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Judgment: approved by the Court for handing down | *Delivered:* **23/09/2009**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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McCaughey and Quinn's Application [2009] NIQB 77

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

BRIGID McCAUGHEY AND LETITIA QUINN

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WEATHERUP J

[1] This is an application for leave to apply for Judicial Review of a decision of the Coroner in relation to the Inquests yet to be held into the deaths in 1990 of Martin McCaughey and Dessie Grew at the hands of members of the security forces. Ms Quinlivan appears for the applicant, Mr Doran for the respondent, the Coroner and Dr McGleenan for the Notice Party, the Police Service of Northern Ireland.

[2] The grounds for Judicial Review rely in the first place on the right to life under Article 2 of the European Convention on Human Rights and the procedural requirement for prompt investigation, secondly on a claim for entitlement to what is described as an Article 2 compliant Inquest and thirdly on Rule 3 of the Coroner's (Practice and Procedure) Rules (Northern Ireland) 1963 as amended and the requirement to hold an Inquest as soon as practicable.

[3] First of all the Article 2 grounds. The right to life protected under Article 2 comprises two aspects namely the substantive aspect and the procedural aspect, the latter including a prompt and effective investigation and an Inquest that complies with the requirements of the European Court of Human Rights. The House of Lords decided in Re McKerr [2004] 1WLR 807 that Article 2 does not have retrospective effect in relation to deaths that occurred before the commencement of the Human Rights Act on 2 October

2000. The House of Lords found that the substantive and the procedural aspects of Article 2 were not severable and that a death occurring before the commencement of the Human Rights Act 1998 could not attract the procedural requirements of Article 2 after that date. There was found to be no freestanding procedural right in respect of deaths that arose prior to 2 October 2000. Accordingly where the death occurred prior to that date, as in the present cases, the procedural aspect of Article 2 did not apply.

[4] The applicants contend that the position has changed as a result of a decision of the Grand Chamber of the European Court of Human Rights in Silih v Slovenia on 9 April 2009. Slovenia ratified the European Convention on Human Rights on 28 June 1994. The death in question occurred on 19 May 1993 during the course of medical treatment of the deceased. It is therefore apparent that the death occurred before the Convention had effect in Slovenia. A conclusion as to whether the European Court of Human Rights should entertain the application in relation to a death occurring before the Convention had effect in Slovenia appears at paragraphs 159-163 of the judgment. The ECtHR, having reviewed the background to Article 2 and noted the substantive and procedural aspects, stated at paragraph 159 that –

"…. the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it was triggered by acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent interference…. In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date."

[5] In Silih the critical date was ratification of the Convention by Slovenia on 28 June 1994. Having regard to the principle of legal certainty, the ECtHR introduced qualifications to the detachable procedural obligation under Article 2. Thus the Court's temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respect of deaths that occurred before the critical date is not open ended. The first qualification is that where the death occurred before the critical date only procedural acts and/or omissions occurring after that date could fall within the Courts temporal jurisdiction. The second qualification is that there must exist a genuine connection between the death and the entry into force of the Convention in respect of the respondent State for the procedural obligations imposed at Article 2 to come into effect.

[6] The proposed Respondent in the present case contends that Silih addresses the temporal jurisdiction of the ECtHR on ratification of the Convention and does not affect the decision of the House of Lords in McKerr on the absence of any retrospective effect for Article 2 within the United Kingdom in relation to deaths occurring before the commencement of the Human Rights Act.

[7] On the other hand the applicants contend that Silih establishes the separation of Article 2 procedural rights and substantive rights and grants to procedural rights a freestanding detached status and in that respect Silih is said to be in direct conflict with McKerr.

[8] Further the applicants contend that the approach to conflict between a decision of the House of Lords and a decision of the Grand Chamber is to be found in the decisions of the House of Lords in R (Purdy) v DPP [2009] UKHL 45 and Secretary of State for the Home Department v AF {2009] UKHL 28. I take AF to demonstrate the approach. AF was concerned with Control Orders and whether the use of closed information as the sole or decisive basis on which a decision was made would contravene the requirement for a fair trial under Article 6 of the Convention. The House of Lords had decided in Secretary of State for the Home Department v MB [2007] UKHL 46 that it was possible to achieve substantial fairness for the purposes of Article 6 where closed material was the sole or decisive ground for the decision. However the Grand Chamber decided to the contrary in A v United Kingdom [2009] ECHR 301, namely that where closed material was the sole or decisive basis for a decision that it would constitute a breach of the right to a fair hearing under Article 6. Thus when AF came to the House of Lords earlier this year it was faced with a conflict between its own previous decisions in MB in 2007 and the subsequent finding of the Grand Chamber in A v UK in 2009.

[9] The approach taken by the House of Lords in AF was that, while the domestic statutory obligation under the Human Rights Act was to take into account the decisions of the European Court of Human Rights, the House was, in the circumstances of the case, obliged to follow the approach that was taken by the Grand Chamber in the interpretation of the Convention. Accordingly the House of Lords followed the decision of the Grand Chamber in A v UK and not its previous decision in MB and found that it was a breach of the Convention for a decision maker to rely solely or to a decisive extent on closed material.

