Coroner is so directed by the Attorney General under section 14 of the 1959 Act, a matter discussed below.

[13] However the Coroner does retain certain residual powers in relation to a death where the Inquest has been completed. Jervis on Coroners (12th Ed) from paragraph 18.01 expands as follows –

> "A coroner's power to enquire into a particular death is not general and capable of exercise from time to time. Instead, it is limited, and in the absence of statutory or judicial authority can be exercised once only. Enquiry into the death having been completed, the coroner no longer has any inquest jurisdiction in relation to it: in the old Latin expression, he is *functus officio*. Although this is a convenient shorthand, it must be borne in mind that this does not necessarily mean that *all* powers of the coroner have ceased in relation to the particular death; usually it means only

> that the power to hold an inquest has done so. Other powers (e.g. correction of errors in certificates, exhumation, and so on) are usually still exercisable. But a coroner who attempts to make further enquiry, and in particular to hold a second inquest into a particular death without having been ordered to do so by the court, will be restrained from so acting."

[14] The boundary between the Coroner being functus officio and having residual powers was considered recently by the Court of Appeal in England and Wales in Terry v. East Sussex Coroner [2002] QB 312. It was decided that the Coroner was not functus officio after issuing a certificate under section 19 of the 1988 Act that the cause of death was as disclosed in the post mortem report. The Coroner had been satisfied that there was no reason to hold an Inquest into a death and he issued the statutory certificate confirming that the cause of death was as disclosed by the post mortem report. Subsequently the deceased's family requested the Coroner to hold an Inquest on the basis of new evidence and the Coroner refused. The Court of Appeal upheld the Coroner's decision. At paragraph 4 Simon Brown LJ stated –

> "When does a coroner become functus officio? Certainly he does so once an inquest has been held. Even if important new evidence then comes to light, there cannot be another inquest into the death unless and until the High Court so orders under section 13 of the 1988 Act. In Re Rapier deceased [1988] QB 26 illustrates the point, the section 13 application there having been initiated by the coroner himself. Equally certainly the coroner does not become functus officio merely because he decides that he has no duty (and, therefore, no power) to hold a inquest under section 8 of the 1988 Act, and notifies the Registrar of Deaths of his decision by what is colloquially called Pink Form A – see this court's decision in R (Touche) v. Inner London North Coroner [2001] QB 1206 as a recent case in point. What is for decision on this appeal is whether a coroner becomes functus officio if, following a post mortem examination ordered by him under section 19 of the 1988 Act, he decides that an inquest is unnecessary and sends the Registrar of Deaths a certificate in what is known as Pink Form B showing the cause of death as that disclosed by the post mortem examination report."

[15] The applicant accepts that the Coroner will be functus officio for most purposes but contends that nevertheless there are certain continuing functions

that include the duty to receive documentation from the police concerning the finding of the body or concerning the death. Reference is made to the Coroners Practice and Procedure (Rules) (Northern Ireland) 1963 which provide for continuing powers of the Coroner in relation to documents as follows –

> "36. Any document (other than an exhibit at an inquest) in the possession of a coroner in connection with an inquest or post mortem examination shall, unless a court otherwise directs, be retained by the coroner for at least 10 years;
> Provided that the coroner may at any time deliver any such document to any person who in the opinion of the coroner is a proper person to have possession of it.
>
> 38. A coroner may, on an application and without charge, permit any person who, in the opinion of the coroner, is a properly interested person to inspect any report of a post mortem examination, or any notes of evidence, or a document put in evidence at an inquest."

[16] These rules provide for administrative oversight by the Coroner of documents connected to the Inquest or the post mortem examination, with the power to make disclosure to properly interested persons. I am satisfied that the powers of the Coroner do not invest the Coroner with further investigative powers in relation to the death once the Inquest has been completed. To hold otherwise in relation to those powers would in effect be to disregard the position stated above in relation to the Coroner being functus officio.

[17] A new Inquest may be ordered by the Attorney General. Section 14 of the 1959 Act provides that –

> "Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner (whether or not he is a coroner for the district in which the death has occurred) to conduct an inquest into the death of that person, and that coroner shall proceed to conduct an inquest in accordance with the provisions of this Act (and as if, not being the coroner for the district in which the death occurred, he were such coroner) *whether or not he or any other coroner has viewed the body, made any enquiry or investigation, held any inquest into or done any other act in connection with the death."*

[18] So, in the absence of the first Inquest being quashed by the Court, the route to a new Inquest is through a direction by the Attorney General that a Coroner should conduct a second Inquest. In some of the cases associated with this application, where it is contended that the police failed to furnish all the relevant documentation to the Coroner before or at the Inquest, the families of the deceased have invited the Attorney General to exercise the powers under section 14 of the 1959 Act. The existence of this route to a new Inquest led the Court to set aside the initial grant of leave for an Order quashing the earlier Inquests. The Attorney General deferred decisions under section 14 of the 1959 Act pending the outcome of the applications for judicial review.

