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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION BY SALLY GRIBBEN
FOR JUDICIAL REVIEW

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Gribben's (Sally) Application [2015] NIQB 51

WEATHERUP J

[1] This is an application for judicial review of decisions of the Coroner conducting the inquest into the deaths of Martin McCaughey, a brother of the applicant, and Desmond Grew who were killed by special forces of the military on 9 October 1990. The jury in the inquest returned their verdict on 2 May 2012. Ms Quinlivan QC appeared for the applicant, Mr Simpson QC and Mr Doran QC for the Coroner, Mr Perry QC with Ms Cumberland for the Ministry of Defence and Dr McGleenan QC for the Police Service of Northern Ireland.

[2] Three issues arose on the application for judicial review.

The first concerned the Coroner's decision to conclude the inquest without recalling Soldier A. I gave leave to apply for judicial review on that ground on 18 October 2012 in Gribben's Application [2012] NIQB 81.

The second issue concerned the Coroner's decision not to disclose to the applicant information about the involvement of witnesses in other fatal shootings by the military. I refused leave on this ground and the Court of Appeal gave leave on 3 June 2014 in Gribben's Application [2014] NICA 42.

The third issue concerned the Coroner's decision to conduct the inquest with a jury. I refused leave on this ground and the Court of Appeal left the grant of leave to this hearing.

The jury issue.

[3] I take the jury issue first. The Coroner has a discretion whether to conduct the inquest alone or with a jury. There was no challenge made by the applicant before or during the inquest to the engagement of a jury at the inquest. The applicant raised a challenge to the inquest being conducted with a jury after the inquest had been completed and on the leave hearing on this application for judicial review. On 18 October 2012 in Gribben's Application [2012] NIQB 81 at paragraphs 54-60 I addressed the issue and refused leave, essentially because there had been no challenge raised with the Coroner to the use of a jury. The applicant appealed the refusal of leave.

[4] The next step was Jordan's Application [2014] NIQB 11 on 31 January 2014, another legacy inquest where a challenge was made to an inquest being conducted with a jury. An application had been made to the Coroner that a jury should not be engaged and the Coroner had decided to proceed with a jury. Thereafter an application was made for judicial review of the decision of the Coroner. The challenge was addressed at paragraphs 223-256 of the judgment, in particular at paragraphs 245 and 246 where it was stated by Stephens J that for an inquest to be Article 2 compliant it should not allow any real risk of a perverse verdict. It was concluded that the Coroner ought not to have conducted the inquest with a jury. The judgment emphasised that this was a prospective decision, that the applicant did not have to establish that the jurors eventually selected and who heard the inquest were perverse in their verdict, but rather that prospectively, at the start of the inquest, what had to be established by the applicant was a real risk of a perverse verdict. Stephens J granted a declaration that the inquest ought not to have been conducted with a jury. The respondent appealed.

[5] On 3 June 2014 the appeal against my refusal to grant leave on this ground in the present case was determined by the Court of Appeal. At paragraph 20 of Gribben's Application [2014] NICA 42 the Court of Appeal did not give leave on the jury ground but stated that the issue should be raised on the substantive hearing of this application for judicial review in the light of the decision to be made by the Court of Appeal in the pending appeal in Jordan's Application.

[6] Hence, we come to 17 November 2014 when the Court of Appeal determined the appeal in Jordan's Application [2014] NICA 76. The jury issue was addressed at paragraphs 69-92. In particular at paragraphs 86 and 88 the Court of Appeal stated that a Coroner, in exercising his discretion under section 18(2) of the Coroners' Act 1959 whether to engage a jury, must, having considered the facts of the case, ask if there is a real possibility that a jury will be biased. In that case it was found that the Coroner had clearly established that there was a real risk of a perverse verdict and moreover he had taken steps to address that risk. However, having taken those steps, it was imperative that the Coroner then stood back and asked himself whether or not he considered that those steps had removed such risk to a fanciful or remote

level. The Court of Appeal was not persuaded that the Coroner had directed his mind to the risk of jury bias which might have led, for example, to a disagreement or a hung jury notwithstanding the steps he had taken. The Court of Appeal had already decided, for other reasons, that a fresh inquest should be conducted. At paragraph 92 the Court of Appeal stated -

> "In the circumstances therefore we consider that it is unnecessary to conclude that in the so called legacy inquests which are controversial and involve security and terrorist issues there is inevitably a real risk of a perverse verdict. Each inquest must be dealt with on a case by case basis."

