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

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY STEVEN DAVIS & OTHERS FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for leave to apply for judicial review of a decision of the Secretary of State made on 26 June 2007 refusing to amend the terms of reference of the Billy Wright Inquiry. The applicants are employees of the Northern Ireland Prison Service and will be witnesses at the Inquiry.

[2] The Inquiry was announced by the Secretary of State, Paul Murphy, on 16 November 2004. The Inquiry was constituted pursuant to section 7 of the Prisons Act (Northern Ireland) 1953 and the terms of reference were promulgated by the Secretary of State. On 23 November 2005 the Inquiry was converted by the Secretary of State, Peter Hain, to an Inquiry under the Inquiries Act 2005. The original terms of reference were applied to the converted Inquiry.

[3] The terms of reference for the Inquiry are stated as follows:

> "To inquire into the death of Billy Wright with a view to determining whether any wrongful act or omission by or within the prison authorities or other state agencies facilitated his death, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; and to make recommendations."

[4] Section 2 of the Inquiries Act 2005 has the heading "No determination of liability" and provides:

> "(1) An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.

> (2) But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes."

[5] On 8 June 2007 solicitors for the applicants wrote a letter to the Secretary of State expressing concern that the terms of reference fell foul of section 2(1) of the 2005 Act and that the Inquiry would be acting outside the extent of its authority under the Act if it proceeded to rule on or to determine matters under its existing terms.

[6] On 26 June 2007 the Northern Ireland Office replied on behalf of the Secretary of State. The letter stated that the Secretary of State did not share the applicants' views about the terms of reference, or that they required to be amended or that they were incompatible with the 2005 Act. The Secretary of State stated his confidence that the Inquiry had so far carried out its tasks in conformity with the 2005 Act and that it would continue to do so.

[7] Having received the reply the applicants made the application for leave to apply for judicial review on 11 July 2007. A leave hearing was conducted on 3 August 2007. The application generated much interest from other parties who were given leave to appear at the leave hearing. Mr Scoffield appeared for the applicant, Dr McGleenan appeared for the proposed respondent, the Secretary of State, Mr Larkin QC appeared for the Billy Wright Inquiry, Mr Kane QC and Mr Donaghy appeared for the Wright family, Mr Brangam QC appeared for the Chief Constable and the Police Service of Northern Ireland and Mr Greatorix appeared on behalf of the Northern Ireland Prison Service Headquarters and certain Northern Ireland Office employees. In addition a written submission was received from British Irish Rights Watch.

[8] The first issue that arises is that of delay in the making of the application. Section 38 of the 2005 Act provides that:

> "(1) An application for judicial review of a decision made –
>
> (a) by the Minister in relation to an inquiry, …
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> must be brought within 14 days after the day on which the applicant became aware of the decision, unless that time limit is extended by the court."

[9] The Inquiry was established on 16 November 2004. The words of section 2 of the 2005 Act do not appear in the 1953 Act but the standard approach of Inquiries was that they would not make rulings on matters of civil or criminal liability. The conversion from a Prisons Act Inquiry to an Inquiries Act Inquiry occurred on

23 November 2005. The proposed respondent says that time began to run against the applicants for the making of an application on 23 November 2005.

[10] A further event of some significance occurred when the Inquiry hearings opened on 30 May 2007 and Mr Batchelor QC, Counsel to the Inquiry, made an opening statement. The terms of that opening statement gave rise to some concern on the part of the applicants and were quoted by the applicants' solicitor in the letter of 8 June 2007 to the Secretary of State. The opening statement referred to the terms of reference for the Inquiry and included the following –

> "We have looked at the evidence available with a view to allowing the Panel to answer a number of questions. Firstly, whether there is prima facie evidence of any wrongful act or omission and we have taken that phrase as covering both civil and criminal responsibility. Secondly, whether there were any Government or State agencies or individuals who may have been involved in any such wrongful conduct."

[11] I find that the time for making an application for judicial review began to run from 23 November 2005 when the Inquiry was converted into an Inquiry under the 2005 Act and the applicants were aware of the terms of reference and the terms of section 2 of the 2005 Act, if indeed time did not begin to run on 16 November 2004 when the Inquiry was originally established under the Prisons Act. In any event the delay provision which is now in issue, namely section 38 of the 2005 Act, first appeared in statutory form on 23 November 2005.

[12] The relevant decision of the Minister is the decision of the Secretary of State to confirm the terms of reference when the Inquiry was converted under the 2005 Act on 23 November 2005. As an application for judicial review was not made within 14 days of that date the present application is out of time. If the application is to proceed the court must extend the time under section 38(1) of the 2005 Act.

[13] In deciding whether to extend the time I propose to consider whether it is fair and reasonable to grant an extension of time in all the circumstances. I take account of a number of matters in particular. First, knowledge of the suggested approach to the terms of reference of Counsel to the Inquiry arose on 30 May 2007 when Mr Batchelor made the opening statement to the Inquiry. Secondly, it was appropriate for the applicants' solicitors to write to the Secretary of State about their concerns rather than immediately launching proceedings and it was appropriate for them to await a response from the Secretary of State before determining what step to take. Thirdly, the applicants' representatives moved promptly in the light of the response from the Secretary of State, given the time at which events occurred. Fourthly, there is the prospect of prejudice to the Inquiry if there is delay in the scheduled commencement of hearings on 10 September. However, the applicants say that the hearing can proceed in any event. While that is so there can be little

doubt that some prejudice would accrue to the workings of the Inquiry if it has to proceed while its terms of reference were in issue in judicial review proceedings. Fifthly, there will be an adverse impact on the family if, after 10 years from the death of Billy Wright, the Inquiry is further affected by judicial review proceedings about the terms of reference of the Inquiry. However, if the applicants are correct in their complaint about the terms of reference, that is an issue which requires to be addressed at some point. Having considered the above matters and all the other circumstances of the case I consider that it is fair and reasonable to extend the time for the making of this application for judicial review. I extend the time to 11 July 2007, being the date on which the application was made.

