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THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Gribben's (Sally) Application [2012] NIQB 81

AN APPLICATION BY SALLY GRIBBEN

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application for leave to apply for judicial review of the decisions of the Coroner and the jury arising out of the Inquest completed on 2nd May 2012 touching the deaths of Martin McCaughey and Desmond Grew who were shot dead by members of a specialist military unit in controversial circumstances on 9th October 1990.

[2] The case has given rise to many legal proceedings but of recent note for present purposes is the opinion of the House of Lords in McCaughey v The Chief Constable [2007] 2 AC 226 and of the Supreme Court in McCaughey's Application [2011] 2 WLR. Proceedings were commenced in the name of Brigid McCaughey, mother of Martin McCaughey deceased and as she is now deceased the proceedings are continuing in the name of Sally Gribben, sister of the deceased.

[3] After the inquest hearing had commenced the next of kin of the deceased applied for judicial review of the Coroner's ruling of the 8th March 2012 in relation to other lethal shootings involving the soldiers giving evidence at the inquest. McCaughey's Application [2012] NIQB 20 was decided on the 12th March 2012. I summarise briefly because it is of some relevance to the context of the present application. The soldiers involved were known by letters. Soldiers A, C, D and G had disclosed their

involvement in other lethal shootings. Soldiers B, E and I had been silent on a request to identify their involvement in previous shooting incidents. Other soldiers had stated that they were not so involved. The issue was whether there should be disclosure of defining features in relation to the other shooting incidents in which the four soldiers had been involved and whether the three silent soldiers should be required to provide an answer as to involvement in other incidents. However leave was refused as the inquest had started and the Coroner had indicated that he would keep the issue under review.

[4] There was a second application for judicial review in McCaughey's Application (No 2) [2012] NIQB 23 decided on 28th March 2012 in relation to the Coroner's ruling on 23rd March 2012 in relation to Soldier A and his involvement in two other incidents involving the deaths of men called Bradley and McIlwaine. The Coroner had ruled that Soldier A's Bradley evidence was not to be admitted although he had found it was potentially relevant and the Coroner had found that the McIlwaine evidence was not relevant. The outcome of the judicial review was that the matter was referred back to the Coroner to reconsider the position in relation to the Bradley evidence.

[5] Before considering the present grounds for judicial review I refer to the comments of Lord Bingham in R v Davis [2008] 1 AC 1128 at paragraph 21 -

> "An inquest is an inquisitorial process of investigation quite unlike a criminal trial. There is no indictment, no prosecution, no defence, no trial. The procedures and rules of evidence suitable for a trial are unsuitable for an inquest. Above all there is no accused liable to be convicted and punished in these proceedings".

[6] I take in turn the ground relied on by the applicant. The first three grounds can be taken together. Ground A states that the Coroner refused to provide the next of kin with disclosure of information relating to the involvement of military witnesses in other lethal force incidents in Northern Ireland. Ground B states that the Coroner prevented the next of kin from questioning military witnesses about their involvement in other lethal force incidents in Northern Ireland. Ground C states that the Coroner edited the statements of soldiers to remove any reference to their involvement in other lethal force incidents so that material was not before the jury. The matters referred to are said to be relevant to the proper examination of the broad circumstances in which the deceased came by their deaths including, in particular the extent to which the soldiers who were involved in this incident might be said to have been involved in any form of shoot to kill policy.

[7] The Applicant's grounding affidavit was sworn by Mr Sheils which was a most comprehensive survey of all the grounds. The affidavit sets out some of the background and states that the shootings have given rise to allegations of a shoot to kill policy, that the soldiers involved in these deaths were members of the SAS, that the actions of the SAS resulted in 31 deaths in Northern Ireland in the 1980s and a further 10 deaths in 1990 to 1992, that representations were made to the Coroner on the basis that the involvement of the soldiers in this incident who had been involved in other similar incidents was relevant to the inquest. The soldiers were identified as soldiers A to L. Soldiers A, B, C and D were involved in the shooting on the night in question. Soldiers E and F were located nearby. Soldiers G and I were part of a mobile support unit who arrived as the shooting was taking place. Soldier H was more senior and in radio communications with those on the ground from Headquarters. Soldiers J and K were involved in planning and control issues and soldier L was in the Army legal services and attended the police interviews.