[7] The issue of a jury being engaged in the present inquest therefore comes before this Court as directed by the Court of Appeal on 3 June 2014 with consideration to be given to the manner in which the Court of Appeal addressed the jury issue in the appeal in <u>Jordan's Application</u> on 17 November 2014. In relation to the discretion to engage a jury the concern is whether there is a real risk of a perverse verdict. In a case involving security forces and suspected terrorists that may be a real concern but there is not inevitably a real risk of a perverse verdict. Each case has to be dealt with on its own facts and circumstances. Nor is it inevitable that the Coroner would reach a decision that there are not measures that may reduce any such risk to a sufficiently low level. It is, as the Court of Appeal stated, a matter to be dealt with on a case by case basis.

[8] This issue ought to be dealt with by application to the Coroner prior to the commencement of the inquest. Had the applicant had a real concern about a jury being engaged in the inquest it would have been expected that the issue would have been brought before the Coroner when arrangements were being made for the hearing. That did not happen. The issue was not dealt with prospectively, it was raised retrospectively. The decision under challenge is the decision of the Coroner to engage a jury, a decision to which no challenge was made at the time. The applicant brought multiple complaints by way of judicial review before and on the eve of and during the inquest and had the opportunity to challenge the Coroner's decision on the use of a jury and clearly elected not to make any such challenge initially. The applicant opted for a jury hearing until the jury returned their verdict.

[9] Nor, retrospectively, has evidence been produced that the risk arose in the present case, beyond the general assertion that such a risk may arise in cases involving security forces and suspected terrorists. Each case turns on its own facts and in the present case no specific concern has been raised that suggests that the risk arose.

[10] Further, where a jury has been engaged, there may be, in a particular case or with a particular jury panel or a particular jury member, circumstances that would lead the Coroner to conclude that a real risk had arisen. That may emerge prior to

the commencement of or during the course of the inquest and may lead the Coroner to conclude that it is not appropriate to commence or to continue the inquest with a jury. Issues were raised in the course of the inquest about the conduct of a particular juror and that matter was investigated and did not lead to the discharge of the jury and is not the basis of the present challenge.

[11] In addition it is necessary to consider whether or not, given the experience with this particular jury, there was anything that indicated that a perverse verdict had been returned. I have not been satisfied, now that the inquest has been concluded, that anything occurred that calls into question the conduct of the jury in reaching their verdict nor has anything occurred in relation to the jury that would warrant the quashing of the verdict of the jury.

[12] I am satisfied, in respect of the engagement of a jury, that the inquest was fair and compatible with the requirements of Article 2.

[13] Accordingly I refuse leave for a challenge to be made in relation to the engagement of a jury at the inquest.

Other fatal shootings

[14] The next matter concerns evidence about other fatal shootings carried out by the military. This is a matter on which I refused leave at first instance, as appears at paragraphs 6-16 of my decision at [2012] NIQB 81. Broadly the refusal of leave was based on the late application for leave to apply for judicial review and what was considered to be the safeguard provided by the Coroner's continuing review of the potential relevance of evidence about the other fatal shootings involving witnesses in the inquest. However leave was granted by the Court of Appeal, as appears at paragraphs 9-18 of [2014] NICA 42. In essence the Court of Appeal noted that there was a question mark over the Coroner's understanding of the shoot to kill issue being dealt with at the inquest. Remarks made by Counsel for the Coroner in the hearing before the Court of Appeal led to the suggestion that the Coroner had not considered the shoot to kill issue to be within the scope of the inquest. Had that been the position of the Coroner it would have undermined the basis on which I had refused leave as there would have been no safeguard provided by the Coroner's continuing review of the potential relevance of the other incidents to the shoot to kill issue.

