

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Gribben's (Sally) Application [2015] NIQB 27

**AN APPLICATION BY SALLY GRIBBEN
FOR JUDICIAL REVIEW**

WEATHERUP J

[1] A preliminary issue has arisen about the Police Service of Northern Ireland appearing at the hearing of this application for judicial review. Ms Quinlivan QC appeared for the applicant and Mr McGleenan for the PSNI.

[2] The application for judicial review concerns the decisions of a Coroner at the inquest touching the deaths of Martin McCaughey and Desmond Grew who were shot dead by members of a special military unit in controversial circumstances on 9 October 1990.

[3] I granted leave to apply for judicial review on 18 October 2012 on one of the grounds relied on by the applicant and refused leave on several other grounds – Gribben's Application [2012] NIQB 81. The applicant appealed to the Court of Appeal against the refusal of leave on the other grounds. The Court of Appeal on 3 June 2014 granted leave on additional grounds and refused leave on others – Gribben's Application [2014] NICA 42. The result is that the application has returned for substantive hearing on all the grounds in respect of which leave has been granted. First of all there is this preliminary issue, should the PSNI be heard at the substantive hearing?

[4] The applicant defines the scope of the judicial review as follows. The first theme is the failure to secure the attendance of a witness, described as Soldier A, to answer questions about his role in another shooting incident that concerned the

death of a Francis Bradley. The second theme is the failure to disclose to the next of kin the roles of soldiers in other lethal force incidents and the consequent inability to deploy such information at the inquest. The third matter concerns the decision to sit with a jury.

[5] Given those three themes in the judicial review the applicant contends that the PSNI are not directly affected or a proper person to be heard for the purposes of the hearing of the judicial review.

[6] The respondent in the judicial review is the Coroner, whose decisions in relation to the inquest are directly in issue. The Ministry of Defence is a notice party as soldiers were responsible for the deaths that are being investigated and the MOD is responsible for their actions. The PSNI has been a notice party to the leave applications to this Court and to the Court of Appeal. The applicant contends that making PSNI a notice party at the leave stage was appropriate given that the grounds of the application for leave to apply for judicial review were wider than those in respect of which leave has been granted and those wider grounds did directly affect the PSNI. However, leave having been refused on the wider grounds, the applicant contends that the PSNI is no longer entitled to be heard as they are no longer directly affected or a proper person to be heard. On the other hand the PSNI contends that it is already a party and that it should remain so as a party directly affected and a proper person to be heard. Alternatively the PSNI contends it should be treated as an intervenor and its role in the proceedings in that capacity would be a matter of case management for the Court.

[7] Order 53 Rule 5 of the Rules of the Court of Judicature deals with the mode of applying for judicial review.

Rule 5(3) provides for service of the notice of motion on 'all persons directly affected'. The rules contemplate an ex parte application for leave and where granted, a notice of motion served with the original statement and affidavits. In accordance with normal practice in this jurisdiction the PSNI were put on notice of the application for leave and appeared at the leave hearing in this Court and in the Court of Appeal.

Rule 5(7) provides that on the hearing of the application for judicial review the Court may adjourn the hearing for service of the proceedings on 'any persons who ought, whether under this rule or otherwise, to have been served. This applies to any person who ought to have been served under Rule 5, namely a person directly affected, or to a person who 'otherwise' ought to have been served, although not directly affected.

Rule 9 provides that on the hearing of the application for judicial review any person who desires to be heard in opposition to the motion and appears to the Court to be 'a proper person to be heard', shall be heard.

[8] There are a variety of forms of involvement in response to an application for judicial review.

First, the respondent decision maker, in this case the Coroner.

Secondly, two types of notice parties, those directly affected, in this case the MOD - under Rule 5(3) - and those who otherwise ought to be on notice but are not directly affected - under Rule 5(7).

Thirdly, two types of intervener, those in opposition to the applicant - under Rule 9 - and those in support of an applicant, or at least interested in the proceedings if not in opposition - not referred to in Order 53.

Fourthly, an amicus curiae who is asked to assist the court - not referred to in Order 53.

[9] Is the PSNI 'directly affected' so that they should remain a notice party? In R v The Rent Officer Service ex parte Muldoon [1996] 1 WLR 1103, in an application for judicial review of a refusal of a rent officer and the local authority to pay housing benefit, the Secretary of State was responsible for the reimbursement of 95% of the local authorities housing benefit budget and therefore claimed to be directly affected under Rule 5(3). The Court rejected the Secretary of State as a party directly affected. The role of the Secretary of State was through the intervention of an intermediate agency, the local authority that paid the housing benefit, and the Secretary of State who increased the subsidy to the local authority as required, was only indirectly affected.

[10] In the present case the PSNI was already a notice party as directly affected by the terms of the original application for leave and in effect the applicant wants that status to be removed. PSNI involvement was not under Rule 5(3) as it occurred in advance of the leave hearing. However PSNI involvement was on the basis that they were directly affected by the application. The absence of standing as a notice party will prevent any appeal by the PSNI.

[11] The English rules have been altered and the concerns in the present case may not now arise in England. The English Civil Procedure Rules Part 54 refers to those directly affected as 'interested parties'. *Judicial Review: Principles and Procedure by Auburn Moffett Sharland* at paragraph 24.59 comments that it is unlikely that the courts would continue to adopt what is described as the strict Muldoon approach as to who may be an interested party under CPR Part 54 as the former (in England) Order 53, with which Muldoon was concerned, made no provision for interested parties and Rule 5(3) was primarily directed at the service of the claim for judicial review on the respondent. The text states that, in any event, whether a party is an interested party or an intervener is now unlikely to be of much significance as the reason that the Secretary of State wished to be a party in Muldoon, rather than merely an intervener, was that he was of the view that he could only seek permission

to appeal an adverse decision if he was a party. However it is noted that the right to appeal is no longer so limited as the definition of 'appellant' in CPR Part 52 is sufficiently wide to include a person who is not a party to proceedings but who is adversely affected by the outcome.