[8] In the disclosure of their involvement in other incidents soldiers A, C, D and G identified such involvement and soldiers B, D and I were silent on the issue. The Coroner received a grid from the Ministry of Defence which identified the witnesses who were involved in this incident and who were involved in other lethal force incidents and specified the nature of their involvement in the other incidents. In addition the Coroner received from the Ministry of Defence personnel files of the soldiers. This information was not available to the representatives of the families.

[9] The Coroner gave a ruling on the 8th March 2012 where he found that one other incident involving Soldier A was of potential relevance to the issues to be determined in the inquest, namely the Bradley incident, and the details of that incident were to be disclosed to the next of kin. The applicant applied for judicial review of the decision of the Coroner. The application was drafted in broad terms that included the release to the families of the information about the soldiers supplied by the Ministry of Defence so that the representatives of the families might make representations to the Coroner in relation to the scope of the inquest and in particular to what, if any, extent the inquest should inquire into other lethal force incidents. In the event the hearing narrowed to seeking the release of information about Soldier A and the McIlwaine incident, the information about the other incidents that the other three soldiers were involved in and a response from the three silent soldiers. The application was refused because the inquest had already commenced and because the Coroner stated that he was going to keep the matter under review.

[10] In the event there was no disclosure of any information in relation to any of the other soldiers in the course of the inquest. The applicant contends in this application that the information about the other incidents and the information disclosed to the Coroner about the soldiers should have been disclosed to the families. The respondents approach is that it is for the Coroner to determine the scope of the inquest, that he

decided that one incident was potentially relevant, namely Soldier A and the Bradley incident, that there was disclosure of information about the only potentially relevant incident, that the Coroner maintained on-going review of the scope of the inquest as he heard evidence from the other soldiers and in so doing he did not come across anything that indicated that there was a need to examine any other incidents. It is not known what information precisely the Coroner had before him in the grid and the personnel files to guide him in relation to the relevance of other incidents but in general it comprised information identifying the soldiers who were involved in other incidents, the circumstances of the incidents they were involved in and the nature of their involvement. This was considered by the Coroner to have been sufficient to indicate to him whether anything that the soldiers said or did in the present incident and the other incidents had any bearing on the issues that the Coroner was examining. In the light of this the respondents indicate that the Coroner was best placed to make the decision in relation to the appropriate scope of the inquest.

[11] There was delay in sorting out the scope of the inquest. It is apparent that when the inquest started the applicant was still not satisfied with the position. One might have thought that this was an issue that would have been brought forward in a manner that would have permitted it to be determined before the inquest started. There are reasons given as to why that did not happen.

[12] The Coroner was obviously of a mind that other incidents could be potentially relevant to the inquest as he found to that effect in relation to Soldier A and the Bradley incident. There was disclosure of information to the jury in relation to that incident. Had the Coroner considered it necessary to disclose any information contained in what were described as the soldiers' personnel files, there may have been issues about disclosure of some of the content of those files, although the precise content is not known. However what the Applicant sought was identifying information in relation to other incidents and the identity of the soldier involved in each incident and the nature of that involvement, which need not have involved disclosure of the content of the personnel files.

[13] Where the Coroner in this type of inquest is considering whether the shoot to kill issue should be examined at the inquest there should be disclosure of information to the families of the deceased which is sufficient to identify any other similar incident in which any soldier was involved and the soldier's role in the subject incident and the other such incident, so as to permit the families to make representations on whether the other incident is potentially relevant to the issue of shoot to kill. Ultimately it is for the Coroner to decide in each case whether other incidents are potentially relevant to the issues to be determined in the inquest.