[15] Before I turn to the Coroner's response in these proceedings I should say a word about the scope of the inquest generally. The scope of this inquest was considered by the Supreme Court in May 2011 in McCaughey's Application [2011] UKSC 20 (being the mother of the deceased, now herself deceased) where it was confirmed that there would be an Article 2 inquest in relation to the deaths, even though they occurred before the commencement of the Human Rights Act, and that

planning and control of the operation that led to the deaths would be an issue in the inquest.

[16] In October 2011 the applicant gave notice that their understanding of the scope of the inquest extended to consideration of other lethal force incidents as being potentially relevant to the issue described as shoot to kill and whether or not there was shoot to kill in the particular case. On 9 March 2012, after a rather casual return of soldiers' statements about their engagement in other lethal force incidents, the Coroner gave his ruling in relation to the other incidents that were considered to be potentially relevant. He decided that only one of the soldiers, Soldier A, and his involvement in what I describe as the Bradley incident, was potentially relevant to the shoot to kill issue.

[17] In an application for judicial review in March 2012 - [2012] NIQB 20 - the applicant sought production of information in relation to other soldiers involvement in other incidents. Leave was refused, essentially because the inquest had already begun, the application for additional information could and should have been made earlier and in any event the Coroner was continuing to monitor the evidence relating to the shoot to kill issue.

[18] On 23 March 2012 the Coroner gave a further ruling that there was to be no questioning of Soldier A about the Bradley incident, which he had earlier decided was potentially relevant. That too led to an application for judicial review in the course of the inquest - [2012] NIQB 25 – seeking the admission of the Bradley evidence and further evidence in relation to another shooting at which Soldier A was present which I will describe as the McIlwaine incident. Soldier A had not shot anyone in the McIlwaine incident but he had been involved in the events that led to the shooting. I quashed the decision of the Coroner to exclude the evidence of Soldier A in relation to the Bradley incident as I considered that the evidence would be relevant to the inquest. I upheld the decision of the Coroner not to admit the McIlwaine evidence which had been found by the Coroner not to be potentially relevant.

[19] The Court of Appeal, when granting leave in relation to the evidence of other fatal shootings, questioned whether or not the Coroner had understood the scope of the inquest to extend to consideration of the issue of shoot to kill. The Coroner addressed that concern in a further affidavit. At paragraphs 35-37 of that affidavit the Coroner stated -

> "The scope of the inquest expressly included consideration of: the purpose and planning of the operation that culminated in the deaths; the actions and state of knowledge of the soldiers involved; and the nature and degree and force used by the soldiers. The next of kin raised the question of whether this was a "shoot to kill" incident in correspondence of October 2011 and in subsequent submissions. In

> considering the material relating to other lethal force incidents for the purpose of my ruling of 8 March 2012, I was cognisant of those submissions.
>
> The question of whether soldiers deliberately engaged in unlawful force to the exclusion of other reasonable courses of action that may have been open to them (such as the arrest of the two men), went to the very heart of the evidence and the submissions in the case. The issue of whether the soldiers had resorted to "shoot to kill" was thus examined with reference to the defined scope of the inquest, as had been confirmed following the decision of the Supreme Court. I can say therefore that material suggestive of any operation that was planned or conducted with the objective of killing Mr McCaughey and Mr Grew, contrary to the soldiers' account that they had resorted to the use of force in the belief that their lives were in danger, would have been regarded by me as relevant or at least potentially relevant to the issues to be determined in the inquest.
>
> The inquest was not, however, tasked with examining the broader question of whether there was "shoot to kill policy" pursued by the security forces in Northern Ireland at the relevant time. Had the inquest been tasked with examining that broader question, it would have been necessary to engage in an inquiry extending well beyond any inquiry ever contemplated or proposed by any interested party in this inquest."

