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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR29's Application (Leave Stage) [2009] NIQB 97

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

JR 29 (INQUEST)

WEATHERUP J

[1] This is an application for leave to apply for Judicial Review of the decision of the Coroner of 20 October 2009 concerning the scope of an Inquest into the deaths of all the members of a family comprising the father, the mother and five children, who died in a house fire on 13 November 2007. The applicant is the paternal grandfather and the maternal grandparents are notice parties. Mr Doherty appeared for the applicant, Mr McAlinden for the Coroner and Mr Lunny for the notice parties.

[2] The applicant challenges the scope of the Inquest that has been ordered by the Coroner as amounting to an investigation that extends beyond the proper bounds of an Inquest. The Coroner has decided that the proposed scope of the Inquest is necessary to determine how each of the deceased came by their death. The Coroner is proceeding on the basis of two possible scenarios as to the cause of the fire. The first is that the father, who also died in the fire, is suspected of setting the fire. The alternative is that some third party started the fire either by gaining access to the house or from outside the house.

[3] The Coroner therefore proposes to examine certain matters in the course of the Inquest and the applicant objects to the inclusion of those matters. First of all there is the father's history of sexual offending against young girls. Secondly, there are allegations against the father of a sexual relationship with a person being described as Witness A, which relationship started when she was under age and was continuing before the deaths.

Thirdly, there were incidents around the family home involving Witness A's mother. Fourthly there were contacts between the father and another under age girl. Fifthly, there are suggestions of violence by the father against the mother. Sixthly, there is a psychiatric history and a report of a history of self harm by the father.

[4] The Coroner has filed an affidavit explaining her reasons for including the disputed material in the Inquest. She states that the scope of the Inquest into the deaths of the deceased is not restricted to investigating the narrow cause of death but must extend to investigating such issues as the cause of the fire and whether the fire started accidentally or was deliberately started; if the evidence pointed towards the fire being started deliberately it would be important to investigate whether there was any evidence to suggest that any of the deceased started the fire or whether there was evidence to suggest that the fire was started by a third party, how they gained access to the house, started the fire and then left the house or started the fire from outside the house; the proper and thorough investigation of these matters would include the gathering and the subjection to forensic examination of all evidence which might suggest a motive for or provide an explanation for either one of the deceased or a third party deliberately starting the fire.

[5] The evidence of six witnesses is in issue and the applicant contends that part or in some cases all of the evidence of those witnesses should be excluded from the Inquest.

The first is Witness A. She will be called to give evidence about contacts with the father before the fire. However the applicant wishes to exclude her evidence of their sexual relationship.

Secondly, there is the evidence of Sergeant McFall. He is a police officer who visited the family home on 5 November 2007 as risk manager for the father as a registered sex offender. He was investigating a complaint about an incident that had been reported to police concerning Witness A the previous weekend. He can give evidence as to how he found the father and the mother on that occasion. The applicant wishes all of his evidence to be excluded.

Thirdly, Ms Duffy, a neighbour, witnessed events at the time of the fire. The applicant wishes to exclude two parts of her evidence. In the first place she records the mother being hit some three or four years earlier and secondly she records the presence of Witness A's mother outside the house some three or four weeks before the fire.

Fourthly, there is the evidence of Mr Taggart, a neighbour who came to the scene of the fire. The applicant wishes to exclude the evidence of the witness in relation to Witness A's mother being outside the family home in September 2007.

Fifthly, Detective Chief Inspector Scott attended the scene and was investigating officer. The applicant wishes to exclude the parts of his evidence relating to the previous sexual offending of the father; his relationship with

Witness A; his contacts with another under age female; the establishment of a Bebo website in which the father had registered as a 13 year old boy called Sean; telephone activity on Saturday 11 November and Monday 12 November between the father and Witness A and the other under age girl. On those dates it appears that there are records of 154 messages being sent on the Sunday and 1 hour 30 minutes of telephone calls with the two girls. On the Monday there are records of 21 text messages with the two girls and 34 telephone calls with one of the girls.