[14] There are two matters that arise in the circumstances of the present case. First of all, this dispute about the scope of the inquest and the potential relevance of other

incidents and the disclosure of information to the families to enable representations to be made to the Coroner should have been dealt with earlier and not on the eve of the inquest. The explanation for the delay in dealing with the dispute is not a sufficient or satisfactory explanation, given that the inquest was dealing with events that had occurred 20 years before and the inquest had been years in the preparation.

[15] Secondly, the Coroner did address the issue of potential relevance and did keep it under review as the inquest progressed. The ongoing review by the Coroner amounted to a secondary safeguard only because the immediate issue is that of adequate participation by the applicant in the decision making in relation to the potential relevance of other incidents to the shoot to kill debate. In this regard the secondary safeguard is the oversight of the Coroner of the evidence on potential relevance, a matter within the Coroner's control, whereas the primary safeguard, which was not made available, was the right to make fully informed representations.

[16] The above two considerations lead me to conclude that, while there should have been disclosure of the identifying information to the families, I propose to refuse leave on the applicant's first three grounds. The disclosure issue should have been dealt with sooner than the eve of the inquest when there would have been an opportunity for the matter to be resolved in time to be implemented at the inquest, by whatever means were required to achieve that outcome. Further, there was the secondary safeguard on the issue because the Coroner kept the issue under review as he carried out the inquest, had demonstrated his willingness to find other incidents potentially relevant by so finding in relation to Soldier A, heard the evidence of the other soldiers and in the event did not find that, in the light of that evidence, there was a need to re-open any of the decisions on the potential relevance of other incidents.

[17] Ground D states that despite the High Court ruling that the next of kin should be permitted to question Soldier A about his involvement in a lethal force incident involving Francis Bradley, no or no adequate steps were taken by the Coroner to secure Soldier A's return to give evidence in that regard and the Coroner refused to adjourn the inquest in order to secure his attendance. The reference to the High Court is a reference to the judgment in McCaughey's Application (No 2) [2012] NIQB 23 where it had been directed that the Coroner should reconsider the position in relation to Soldier A and the Bradley incident and the Coroner did so and attempted to make arrangements for the attendance of Soldier A to give evidence on the Bradley incident.

[18] Information was given to the jury about the Bradley incident by the disclosure of soldiers' statements and post mortem information that had been before the inquest that had already been completed in relation to that incident. However this was an inquest that was to be undertaken again on the direction of the Attorney General. The Bradley incident was potentially relevant because the Applicant had shot Francis Bradley in circumstances which were not dissimilar to those which arose in this case. In the event

Soldier A was not examined in relation to the Bradley incident and did not reattend the inquest for that purpose.

[19] The sequence of events is set out in some detail in the papers. Soldier A arrived in Belfast to give evidence at the inquest on 22nd March 2012. The Coroner ruled on the 23rd March that soldier A could not be questioned about Bradley. The next of kin applied for judicial review of that decision on the 26th March. On that day Soldier A commenced his evidence on other matters which continued until the 28th March. On the 28th March I gave the ruling in the second Judicial Review and referred the matter back to the Coroner to reconsider. On the 29th March it was reported to the Coroner that Soldier A was in the UK, was planning to return to the Middle East where he was then working (he no longer being a member of the military) and it was believed he would be available to attend the inquest in the week of the 9th April.

[20] On the 5th April the Coroner ruled that Soldier A should make himself available at the inquest on the 11th April and he indicated that if Soldier A failed to attend he would provide information to the inquest in relation to the Bradley death. On the 11th April Soldier A did not attend the inquest. He had taken independent legal advice. He was due to leave on that day for a three week holiday outside the UK which had been booked for 20 months. Beyond his own personal circumstances he indicated a concern about prejudice that might arise because the Bradley inquest was to be re-heard and he had concerns as to whether or not he could prepare properly to be examined about the Bradley incident. In the event Soldier A did not re-attend the inquest and on the 13th April the Coroner gave the Bradley papers to the jury and adjourned the matter until 25th April. The adjournment was to accommodate certain jurors holiday commitments.