[19] The result is that, having completed the Inquest in 1987, the Coroner is functus officio and cannot reopen the Inquest. The route to a new Inquest is through the direction of the Attorney General to a Coroner to conduct another Inquest. Pending such a direction a Coroner has no standing to receive additional documents from the police concerning the finding of the body or concerning the death, as the Inquest has been concluded. Should the Attorney General direct a Coroner to conduct a new Inquest then section 8 of the 1959 Act will apply so as to require the police to furnish to the Coroner such information in writing as the police are able to obtain concerning the finding of the body or concerning the death, which would include the documentation uncovered by the police since the previous Inquest and now listed in appendix B and appendix C. Accordingly, while there is presently no basis for a new Inquest, either by way of the Court quashing the first Inquest or the Attorney General directing a second Inquest, it is not appropriate to order the police to furnish the documents to the Coroner. The issue of the disclosure of the new documents by the police to the Attorney General is a matter between the police and the Attorney General and does not arise in these proceedings.

(4) Should the police be ordered to produce <u>to the applicant</u> the documents referred to in appendix B and appendix C?

[20] When Inquest proceedings are pending the release of documents by the Coroner to the family of the deceased would be a matter for the decision of the Coroner, whose considerations would include relevance, privilege and public interest immunity. Where the police propose to raise no issues about disclosure of documents to the family of the deceased there may be direct disclosure by the police to the family. When the Inquest was held in 1987 there was more limited disclosure of documents than would arise today and statements of witnesses would have been produced only when the witness was giving evidence at the Inquest. Those rules later changed to provide more extensive disclosure and to allow witness statements to be produced in advance of the Inquest. More recent developments apply in relation to those

deaths to which Article 2 of the European Convention on Human Rights applies where the procedural requirement for an effective investigation of the circumstances of the death may include access by the family to the investigation file. The jurisprudence of the European Court of Human Rights does not establish that in such cases the family of a deceased victim should in all circumstances be entitled to have access to the investigation file. Access to information about the investigation is one of the factors that will be taken into account in determining the inadequacy of the inquiry. Access to information is not an inevitable pre condition of an effective investigation. However the present case is not one to which Article 2 of the European Convention on Human Rights applies (the House of Lords decided in Re McKerr [2004] NI 212 that Article 2 applies to cases where the death occurred after the commencement of the Human Rights Act 1998 on 2 October 2000).

[21] Where there are no outstanding Inquest proceedings and where there are no procedural obligations arising under Article 2, as in the present case, there is no duty on the police in domestic law to make disclosure of documents to the applicant. However if the Attorney General directs a Coroner to conduct a new inquest the police will be obliged to furnish to the new Coroner all the information in the possession of the police concerning the finding of the body or the death. The new Coroner will determine the extent of disclosure of documents to the family of the deceased and will determine issues of relevance, privilege and public interest immunity.

Summary

[22] (1) The Court will make a declaration that, prior to the completion of the Inquest, the Chief Constable failed to provide the Coroner with all such information in writing as the police were able to obtain concerning the finding of the body or concerning the death of the deceased, contrary to section 8 of the Coroners Act (Northern Ireland) 1959.

(2) Without sight of the documents referred to in appendix B and appendix C and a rehearsal of the issues arising at the Inquest it is not proposed to make any determination as to the compliance of the Inquest with the terms of the 1959 Act.

(3) The Inquest has been completed and the Coroner is functus officio and has no power to hold a second Inquest, unless and until the Coroner is so directed by the Court or by the Attorney General under section 14 of the Coroners (NI) 1959 Act. Should the Court or the Attorney General direct a Coroner to conduct a new Inquest then section 8 of the 1959 Act will apply so as to require the police to furnish to the Coroner such information in writing as the police are able to obtain concerning the finding of the body or concerning

the death, which would include the documentation uncovered by the police since the previous Inquest and now listed in appendix B and appendix C.

(4) As there are no outstanding Inquest proceedings at present and there are no procedural obligations arising under Article 2 of the European Convention on Human Rights as the death occurred before 2 October 2000, there is no duty on the police in domestic law to make disclosure of the documents to the applicant.