Sixthly, there is the evidence of Ms Coyle, an acquaintance of the mother through their respective children being at the local school, who records some of the mother's conversations about the father, about a suicide attempt by the father and about the family finances. The applicant wishes to exclude the evidence of this witness.

[6] The applicant's grounds for judicial review are first of all that the Coroner's ruling was Wednesbury unreasonable in that it went beyond her remit as it could not be said that the proposed evidence related to matters directly causative of the death.

Secondly, that the wider Inquest proposed by the Coroner was unfair as the applicant had no right to call any relevant and admissible evidence and had no right to disclosure of relevant documents nor any right to address factual submissions to the tribunal of fact.

Thirdly, that the Coroner took into account irrelevant considerations. The first such matter was the description of the father as 'the chief subject', which is said to be contrary to the statutory prohibition on expressions of opinion on criminal and civil liability and the apportionment of guilt.
The second such matter was the consideration that the Inquest would be the only means of conducting an inquiry in the public interest in relation to the circumstances of the deaths. This is said to provide no basis for a wide investigation where there is no suggestion of wrong doing on the part of agents of the State and where the appropriate public inquiry had already been conducted by the completion of the Toner Report.

Fourthly, that the irrelevant considerations indicated that the Coroner exceeded the statutory remit of a Coroner.

Fifthly, that the irrelevant considerations rendered the decision procedurally unfair.

[7] The relevant legislative provisions are set out below, with italics added.

Section 31 of the Coroners Act (Northern Ireland) 1959 states that, where all members of the jury at an Inquest are agreed, they shall give, in the prescribed form, their verdicts setting forth, so far as such particulars have been provided to them, *who the deceased person was and how, when and where he came to his death.*

Rule 15 of the Coroners (Procedure) Rules (Northern Ireland) 1963 states that *the proceedings and the evidence at an Inquest shall be directed solely to ascertaining the following matters – (a) who the deceased was and (b) how, when and where the deceased came by his death* and (c) the particulars required for registration of the death.

Rule 22(1) provides that after hearing the evidence the Coroner, or where the Inquest is held by a Coroner with a jury, the jury, after hearing the summing up of the Coroner shall give a verdict in writing, *which verdict shall so far as such particulars have been proved be confined to a statement of the matter specified in Rule 15.*

Rule 22(2) provides that where it is proved that the deceased took his own life *the verdict shall be that the deceased died by his own act* and where in the course of the proceedings *it appears from the evidence that at the time the deceased died by his own act the balance of his mind was disturbed the words 'whilst the balance of his mind was disturbed' may be added as part of the verdict.*

Rule 16 provides that *neither the Coroner nor the jury shall express any opinion on questions of criminal or civil liability* or on any matter other than those referred to in Rule 15.

Rule 23(3) provides that a Coroner who believes that action should be taken to prevent the occurrence of fatalities similar to that in respect of which the Inquest is being held, *may announce at the Inquest that he is reporting the matter to the person or authority who may have power to take such action and report the matter accordingly.*

[8] This death occurred after 2 October 2000 and the right to life under Article 2 of the European Convention on Human Rights applies. Article 2 creates two obligations. First of all the substantive obligation whereby the State has the negative duty not to take life and a positive duty in certain circumstances to take steps to protect life. Secondly, Article 2 raises a procedural obligation on the State to provide for an effective public investigation into a death by an independent official body. This procedural obligation may apply in a number of situations which include (1) where State forces directly cause the death and (2) where the State has an obligation to protect a person, such as a person in custody or in care and where that person has died by their own hand or by the hand of a third party or by the nature of attention provided and (3) where relevant State authorities knew or ought to have known of the risk to the deceased, such as the police being on notice of a threat to the deceased. This procedural obligation may also arise (4) where there is no direct or indirect responsibility for the death on the part of State agencies, as to which see the judgment of Kerr LCJ in Kincaid's Application [2007] NIQB 26.