[12] The applicant contends that the PSNI are not directly affected by this application for judicial review. The applicant points to the grounds on which leave has been granted, namely concerning Soldier A, the other soldiers and the use of a jury. The PSNI on the other hand point not to the grounds but to the relief claimed, namely the quashing of the decision of the Coroner and the prospect of a further inquest. This outcome, contends the PSNI, would raise further issues for the police in any new inquest. The issue of police planning and control of the operation will arise, although the shooting was undertaken by soldiers rather than the police.

[13] That a person may be regarded as directly affected when it is the consequences of a successful judicial review that would impact upon them appears from Secretary of State V The Coroner of Inner North London [2013] EWHC 1786 Admin. The Coroner in part upheld the Secretary of State's PII claim and in part rejected it. The Secretary of State sought judicial review of that part of the Coroner's decision which rejected the claim for PII. Goldring LJ stated in paragraph 2 that the essential issue was whether the 'properly interested persons' in the inquest should be 'interested parties' who should participate in the judicial review, that is persons directly affected. CPR Part 54 provides that notice of the claim must be served on any person that the claimant considers to be such an interested party 'unless the court otherwise directs'. The issues were whether the members of the family of the deceased, who were interested persons for the purpose of the inquest, were interested parties for the purpose of the judicial review, and if so, whether the court should direct that they were not to be served and not be a party to the judicial review proceedings.

[14] On the first question the court agreed that the members of the family were interested parties as they were directly affected by the claim. On the second question the court concluded that the members of the family should not be served with the claim. The reasons dealt with private hearings on PII matters and are not relevant in the present case. On the first question as to whether or not they were interested parties the Court referred to Muldoon and the concept of being directly affected and at paragraph 50 stated -

"The issue as far as CPR 54(2)(f) is concerned is whether in those circumstances the PIPs [properly interested persons] would be directly affected by the claim for judicial review of the Coroner's decision to disclose. That can be tested by considering the consequences of the Court quashing the decision. The quashing of the Coroner's decision would mean that the PIPs would not receive the material which the Coroner had decided was

relevant and necessary for a proper inquest. They could not exercise their rights in relation to it. They could not make submissions regarding it in pre-inquest hearings. They could not examine any witness regarding it. That, as it seems to me, would be a direct consequence of the claim for judicial review. It would not be indirect as was the case in Muldoon. Applying the plain and natural meaning of CPR 54.1(2)(f) to the facts of the case means, in my view, that the PIPs are interested parties in the judicial review."

[15] On the same basis I am satisfied that the PSNI are directly affected by the present judicial review. I accept that a consequence of this application for judicial review may be that an order is made for a further inquest and such an order would directly affect the PSNI for the reasons advanced. Therefore I am satisfied that the PSNI are directly affected by the judicial review, not by reason of the applicant's grounds but by the consequences of the applicant succeeding.

[16] The alternative form of notice party is a person who is not directly affected but nevertheless should 'otherwise' be served. *Larkin and Scofield: Judicial Review in Northern Ireland* at page 159 states that this alternative contemplates a category of persons beyond that of persons directly affected who ought to be served with a notice of motion. This is said to include persons whose interests may be decisively affected by the decision and gives an example of other residents who claim an adverse impact on property values as a result of a judicial review. The footnote refers to an example in the Christian Institute & Others Application [2008] NI 86 where on an interlocutory application on behalf of the Catholic Bishops they were joined under Rule 5(7) as notice parties in a challenge to the Equality Act (Sexual Orientation) Regulations (NI) 2006. It is stated that although the rule is drafted in such a way that the initiative for fuller participation would appear to come from the Court and this sometimes occurs in practice, it is much more frequent for someone in this position to come to the Court and make an application to be heard.

[17] Thus, if the PSNI are not directly affected, I am satisfied that they 'otherwise' ought to be served for the same reason that I have given, namely the consequences of a quashing of the decision which is under challenge would impact on the PSNI in a further inquest and they should be notice parties.

[18] The next possibility is that the PSNI may be interveners. Under Rule 9 interveners who appear in opposition to the application are only entitled to do so if they appear to the Court to be 'a proper person to be heard'. Again given that I accept the PSNI argument that the quashing of the decision impacts on the PSNI if a new inquest is held, I am satisfied that they would be proper persons to be heard. The applicant objects to introducing the PSNI because of the added time that the application will take and the added expense that might be incurred. However these are not objections in principle but rather case management issues. With the PSNI as a

notice party or an intervener I would certainly seek to exercise case management powers so as to minimise the amount of time and the amount of expense involved and avoid duplication.

[19] Practice Direction 1 of 2013 applies to interveners in the High Court and the Court of Appeal and makes provisions for leave to intervene. If and insofar as I may be wrong to conclude that the PSNI are directly affected or that they should otherwise be made notice parties and they may have the status of interveners only, I waive any requirement for a formal application and treat the argument that I have heard as the application to intervene and grant the application to intervene.

[20] However it is my conclusion that the PSNI is directly affected by the application for judicial review and has the status of a notice party. Accordingly I dismiss the application to refuse the PSNI a right to appear upon the hearing of the application for judicial review.