[21] On 25 April the inquest resumed, the evidence was complete and over two days there were submissions to the jury and they were addressed by the Coroner. The jury retired on the 27th April and returned their verdict on the 2nd May. It appears that some consideration was given to adjourning the inquest further and two jurors raised concerns about holidays that had been arranged for early May and the Coroner decided to proceed. All of this is taken from a skeleton argument produced by the Ministry of Defence and there was no evidence filed on this matter.

[22] The result was that while Soldier A was considered to be potentially relevant and the Coroner was preparing to have him give evidence in relation to the Bradley incident, in the circumstances that have been outlined above it did not happen. I am satisfied, as was the Coroner, that the evidence of Soldier A in relation to the Bradley incident was potentially relevant to the shoot to kill issue raised in the present case. The Ministry of Defence's position in relation to Soldier A is that the inquest would have been put in jeopardy had there been further adjournments to recall Soldier A, who had expressed reluctance to give evidence in any event because of potential prejudice. Further, it is contended that the jury had the information they needed in relation to the

Bradley incident and therefore it was not necessary or appropriate given his unavailability, to adjourn the matter any further. The information provided by the Coroner included the statements of the soldiers, Dr Carson the State Pathologist's deposition in the Bradley inquest and the deposition of a Mr Thompson, a ballistics expert, in the Bradley inquest.

[23] As soldier A was potentially relevant to the shoot to kill issue and arrangements were made for his attendance and there was no other soldier who gave evidence in relation to the shoot to kill issue and it remained a live issue in the inquest, there is an arguable case that the Coroner should have taken further steps to attempt to secure the presence of Soldier A at the inquest. The many factors that have been outlined in the papers as relevant in relation to his non-attendance are not in formally in evidence. This is a ground that requires further examination. Leave is granted to apply for judicial review.

[24] Ground E states that the questions presented by the Coroner to the jury failed to ensure an Article 2 compliant inquest. It is said that the questions failed to ensure that the central issues relating to recourse to lethal force at each stage of the operation were identified and addressed. This relates to the shoot to kill issue. One such incident is that Soldier A gave evidence of another unidentified soldier shooting Grew while he was on the ground. This was a separate and distinct issue from the admitted shooting by Soldier D of Grew while he was on the ground. Soldier's A evidence was that he had seen nothing which would have justified the unidentified shooting. The jury were not expressly asked any questions about their conclusions as to that conduct and consequently no conclusions were reached by them on that issue. A further incident is the suggestion that Soldiers C and D were walking forward while shooting and that this was not an issue brought out by the questions.

[25] I have read from Lord Bingham above. The inquest is an investigation. The jury are not making a determination of guilt or innocence but making a narrative finding. The questions included the causes of the deaths, the scenario in which the deaths occurred, the role of the soldiers with particular reference to whether the force used was reasonable and whether there was minimal recourse to lethal force, how the wounds were occasioned, the supervision and control of the operation and finally the jury were given the opportunity to record any other factor that caused or contributed to the deaths.

[26] At this point it is appropriate to look at the verdict that was returned by the jury. The narrative in response to the question as to whether the force used was reasonable reads as follows:

> "Soldier A opened fire in the belief that their position had been compromised and their lives were in

> danger. A believed that Mr Grew and Mr McCaughey, who were armed with guns, wearing gloves and balaclavas, had moved forward towards their position. Soldiers B, C D followed A's initial shot and continued firing until they believed the threat was neutralised. Given these circumstances we believe the soldiers used reasonable force.
>
> The soldiers then moved forward to within the area of the mushroom shed, Soldier D fired a further 2 shots at Mr Grew close to the shed door. He still felt under threat and his reaction was reasonable.
>
> Whilst there is evidence of a third shot being fired within the area of the mushroom sheds, the evidence is insufficient for us to comment on the circumstances of this shot.

The narrative in response to a question on whether there was any other reasonable course of action available reads as follows –

> We cannot be unanimous on the balance of probabilities whether or not there was an opportunity to attempt arrest in accordance with the yellow card prior to the soldiers feeling compromised. However once the soldiers felt compromised we agree that there was no other reasonable course of action."