[14] I turn then to consider whether the applicants can establish an arguable case that would warrant the grant of leave to apply for judicial review.

[15] Section 2(1) of the 2005 Act contains first of all a prohibition on the Inquiry ruling on any person's civil or criminal liability and secondly a declaration that the Inquiry has no power to determine any person's civil or criminal liability. This is a reflection of the position that issues of civil and criminal liability are matters for the courts. Section 2(2) provides that liability may be inferred from the facts determined by the Inquiry and from the recommendations that it makes. Accordingly, there is a dividing line in the two parts of section 2 between prohibited and permitted findings by the Inquiry. The result is that the Inquiry may make findings of fact from which civil or criminal liability may be inferred, but they may not make rulings on civil or criminal liability.

[16] The terms of reference also use the word "determine". The Inquiry will determine whether any "wrongful" act or omission has been committed which has facilitated this death and whether any such act or omission was "intentional or negligent". The applicants focus on the requirement that the Inquiry should make a determination of wrongful acts or omissions and of intentional or negligent acts or omissions. This, say the applicants, by plain meaning requires the Inquiry to make a determination of civil and criminal liability, that legal terms have in effect been adopted and therefore the Inquiry, in carrying out the terms of reference will necessarily offend the provisions of section 2(1) of the 2005 Act. The respondent on the other hand says that the wording is not to be read as involving technical legal words and that the terms of reference have a wider meaning than a finding of civil or criminal liability that involves the Inquiry in making findings of fact. The respondent says that the applicants' argument would only be valid if the terms of reference required the Inquiry to determine civil or criminal liability and that is not the case. According to the respondent the terms of reference could be interpreted in the way that the applicants contend and if that were to happen it would offend section 2(1) of the 2005 Act, but the Inquiry need not interpret the terms of reference in that way.

[17] Turning then to the position of the Inquiry. The applicants' letter of complaint to the Secretary of State was copied to the Inquiry. The Inquiry replied to the applicants' solicitor on 10 July 2007 and included this paragraph:

> "The Chairman has instructed me to write to assure you that the Panel will not, and indeed cannot, make any determination of criminal or civil liability. It is clear from section 2(1) of the Inquiries Act that this Inquiry cannot rule on or determine any person's civil or criminal liability. That is a matter for the civil or criminal courts and, so far as I am aware, no Public Inquiry has ever had such a power. That, however, does not prevent the Inquiry from determining what it considers to be wrongful acts or omissions and whether they were intentional or negligent."

[18] The applicants are dissatisfied with the reply from the Inquiry. They contend that the words of the reply are understood by the Inquiry as permitting the Inquiry to make statements amounting to findings of civil or criminal liability and thereby offending section 2(1) of the 2005 Act.

[19] One might identify some support for the applicants' view in the opening remarks of Counsel to the Inquiry referred to above. The Secretary of State has stood back from the terms of the opening remarks to the Inquiry. In the letter written on behalf of the Secretary of State to the applicants' solicitor on 26 June 2007 it is stated that the Secretary of State had taken note of the comments made by Senior Counsel to the Inquiry on 30 May and appreciated that they may have caused concern to the applicants. The letter continued "That is a matter which it is open to your clients to raise with the Inquiry, so that they may clarify the true position." Therefore, it is apparent that the Secretary of State and his advisers shared the concerns that arose in relation to the manner in which Counsel to the Inquiry had framed the issues before the Inquiry. The matter was taken up with Senior Counsel who appeared for the Inquiry on this application for judicial review, Mr Larkin QC, and he stated to the court on behalf of the Inquiry that the remarks made by Mr Batchelor were regarded as incorrect.

[20] The terms of reference do not require the Inquiry to reach a conclusion that is incompatible with section 2 of the 2005 Act. The Inquiry is conscious of the proper parameters of the terms of reference. The words of the Explanatory Notes to section 2 of the 2005 Act did not draw dissent from anyone. They are as follows:

> "The purpose of this section is to make clear that inquiries under this Act have no power to determine civil or criminal liability and must not purport to do so. There is often a strong feeling, particularly following high profile, controversial events, that an inquiry should

> determine who is to blame for what has occurred. However, inquiries are not courts and their findings cannot and do not have legal effect. The aim of inquiries is to help to restore public confidence in systems or services and by investigating the facts and making recommendations to prevent recurrence, not to establish liability or to punish anyone.
>
> However, as subsection (2) is designed to make clear, it is not intended that the inquiry should be hampered in its investigations by a fear that responsibility may be inferred from a determination of fact."

[21] I am not satisfied that the applicants have established an arguable case that the Inquiry is proposing to approach its terms of reference in a manner that is incompatible with section 2 of the 2005 Act. Leave to apply for judicial review of the decision of the Secretary of State not to amend the terms of reference of the Inquiry is refused.