[20] The responding affidavit dispels the Court of Appeal's concern that the Coroner had not treated the shoot to kill issue as being within the scope of the inquest. Accordingly the premise on which the Court of Appeal granted leave on this ground has been established not to be the case.

[21] The Coroner's approach to the disclosure of information about the soldiers' involvement in other incidents was to examine the material provided about the soldiers and to decide, by reference to their background and involvement in other incidents, whether there was information that was potentially relevant to the shoot to kill issue. The Coroner found that the only information that was potentially relevant was the evidence of Soldier A in relation the Bradley incident. The Coroner examined the personnel files of the military witnesses and was satisfied there were no disciplinary or criminal material in relation to any of the soldiers. The applicant contends that the information should have been produced to the applicant so that representations could have been made to the Coroner as to what was potentially relevant. If material were to be potentially relevant there would follow the consideration of whether it would be relevant and ought to be admitted in evidence.

[22] The expression "Shoot to kill" may be variously understood. On a general level the expression will concern whether or not there was a policy or an understanding that the soldiers would shoot any suspects. Perhaps rather than shoot to kill it is better captured by an expression such as 'shoot on sight' or 'take no prisoners'. The issue is more to do with whether the soldiers would shoot if it was not necessary to do so to protect life. To do so would be criminal. Thus the issue becomes whether there was a policy or understanding to shoot on sight or take no prisoners. The inquest did not involve a case being made that the military operated such a free for all. The applicant's approach at the inquest involved a more subtle examination of the concept of shoot to kill.

[23] At another level shoot to kill may be understood as whether or not the planning of the operation for engagement with suspects was such that by taking up an unnecessarily confrontational position the soldiers might have in effect necessarily occasioned a shooting where the adoption of different positions might not have resulted in such ready engagement.

[24] At yet another level, shoot to kill might concern whether or not there was a general culture of unnecessarily aggressive action taken by soldiers that resulted in fatalities when soldiers were engaging with suspects.

[25] What occurred at the present inquest? First of all it is not in dispute that the involvement of the soldiers in other lethal shootings was potentially relevant to this inquest, although it was not always regarded as such by the MOD. The Coroner had to decide on potential relevance and relevance and admissibility of evidence in relation to the issues being addressed at the inquest. As to the judicial review of the Coroner's discretion the Coroner has a wide margin of discretion. It has been stated by the Court of Appeal that it is not for the High Court to micromanage an inquest or to act as a forum for appeal from procedural decisions by a Coroner.

[26] In the present case the applicant did not contend that there was a general policy or order issued to shoot all suspected terrorists. The applicant contended that there was the use of unnecessary force when soldiers confronted armed men by not being prepared to effect arrests. The planning of the operation was said to be marked by aggressive positioning so as to promote the use of lethal force. A further aspect was said to be the culture that had developed with the soldiers of unnecessarily aggressive action against suspects. The applicant was able to develop these themes at the inquest.

[27] In relation to any shoot to kill policy there were questions directed to Soldier K, the officer commanding the unit, and he denied that there was any such policy in relation to suspects. In relation to the planning of the operation and aggressive positioning, Soldier H was the officer commanding the operation. Questions were raised as to what was the appropriate positioning and expert evidence was called on behalf of those alleging aggressive positioning. In relation to the culture and the

manner in which the operation was conducted, the soldiers who undertook the shooting gave evidence. Soldier A was the troop commander and he fired shots and was questioned for some days about his involvement in the incident, as were soldiers C and D. The fourth shooter, Soldier B, was unable to attend the inquest. There were four support soldiers who were Soldiers E, F, G and I who had not fired shots but were in the background. They were available to be questioned if it was thought appropriate about any culture or the manner in which the operation was conducted. The jury had the opportunity to consider all this evidence touching the shoot to kill issue.