[26] In relation to Grew in particular it is stated that he was hit by a number of shots and it is then stated -

> "The shots were fired from the area of the fencing. Mr Grew was upright and facing the soldiers.
> Mr Grew received a further two shots while lying on the ground at the doors of the mushroom shed. Soldier D believed that Mr Grew still posed a threat as he made a noise when Soldier D moved either the shed door or his foot against Mr Grew."

[27] The specific findings in relation to McCaughey are that he was hit through the cheek with a bullet travelling from left to right.

> "…. it is not possible to ascertain from where the shot was fired except to say that it was not within one metre of Mr McCaughey.
> Mr McCaughey was on or close to the ground when he sustained the fatal wound…. a further wound which is behind the left ear. On the balance of probabilities it is not possible to be definitive about the wound behind Mr McCaughey's left ear. Two of Mr McCaughey's other injuries occurred when he was upright and shot in the chest by Soldier A from the direction of the fencing. As he was rotated by the force of the first bullet he received a second shot to his right flank/loin. It is not possible to be definitive about his position when he received the other shots."

[28] It cannot be expected that every detail of the events under investigation should be the subject of a specific question posed by the Coroner. The matters to which particular reference is made by the applicant were matters in evidence and subject to submissions to the jury. The questions that were presented to the jury were capable of embracing all the details of what happened at any particular time and in any particular respect, including the firing of particular shots. The questions focused on the elements of the inquiry that was undertaken. There was no matter that the jury might have considered relevant that was not capable of being addressed in the jury responses. I am not satisfied that there is any arguable ground for suggesting that the questions failed to grapple with the issues. Leave is refused on ground E.

[29] Grounds F and G can be taken together. Ground F is that the Coroner misdirected the jury on the central issue of justification for the use of force in failing to direct the jury to consider each soldiers honest belief, whether the belief was reasonably held and whether the force was necessary. Ground G is that the jury ought to have been directed by the Coroner to consider the 'absolute necessity' of the force used when considering justification. A further point in the Applicant's skeleton argument relies on the decision in Bennett -v- United Kingdom, namely, the application of the test of self-defence imposes in principle a higher standard of care on those with firearms training as opposed to untrained civilians and this was not included in the Coroner's direction to the jury.

[30] It is agreed between the parties that the Coroner directed the jury on the soldiers state of belief and whether the force used was reasonable. He did not state the test in terms of absolute necessity nor did he address them in relation to trained officers and others.

[31] Bennett -v- United Kingdom dealt with the issue of necessity and reasonableness at paragraph 74 of the judgment where it is stated that:

> "The Court finds that while it might be preferable for an inquest jury to be directed explicitly using the terms "absolute necessity" any difference between a convention standard on the one hand and the domestic law standard and its application in the present case on the other, could not be considered sufficiently great as to undermine the fact finding role of the inquest or to give rise to a violation of Article 2 of the Convention."

[32] While the jury were not directed in terms of 'absolute necessity' a failure to do so but to apply the domestic standard is not a violation of the Convention. The Coroner applied the domestic standard and that is Convention compliant.

[33] On the training issue, paragraph 73 of Bennett states –

> "It is evident that the application of the test of self-defence imposes a principle of a higher standard of care on firearms trained officers than for example untrained civilians…"

The Respondent's point out what follows in Bennett, namely that the Coroner devoted days of the inquest to the taking of evidence on the question of the officer's training and referred in her summing up to this training and to the ACPO manual, which contained guidance that limited the use of firearms to absolutely necessity. Thus the Respondent contends that the issue of trained officers is an aspect of opening fire in accordance with the guidance for professional firearms users.

[34] In the present case involving the military the relevant guidance is contained in the yellow card. The guidance and compliance with the guidance were addressed in the evidence in the present case and the circumstances in which soldiers may open fire was brought to the attention of the jury.