[9] The House of Lords has considered the nature of the procedural obligation in R(Amin) v Secretary of State for the Home Department [2003] UKHL 51. The case concerned a death in custody in prison at the hands of another prisoner. In considering the character of the State's duty to investigate it was stated by Lord Bingham at paragraph 31 –

> "The purposes of such an investigation are clear: to ensure as far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relatives may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

[10] The House of Lords considered the issue further in the joined appeals from Northern Ireland in Jordan v Lord Chancellor (concerning a shooting by police) and McCaughey v Chief Constable (concerning a shooting by the military)[2007] UKHL 14. At paragraph 37 Lord Bingham stated –

> "…. the purpose of an inquest is to investigate fully and explore publicly the facts pertaining to a death occurring in suspicious, unnatural or violent circumstances, or where the deceased was in the custody of the state, with the help of a jury in some of the most serious classes of cases. The coroner must decide how widely the enquiry should range to elicit the facts pertinent to the circumstances of the death and responsibility for it. This may be a very difficult decision and the enquiry may (as pointed out above) range more widely than the verdict or findings. It is on the latter alone that the parties join issue."

[11] The present application involved some debate about what Counsel called narrow investigations, as opposed to broad investigations, the latter being described as 'Middleton Inquests'. Counsel for the applicant considered the proposed Inquest to be a 'Middleton Inquest' and to be inappropriate in the circumstances of the case. This issue relates to the requirement that an Inquest should determine 'how' the deceased came by his death, which generally relates to 'by what means' rather than 'in what broad circumstances' the deceased came by his death. The Court of Appeal in England and Wales in R (Jamieson) v HM Coroner for North Humberside and Scunthorpe [1995] QB 1, in dealing with a suicide in prison, confirmed the position at that time that 'how' the deceased came by his death meant 'by what means' rather than 'in what broad circumstances'. The Court of Appeal

in Northern Ireland took the same approach in Ministry of Defence's Application [1994] NI 279, another instance of shooting by the military.

[12] The House of Lords decided in R(Middleton) v HM Coroner for the Western District of Somerset [2004] UKHL 10, in relation to a suicide in prison, that the procedural requirements of Article 2 resulted in there being cases where 'how' the deceased came by his death had to be interpreted as 'by what means and in what broad circumstances'. Lord Bingham stated (*italics added*) –

> "To meet the procedural requirements of article 2 an inquest ought ordinarily to culminate in *an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case."* (paragraph 20).

Having referred to those cases where the procedural obligation might be met by criminal proceedings Lord Bingham continued -

> "In some other cases, short verdicts in the traditional form will enable the jury to express their conclusion on the central issue canvassed at the inquest…. *But it is plain that in other cases a strict ex p Jamieson approach will not meet what has been identified above as the Convention requirement….* The conclusion in inescapable that there are some cases in which the current regime for conducting inquests in England and Wales, as hitherto understood and followed, does not meet the requirements of the Convention (paragraph 31).
>
> Only one change is in our opinion needed: to interpret "how"…. in the broader sense previously rejected, namely as meaning not simply "by what means" but *"by what means and in what circumstances"*. (paragraph 35).
>
> This will not require a change of approach in some cases, where a traditional short form verdict will be quite satisfactory, but it will call for a change of approach in others…. *In the latter class of case it must be for the coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury's conclusion on the central issue or issues.*…. It may be done, and has (even if very rarely) been done, by inviting a narrative form of verdict in which the jury's factual conclusions are briefly summarised. It may be done by inviting the jury's answer to factual questions put by the coroner." (paragraph 36)

Here it should be noted that the form of verdict is different in Northern Ireland to that in England and Wales where, for example, there are verdicts of lawful and unlawful killing whereas in Northern Ireland the verdict will be in the form of a narrative of findings.

[13] Thus Middleton involved an exercise in addressing the Article 2 requirement to provide a factual conclusion to the essential issue in dispute in the Inquest and how that might have been achieved in England and Wales where in some cases the verdicts available might not have provided an appropriate vehicle for expressing a conclusion on any disputed factual issues at the heart of the case. Similarly in Northern Ireland, through the narrative form of verdict available, a conclusion ought to be provided if possible on the disputed factual issues at the heart of the case.