[28] However, says the applicant, the approach to these issues was restricted by the Coroner not providing information on the other incidents of lethal force in which any of the soldiers had been involved, apart from Soldier A and the Bradley incident. With that information on the other incidents the applicant says they could have developed their contention about aggressive positioning and aggressive culture by reference to the manner in which the other incidents were conducted and the soldiers acted. The applicant's skeleton argument puts the matter on the basis that they were disadvantaged in exploring with military witnesses allegations of their involvement in a shoot to kill policy or allegations that SAS soldiers were more likely to have recourse to lethal force or to use excessive force where that was not absolutely necessary or allegations that individual soldiers had a propensity towards the use of excessive force.

[29] The respondent contends that the Coroner had the information on the other soldiers, he had their personnel files, including the files of those who had not made statements about other incidents, and the Coroner had not found anything potentially relevant to the issues. Further the Coroner stated that he kept open the issue of potential relevance as the inquest progressed so that had anything emerged as the inquest progressed the Coroner would have reconsidered. While there was a question mark about whether the Coroner was keeping open the shoot to kill issue I am satisfied from his affidavit that he was so doing and that he did not find that anything further emerged in the course of the evidence that could have been potentially relevant to the issue of shoot to kill.

[30] The applicant contends that it can now be shown that the Coroner was inaccurate in his consideration of what was potentially relevant to the shoot to kill issue. The example is given of Soldier K, the officer commanding the unit, who was also in command of the unit when other lethal shootings occurred. He undertook a tour of duty from 1983-1985 in Northern Ireland when 7 deaths occurred and again from 1989 to 2001 when 8 deaths occurred. These matters, says the applicant, are potentially relevant to Soldier K's evidence about the shoot to kill issue. Soldier K did give evidence in the inquest and he denied that the units were sent out, or set out, to kill those with whom they engaged. I am not satisfied that the role of Soldier K, in overall command of the unit, not engaged in the planning of the operation, not present at the scene and off duty when the incident occurred, undermines the

Coroner's approach or could have affected the evidence on the aspects of shoot to kill considered in the inquest.

[31] It is now the practice in inquests to disclose the involvement of witnesses in other incidents to the representatives of the deceased so that they can make enquiries about those matters and make submissions to the Coroner about whether or not the material is relevant and admissible at the inquest. That is the course which is now being adopted, it is not a determination as to whether or not it is a requirement in all cases.

[32] The Coroner found that apart from Soldier A and the Bradley incident there were no other potentially relevant instances emerging from his examination of the files of the other soldiers. The judicial review challenge to the Coroner's decision on the soldiers' involvement in other shootings concerned the evidence of Soldier A and the Bradley incident, which I found was to be admitted at the inquest, and the evidence of Soldier A and the McIlwaine incident, which I found not to be relevant to the shoot to kill issue. I am satisfied that the Coroner kept the matter under review as the inquest progressed and had no occasion to change the position. The different aspects of the shoot to kill issue were examined in the course of the inquest. The Coroner and the jury dealt with over 27 days of hearings where the issue of necessity for the shooting was examined. The jury completed a careful and considered narrative of their findings.

[33] In the overall context of this completed inquest and the manner of the examination of the issue as to whether there was justifiable force, I am satisfied that there was an effective examination and investigation of the shoot to kill issue for Article 2 purposes, subject to what is discussed below in relation to Soldier A. This is not determined by whether one agrees or disagrees with the outcome but whether the means of obtaining the outcome are considered to be compliant. Having considered that matter I am so satisfied as far as the question of the other fatal shootings is concerned.

<u>Soldier A</u>

[34] Soldier A gave evidence from 26 to 28 March 2012. At the same time an application was dealt with in the High Court seeking a determination that Soldier A should give evidence in relation to the Bradley incident. It was found that Soldier A should do so. On 28 March, having completed his other evidence, Soldier A left the UK for work in the Middle East. The Coroner ruled that Soldier A was to return on 11 April to give the Bradley evidence. Soldier A did not do so. He explained the circumstances of his non-return. He expressed a willingness to co-operate further with the inquest but circumstances had conspired against him. The Coroner adjourned for Easter from 13 April until he heard submissions on 23 April. On that date the Coroner decided to conclude the inquest without further evidence from

Soldier A. The closing to the jury by interested parties and the Coroner occurred on 25 April.