[35] The verdict of the jury setting out the circumstances in which they found that the soldiers had opened fire and their conclusions as to opening fire indicate that the jury found the soldiers were being approached by armed men who were ready to fire and the soldiers response was found by the jury to have been reasonable in the circumstances and that there was compliance with the yellow card provisions. I refuse leave on grounds F and G.

[36] Ground H states that in response to a question posed by the jury as to the impact of shooting into a corpse the Coroner directed the jury in an inappropriate manner. The question that was sent to the Coroner was "If a shot is fired into a corpse, can this legally be defined as excessive force". The Coroner replied "Technically speaking once you are satisfied on the balance of probabilities that someone is deceased you can draw a line underneath it. You can say that the inquest has no further interest. ...but in a strict legal sense questions of excessive force concerns events that lead to the death and not events after the person is dead. The interest of an inquest evaporates once a person is dead so your principal interest is in the death." The Applicant contends that the direction by the Coroner was inadequate because the fact that shooting occurs after someone is known to be dead may itself be an indicator of excessive force having been used to occasion the death.

[37] However, there are two passages that I omitted from that quoted above where the Coroner also said -"If however you feel that in order to properly understand the death you need to comment on a sequence of events I will consider it but I am not going to prevent you from expressing a view on the use of force at any time." The Coroner was there leaving it open to the jury to consider the matter above and beyond the moment of death. That being so I do not find that his response to the specific question can be found objectionable. I refuse leave on Ground H.

[38] Ground I states that the Coroner failed to discharge a juror who was inattentive and hostile. The circumstances of this juror are set out in Mr Sheils affidavit. I summarise as follows. On 20th March 2012 the next of kin's representatives raised issues with the Coroner's solicitors and Counsel in relation to one of the jurors who did not appear to be paying attention. On 23rd March a member of the press raised the same issue with the Applicant's solicitor. On 23rd March seems a telephone call was received from a witness who raised concerns about this juror. On 26th March an application was made to discharge the juror which was refused by the Coroner. On 27th March the juror was again noted to be inattentive and a further application was made to discharge the juror and was refused. Then on 30th March further concerns were addressed to the Coroner about the attitude of this juror. On the 4th April an application was made to discharge the whole jury and this included reference to this juror and the application was refused. On the 25th April some of the family of one of the deceased encountered the juror who was spitting in their direction. On 26th April a further application was made by reference to the spitting incident and was refused. On 27th April an application was made for Judicial Review and Stephens J dismissed that application. Two further steps emerged from that process. First of all an affidavit was filed from the Coroner. The Coroner did not agree with all that had been said about the conduct of this juror and in any event felt that nothing improper had been done that warranted the discharge of the juror. The second matter was that one of the deceased's family swore an affidavit in relation to the incident with the juror. The Coroner looked

at the matter again and he again refused the application to discharge the juror. Ms Quinlivan contends that the rulings were unreasonable and should be set aside.

[39] The Coroner kept the matter under review. He formed a view in relation to the juror's conduct. He was not satisfied that the conduct was sufficient to discharge the juror. No one was better placed than the Coroner to make a judgment on what was happening in the inquest. A particular incident occurred outside the Court. The Coroner had the affidavit in relation to that incident. The Coroner made a judgment in relation to the matter based on the evidence available. I am not satisfied that there are any grounds to argue that he was in error in any respect in failing to discharge the juror. I refuse leave on ground I.

[40] Ground J contains five points concerning the Coroner's closing remarks to the jury. I repeat the comments made above when considering the questions presented by the Coroner. The inquest is an investigation. The jury are not making a determination of guilt or innocence but making a narrative finding. The Coroner's remarks and the questions presented by him go to aid the jury to complete their narrative. Any summing up by the Coroner should of course provide a fair summary of the evidence to assist the jury to express their narrative on the relevant issues, to the extent that it is possible to express such a narrative in the circumstances of the case.