[14] Finally in Middleton, at paragraph 37, a reminder –

> "The prohibition [in the rules] on the expression of opinion on matters [of civil and criminal liability] must continue to be respected. But it must be read with reference to the broader interpretation of "how" [in the Act and the rules] and *does not preclude conclusions of fact as opposed to expressions of opinion.*

The Rules in Northern Ireland are also different in respect of expressions of opinion. In England and Wales the prohibition is on any expression of criminal liability on the part of an individual whereas in Northern Ireland it is any expression of criminal liability.

[15] The state of the authorities was considered further by the House of Lords in Jordan and McCaughey in 2007. It was confirmed that Jamieson was not overruled and neither was Ministry of Defence's Application, although made subject to further comments. Lord Bingham's further comments were -

> "I agree with the Northern Irish courts, and Mr McCloskey, that a jury in Northern Ireland may not return a verdict of unlawful or lawful killing…. It is not suggested that rule 16 is ultra vires, and a verdict of lawful killing (no less than unlawful killing) does express an opinion on a question of criminal liability. (paragraph 38)
> I also agree with the Northern Ireland courts, and with Mr Blake, that nothing in the 1959 Act or the 1963 Rules prevents a jury finding facts directly relevant to the cause of death which point very strongly towards a conclusion that criminal liability exists or does not exist."(paragraph 39)

[16] An Inquest may be required to consider disputed factual issues as to how a deceased came by his or her death, as to the circumstances and responsibility for the death. For the purposes of the procedural requirements of Article 2, the Inquest ought ordinarily to culminate in an expression, however brief, of the conclusion on the disputed factual issues at the heart of the case. In dispute in the present Inquest will be the actions of the father in relation to the circumstances of each of the deaths and his responsibility for each of the deaths. There is a permitted verdict under Rule 22 that the father died by his own act and there is the option of adding, if it be the case, that the balance of his mind was disturbed at that time. Inevitably therefore, in order to consider such a verdict, the actions of the father will be investigated, as well as the balance of his mind at the time. Any psychiatric history would be relevant and one would have assumed that any prior history of self harm would be a relevant consideration. It will be apparent that, if there is an examination as to whether the father died by his own act, that will lead to a consideration as to whether the mother and the children also died by the act of the father. The Inquest may produce factual statements in relation to the actions of the father but the Rules require that the Inquest must avoid expressing opinions on civil or criminal liability.

[17] If the balance of the father's mind at the time of the deaths is being considered, not only must his psychiatric history be considered and his history of self harm but the events of the days surrounding the death are of obvious importance. It is noted for example that there were exceptional mobile phone contacts with the two girls in the two days prior to the death. It seems inevitable that there should be an inquiry into those matters to determine if they relate to the father's conduct or his state of mind in connection with the deaths.

[18] There were other contacts with the two girls. Once the Inquest begins to examine the contacts by telephone in the preceding days, the nature of his relationship with the girls seems inevitably to become a matter that requires further investigation. Then there is the involvement of Witness A's mother in events at and around the home of the family and the connection between those events and the relationship of Witness A and the father. Further, if the father had a history of violence it again seems inevitable that this matter would be examined. If the father had been violent to himself as well as to others in the short and the longer term then that seems to be a matter to be investigated.

[19] So inexorably, when one begins to consider the kind of inquiry that might develop, this leads to the kinds of inquiries that are proposed by the Coroner. The applicant debates the relevance of all of these inquiries. My conclusion is that they are all relevant to the central issue in this case of how all of these deceased died, namely the circumstances and responsibility for the deaths of each of them. This is a matter for the discretion of the Coroner,

subject to Judicial Review. The proposed inquiries are certainly matters that the Coroner was entitled to conclude are relevant to the determination of how each of the deceased came by his or her death. Of course there are constraints imposed by the Act and the Rules on the proceedings and the evidence but I consider that the proposed scope of this Inquest is not outside those restraints. Further of course there are constraints on the verdict in relation to expressions of opinion on criminal and civil liability. This is a matter on which the Coroner has reiterated her awareness and has confirmed that the verdict will not stray beyond what is permitted.

[20] The issue of the scope of the Inquest is primarily a matter for the discretion of the Coroner. I conclude that there is no arguable case that the Coroner has gone beyond the proper statutory remit in her investigation of the circumstances of and responsibility for the deaths.