[35] The applicant contends that on 23 April the Coroner should have adjourned the inquest into May 2012. The Coroner made a decision on the 23 April that he would conclude the inquest without Soldier A. The Coroner explained his position in his first affidavit at paragraph 12 -

> "As regards the submission on behalf of the next of kin that the inquest should be further adjourned to secure his attendance, it was my considered view that to adopt this course would be to place the completion of the inquest in serious jeopardy with no guarantee that the objective of securing Soldier A's return would be achieved."

[36] The Coroner concluded that the value of completing the inquest on the basis of the evidence that had been heard outweighed the value of embarking on what would have unfortunately been a speculative exercise in securing Soldier A's attendance. The Coroner listed the matters that led him to the view that he should conclude the inquest without further evidence from Soldier A and I summarise -

(i) There was no definite prospect of Soldier A attending the inquest.

(ii) Even if he did return to the UK he was going on a 3 week family holiday which he had already arranged from 11 April to 2 May and the Coroner said the prospect of him returning to Belfast on that very day to give evidence was not realistic.

(iii) The jurors had indicated that they too had plans to go on holiday. The inquest was scheduled to end before Easter and the jury had made their plans accordingly. Some jurors had plans for holidays from 3 May to 15 May. Any resumption of the inquest would have had to be after that date.

(iv) The Coroner said it would not have been prudent to proceed with 7 jurors rather than the 9 who were on the panel in the hope that Soldier A would return on a day after 15 May.

(v) An adjournment until Wednesday 16 May would effectively have entailed a break in the evidence of almost 5 weeks from the last date on which the jury had heard evidence with no guarantee that Soldier A would return on that date.

[37] Although the Coroner decided to conclude the inquest, other materials in relation to the Bradley incident were put before the jury. The relevant witness statements about what happened in the incident were read to the jury, including Soldier A's statement prepared for the Bradley inquest, the deposition of Dr Carson

the State Pathologist, the deposition of Mr Thompson, the ballistics expert in the Bradley inquest and a summary of Soldier A's career in the military. Counsel for the next of kin had the opportunity to comment on the Bradley incident to the jury and to highlight its significance from the next of kin's perspective, Counsel for the next of kin dealt with the Bradley incident in some detail in closing on 25 April and informed the jury that it was entitled to consider the parallels between the two incidents when considering the justification offered by Soldier A for his actions on the occasion of the deaths. Counsel also referred to Soldier A having been directed to attend on 11 April and having failed to do so and highlighted that Counsel had been denied the opportunity of questioning him on behalf of the next of kin. The Coroner dealt with the matter in his summation on 26 April, he reviewed the evidence relating to the Bradley incident, directed the jury on the possible views they might adopt with respect to that evidence, emphasised the significance to be attached to the evidence which was ultimately a matter for them and reminded them of Soldier A's failure to attend and the circumstances of that failure.

[38] The applicant says that the approach taken could not replace the oral examination of Soldier A.

[39] Overall the Coroner had to make a difficult decision whether to proceed with the inquest or to further adjourn. He considered Soldiers A's return to be a rather speculative matter. Soldier A had also considered it appropriate to obtain independent legal advice in relation to his being examined by Counsel about the Bradley incident and he may not have made arrangements at the time. The applicant was able to make assertions about the Bradley incident that Soldier A could not contradict.

[40] In all the circumstances I am satisfied that there was an effective investigation for the purposes of Article 2 despite Soldier A's absence on the issue of the Bradley incident. Overall I am satisfied that there was a fair and compliant process. Accordingly I have not been satisfied on the applicant's grounds for judicial review. I dismiss the application.