[41] The first three matters I bring together. They are to do with a strike mark on the ground near Mr McCaughey's head. The first point concerns the introduction by the MOD during closing submissions of material that was not in evidence. The second point relates to the evidence of the forensic scientist Mr Wallace. The third point relates to the inferences that might be drawn from the denial of a third shot having been fired.

[42] These matters relate to a strike mark on the ground beneath Mr McCaughey's head and whether a third shot had been fired by soldier D in the vicinity of the mushroom sheds. Mr Wallace, forensic scientist, was asked during his evidence whether he recalled saying to a policeman in 1992 that the strike mark which was near Mr McCaughey's head was not connected with the wound that he had to his head and Mr Wallace stated that he had no recollection of that conversation. However in closing submissions, and this is the Applicant's complaint, the MOD referred to what Mr Wallace was alleged to have said in 1992. Further, the Coroner had asked the witness whether the strike mark might have come from a shot fired from the area of Mr McCaughey's feet and Mr Wallace had said that was possible. He was also asked by the Coroner if the shot could have been fired from shelving near the sheds and Mr Wallace replied that it could have been.

[43] There were exchanges between the parties and the Coroner as to his comments to the jury on these matters. The Coroner issued clarification to the jury which included the comment "Of course you will remember that in his evidence Mr Wallace said that

any number of things were possible". The applicant objects to the manner in which these matters were dealt with by the Coroner.

[44] The Ministry of Defence lays emphasis on the post-mortem evidence that bullets struck Mr McCaughey from the left, save one which had entered his right loin and which appeared to come from behind and to the right. There was an entry wound on his left cheek which had been caused by shots coming from his left, that is the direction of the field in which the soldiers were located and this could not have been caused by a shot fired from the right, that is the direction of the mushroom shed.

[45] The jury finding in respect of the third shot was that "Whilst there is evidence of a third shot being fired within the area of the mushroom shed, the evidence is insufficient for us to comment on the circumstances of the shot."

[46] I do not find that the manner in which the MOD commented upon the remarks they heard attributed to Mr Wallace or the manner in which the Coroner commented on Mr Wallace's evidence can give rise to any arguable challenge by way of judicial review.

[47] The fourth and fifth aspects of ground J I take together. They concern the failure by the Coroner to deal adequately with a misleading proposition advanced on behalf of the police and with the Coroner directing the jury so as to suggest that they must conclude either that the men had been killed in a deliberate ambush or that the use of force was justified.

[48] The contentions are that in closing submissions Counsel for the police repeatedly asserted to the jury that the next of kin were advancing a positive case that the police had tasked the SAS to establish a planned ambush in order to kill the deceased, a matter that the applicant says was not the case. Further, that incorrect contention by the police was compounded throughout by the Coroner's closing to the jury in which he directed the jury that they had two broad alternative theories to consider, two theories that were polar opposites, namely whether the soldiers' actions were justified or whether their actions were akin to an ambush. The respondent's position in general is that while the two options were referred to there were other options referred to as well.

[49] It is correct that on occasions the Coroner referred to two alternative theories but it does appear that he recognised other alternatives and he was not limited to putting the matter to the jury in the stark terms suggested by the applicant. I do not accept that this aspect is arguable.

[50] The last aspect of this ground concerns the Dunloy incident, namely that the Coroner inaccurately directed the jury as to the significance of the evidence in relation to Dunloy. When Soldier A was giving his evidence about firing at a body on the

ground, he stated that it was well recorded that an incident had happened in Dunloy where a wounded IRA man had shot and killed a soldier. The Applicant's contention is that Soldier A's version of events at Dunloy was a matter of dispute and that the next of kin were prevented, by the absence of Soldier A, from asking further questions about that incident.

[51] The complaint is that the information produced to the jury about Dunloy did not really address the point made by Soldier A. That there had been a shooting at Dunloy of a soldier was not in question but what the Applicant states is that the jury were not invited to address the relevance of the Dunloy issue to soldiers shooting someone who was lying on the ground.