[21] The applicant's second ground is that fairness requires a narrower scope for the Inquest that would not include any of the evidence to which the applicant objects. The inclusion of that evidence is said to be unfair because of the absence of the right to call witnesses or obtain documents or address the tribunal of fact on the factual issues. Counsel for the Coroner has confirmed and the Court appreciates that it is indeed the position in the Coroner's Court, that the applicant may submit names of any witnesses to the Coroner and the Coroner will consider whether to call that witness. It will be a decision in the discretion of the Coroner and may be subject to Judicial Review on Wednesbury grounds. Further the applicant may apply to the Coroner for the disclosure of relevant documents. There may be issues in the Inquest about the disclosure of the content of the text messages, or the recording of phone calls, if there were any recordings, or the computer data retrieved by the police. If the information is relevant to the scope of the Inquest then it may be disclosed in the discretion of the Coroner and her decision will be subject to challenge by Judicial Review. The manner in which disputed factual matters are addressed to the tribunal of fact is again a matter for the Coroner and her conduct of the proceedings at the Inquest is subject to Judicial Review. I do not accept that these issues bear on the scope of the Inquest.

[22] Thirdly the applicant complains that the Coroner took into account irrelevant matters. The first matter is that the Coroner referred to the father as being the chief suspect. This is said to be not only irrelevant but also to involve a breach of the prohibition on expressions of opinion on criminal or civil liability. The Coroner addressed this issue at paragraph 21 of her affidavit where she stated that the suspicion against the father went to relevance and in the concluding words in paragraph 21 – "Any comments made by me during my ruling in relation to the status of [the father] were made solely to illustrate one of the grounds on which it was clear that the evidence, the relevance of which was in dispute, was relevant to the issues which had to be explored during the Inquest".

[23] Rule 16 states that the Coroner and the jury may not express any opinion on criminal or civil liability. This restraint is not limited to the verdict. One would not expect the jury to be expressing any opinion about any matter other than by their finding but the Coroner may be expected to have occasion to make remarks and issue rulings and directions throughout the course of the Inquest. It appears to be the fact in the present case that the police consider that the primary suspicion falls on the father as being responsible for the fire. In this instance as in all instances there is a line to be drawn between what constitutes an acceptable statement of fact and what constitutes an unacceptable expression of opinion.

[24] I would have thought it desirable not to use the language of civil or criminal liability when stating the facts of the case. On the challenge that has been made by the applicant, it is clearly a relevant consideration to examine the actions of those who may be responsible for the immediate cause of the death, namely the fire. That is within the proper scope of this inquiry. I am therefore not satisfied on the applicant's first complaint of irrelevant considerations.

[25] The second irrelevant consideration is said to be the statement that the Inquest is really the only form of public inquiry to satisfy the States obligations. The applicant contends that the Toner Report has been completed and has been made public and involves an examination of these events. Further the applicant contends that as State agents were not involved in the deaths the wide ranging investigation proposed by the Coroner is not appropriate. The Coroner addressed these matters in her affidavit and at paragraph 22 refers to the Toner Report as having focussed on the involvement of various care agencies with the deceased family and with Witness A and her family, without investigating the circumstances surrounding the deaths of the deceased. I agree that the Toner Report was limited in its investigations and that the Inquest is the only public investigation of the causes of the deaths for the purposes of the State's procedural obligations under Article 2 of the European Convention. I consider that the Coroner was doing nothing other than stating the position, namely that the Inquest was the means by which there would purport to be compliance with the State's Article 2 procedural obligations in respect of these deaths.

[26] The further issue is concerned with State agents not being the direct or indirect cause of the deaths and thus the applicant contends that it is not necessary to conduct the wider investigation as proposed by the Coroner. As stated above I consider that the character of the procedural obligation arising under Article 2 is not determined merely by the presence or absence of direct or indirect State involvement in the death of the deceased, although that will be one of the considerations as to the nature of the investigation that is undertaken. This aspect of the challenge about State agents not being involved is not well founded.

[27] The result is that I am not satisfied that there is an arguable basis for any of the applicant's grounds for Judicial Review and accordingly leave to apply for Judicial Review of the Coroner's decision is refused.