Neutral Citation no. [2006] NICA 13

Ref: **KERF5536**

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

Delivered: **06/04/06**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY OWEN McCAUGHEY FOR JUDICIAL REVIEW

Before Kerr LCJ, Campbell LJ and Weatherup J

KERR LCJ

[1] This is an appeal from a decision of Girvan J dismissing an application by the appellant, Owen McCaughey, for judicial review of decisions of the Lord Chancellor in relation to the funding of legal representation for a preliminary hearing to be held by a coroner in advance of an inquest into the death of the appellant's son, Martin McCaughey.

[2] In his judgment Girvan J examined the evolution of the extra statutory scheme that had been devised by the Lord Chancellor to provide public funding for next of kin to be represented by lawyers at coroners' inquests in Northern Ireland. For reasons that will shortly appear we do not feel it necessary to revisit that history.

[3] Martin McCaughey and Desmond Grew were shot dead on 9 October 1990 by members of the security forces near Loughgall, County Armagh. On 6 December 2002 an application was made for funding for the inquest into Mr McCaughey's death. On 3 April 2003 the Northern Ireland Court Service wrote to the appellant's solicitors indicating that the relevant Minister had authorised payment of a sum (that was not to exceed a specified amount) by way of an *ex gratia* payment. This was to be used solely for the costs of solicitors and junior counsel to represent the appellant at the preliminary hearing of the inquest. The sum allowed was to be payable for costs incurred after 26 March 2003.

[4] The Court Service had written to the coroner on 17 December 2002 asking for his views as to whether senior counsel was required to represent the next of kin at a preliminary hearing. He replied on 23 December saying that he would be "somewhat uneasy" about senior counsel being funded for such a

hearing which, he thought, would not take a long time. In response to a further letter from the Court Service on 9 January 2003 the coroner said: -

> "I cannot see the preliminary hearing taking much longer than a morning … I have asked for junior counsel as counsel to the inquiry and I cannot see the need for senior counsel at this early stage"

[5] A preliminary hearing took place on 31 January 2003. Further hearings before the inquest were envisaged, however, and it was in respect of these that the funding was granted. Two aspects of the funding are under challenge. First, it is claimed that the decision to provide funding for junior counsel only is wrong. Secondly, the fact that a 25% reduction has been made in the costs that would otherwise be appropriate is said to be erroneous. The latter decision was taken because the appellant's solicitors had declined to provide the Lord Chancellor with information on the financial means of the deceased's siblings. This information had been sought because paragraph 10 of the scheme provides that where there are other family members, some of whom are not financially eligible for the grant of legal aid, it may be appropriate to refuse funding or restrict it to a proportion of the costs of representation.

[6] A number of significant developments have occurred since the decision in relation to funding was taken. It is now clear that this inquest will not take place until the outcome of appeals in the House of Lords from decisions of this court is known. Two appeals in *Re McCaughey and Grew* and *Re Jordan* are pending before the House of Lords and are at present scheduled to be heard in 2007. Secondly, the coroner assigned to conduct the inquest in the present case has left office. The inquest and any further preliminary hearings will be undertaken by a different coroner. Thirdly, and most significantly, the responsibility for decisions about funding of legal representation at inquests and preliminary hearings has passed from the Lord Chancellor to the Northern Ireland Legal Services Commission.

[7] In these circumstances the decision of the Lord Chancellor in relation to funding has been overtaken by events. It is no longer effective. An application will have to be made to the Legal Services Commission for future funding. In so far as the views of the coroner as to the need for senior counsel continue to be relevant these will have to be expressed by the coroner who will be assigned to this case. The decisions under challenge in the present proceedings are of no current relevance whatever.

[8] Even if the appellant was successful in this appeal, therefore, this will bring him no tangible benefit because the matter of funding of legal representation at any future inquest or preliminary hearing will have to be determined according to the circumstances that then obtain and that decision

will be taken by a different agency from that which decided the proposed funding. The decision will unquestionably be informed by the outcome of the appeal in the cases referred to above. It is submitted for the appellant, however, that a judgment on his challenge may provide guidance for future cases. We cannot accept that argument. The circumstances in which these decisions were taken are most unlikely to recur and are, in any event, related directly and uniquely to the facts of the present dispute.

[9] In *R v Home Secretary, ex parte Salem* [1999] 1 AC 456 the House of Lords accepted that the court should be prepared to pronounce upon questions of general public interest even where the party who initiated the proceedings no longer had a direct interest in the outcome but the Appellate Committee was careful to point out that such pronouncements should only be made where there was good reason in the public interest for doing so. At page 457, Lord Slynn said: -

> "The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[10] Referring to this passage from the opinion of Lord Slynn, this court in *Re McConnell* [2000] NI 116, 120 said: -

> "It is not the function of the courts to give advisory opinions to public bodies, but if it appeared that the same situation was likely to recur frequently and the body concerned had acted incorrectly they might be prepared to make a declaration, to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future."

[11] Applying these principles to the present case, we have come to the firm conclusion that this appeal cannot succeed. It is not invariably required that the same situation is likely to be encountered often or that it is to be apprehended that the decision maker might fall into error again but these are factors to be taken into account in deciding whether the court should

adjudicate in a dispute that is academic as between the parties. Neither has been demonstrated in the present case. The appeal is therefore dismissed.