[52] In relation to the Dunloy incident the statements of the soldiers involved were read to the jury. One soldier stated that he had received serious injuries in the course of the incident, that they had been taken by surprise by terrorists, that one soldier, a Sergeant Oram had been shot and killed, that the soldiers who arrived at the scene went to the assistance of their colleague and there was a terrorist who was still armed and aiming his weapon at the soldiers. The statements of evidence did not address directly the issue of a soldier being shot by a wounded man. Nor indeed can another incident address whether it is necessary to shoot at anyone on the ground in particular circumstances. However it would have been evident to the jury that the statements about Dunloy did not present an occasion when a soldier had been shot by a wounded man. That the jury were mindful of the need to address the issue of a soldier shooting someone already on the ground is apparent from their findings. I am not satisfied that leave should be granted on this aspect of ground J. Accordingly I refuse leave on all aspects of ground J.

[53] Ground K is a catch all ground and does not add anything to the other grounds.

[54] Ground L comes in by amendment and concerns the principle of the use of anonymous and unanimous juries. It reads:

> "The combination of the requirement that a jury is anonymous thus precluding any inquiry into apparent or actual bias and unanimous in its conclusions in the context of controversial lethal force incidents involving state agents, fails to ensure a hearing before an independent and impartial Tribunal is not compliant with the Applicant's Article 2 rights."

[55] There is no objection to this ground being added. The ground was referred to in the Order 53 statement as a form of the relief sought by a declaration but was not set out in the grounds for judicial review.

[56] The issue in relation to the jury system was not raised before the Coroner but only emerged in the course of this application for judicial review. The respondent says that on that basis alone the ground should not be permitted to proceed.

[57] Section 18 of the Coroner's (Northern Ireland) Order 1959 provides that a Coroner shall hold an inquest with a jury if it appears that there is reason to suspect that the death occurred in circumstances, the continuance or possible recurrence of which was prejudicial to the health or safety to the public or any section of the public. Section 3(1) of the 1959 Act provides that the verdict of the jury should be unanimous and there is no provision for majority verdicts as there is in criminal proceedings.

[58] The Justice and Security Act (Northern Ireland) 2007 provides that all juries be anonymous and a new scheme was then introduced in relation to jury service. In the criminal context this was subject to a challenge by way of Judicial Review in the Divisional Court in McParland's Application [2008] NIQB 1. The Divisional Court ruled that the anonymity of juries was compatible with the Article 6 requirement for a fair hearing. The applicant points out that the entire focus of the preparation of the anonymous jury system was on criminal cases and without regard to juries in the Coroner's Court. The Attorney General produced guidelines on jury checks and recognised that it was a safeguard against corrupt or biased juries where there was the availability of majority verdict. The Attorney General recognised a need for further safeguards against the possibility of bias in some cases and he cited national security and terrorism as examples. It was stated that a juror's political beliefs could be so biased as to go beyond normally reflecting the broad spectrum of views and interest in the community to reflect the extreme views of sectarian interest or pressure groups to a degree which might interfere with a fair assessment of the facts of the case or lead to the exertion of improper pressures on fellow jurors.

[59] The applicant contends that self-assessment of independence and impartiality is a wholly inadequate safeguard against bias and therefore the inquest was compromised. The reasons listed include the ability to challenge for cause being rendered nugatory by the jury being anonymous, the protection against corrupt or bias jury provided by a majority verdict not being available, the normal protections being insufficient to protect against a corrupt or biased jury and that the only protections in place were self-selecting processes.

[60] I am informed by Counsel that while there was no application to discharge the jury in this particular inquest there was an application to discharge the jury in another inquest that is proceeding into the death of Pearce Jordan, which application was rejected. It may be that in the Jordan inquest there will be grounds for challenge to the use of a jury. No such issue was raised in the present inquest until after the verdict was

returned. An after the event application to challenge the principle of jury use in an inquest is not something on which I propose to grant leave to apply for judicial review.

[61] The outcome is that for reasons that I have given above leave to apply for judicial review will be granted on ground D in relation to the non-engagement of Soldier A on the issue of a shoot to kill policy.