[10] The applicant contends that the above approach ought to be taken by this Court, that the decision of the Grand Chamber in Silih should be preferred to that of the House of Lords in McKerr and that this Court ought to grant leave to apply for judicial review.

[11] However it is necessary to have regard to the approach that ought to be taken by lower courts to a decision of the House of Lords that is in conflict with a decision of the Grand Chamber. That approach is to be found in Kay v Lambeth [2006] UKHL 10 where Lord Bingham stated the approach at paragraphs 43 -45. In essence the lower court should follow the higher court, for two reasons and subject to one partial exception. The first reason concerns

the rules of precedent and the value of a degree of certainty and at paragraph 43 Lord Bingham stated –

"That degree of certainty is best achieved by adhering, even in the Convention context, to our rules of precedent. It will of course be the duty of judges to review Convention arguments addressed to them, and if they consider a binding precedent to be, or possibly to be, inconsistent with statutory authority, they may express their views and give leave to appeal …. Leap-frog appeals may be appropriate. In this way, in my opinion, they discharge their duty under the 1998 Act. But they should follow the binding precedent….

[12] The second reason was stated to be a more fundamental reason for adhering to our domestic rule to follow the higher court, namely that the domestic courts set the domestic standard. Lord Bingham at paragraph 44 described it thus –

"…. in its decision on particular cases the Strasbourg court accords a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in a special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set and to those decisions the ordinary rules of precedent should apply."

[13] Then there is one partial exception where in certain exceptional circumstances the lower court may follow the Grand Chamber rather than the higher domestic court. The illustration offered by Lord Bingham concerned the Court of Appeal decision not to follow the decision of the House of Lords in X(Minors) v Bedfordshire County Council [1995] 2 AC 633 on the liability of local authorities in respect of the care of children. The Court of Appeal decided in 2004 that the decision of the House of Lords could not survive the introduction of the Human Rights Act. Lord Bingham at paragraph 45 explained why the Court of Appeal had been correct to adopt that approach. X v Bedfordshire was a very exceptional case, not only because the policy considerations that had founded the decision in the House of Lords had been very largely eroded, it had been decided before the Human Rights Act and the Convention had not been referred to in the opinion, but also and importantly the very children whose claim in negligence the House had rejected as unarguable succeeded in Strasbourg in establishing a breach of Article 3 of the Convention. Lord Bingham concluded at paragraph 45 –

"On these extreme facts the Court of Appeal was entitled to hold that the decision of the House of Lords in *X v Bedfordshire*, in relation to children,

could not survive the 1998 Act. But such a course is not permissible save where the facts are of that extreme character."

[14] Kay v Lambeth requires me to conclude that the correct approach of this Court in the circumstances where there is conflict between a decision of the House of Lords and a later decision of the Grand Chamber, in the absence of the exceptional circumstances instanced above, is to follow the decision of the House of Lords and accordingly I do so. It is not necessary to decide if Silih may be distinguished from McKerr on the ground relied on by the proposed respondent. If McKerr is in conflict with Silih I follow McKerr.

[15] McKerr decided that there is no separation of the substantive and procedural aspects of Article 2 and thus Article 2 has no procedural application to deaths prior to 2 October 2000. In any event I do not accept that it follows necessarily, that if there is a freestanding procedural aspect to Article 2, that the applicants thereby overcome the McKerr conclusion that there is an absence of retrospective effect in relation to Article 2. I refuse leave on the Article 2 grounds, which relate both to Article 2 delay and the Article 2 compliant Inquest.

[16] I turn to the alleged breach of Rule 3 of the Practice and Procedure Rules in relation to the delay in the holding of the Inquest. It is provided that every Inquest shall be held as soon as practicable after the Coroner has been notified of the death. It is clearly arguable that the legislative scheme requires reasonable expedition in the conduct of Inquests. That there has been inordinate delay in these cases is undeniable. The deaths occurred in 1990 and 19 years later there have been no Inquests. Legal proceedings in these and other cases have of course contributed in part to that delay. The applicants brought an appeal to the House of Lords where judgment was given in March 2007. There has been further delay of 2½ years since the conclusion of that appeal. The proposed respondent contends that there are practical grounds for not granting leave to apply for Judicial Review in any event. It is said that the disclosure issue that involved the police has been resolved, with disclosure completed on 4 August last, and that issue is not causing any further delay. Earlier this month there was a preliminary hearing completed by the Coroner in relation to the conduct of the Inquest. At that hearing it emerged that there was another issue that might occasion delay, namely the engagement with these incidents of the Historical Inquiries Team, which is a police investigation process in relation to historic incidents in Northern Ireland. The HIT may be fast tracking an inquiry into these particular deaths. The Coroner has therefore fixed 12 October for the hearing of argument as to whether he should adjourn the Inquest further for the completion of the inquiries of the HIT, which it is anticipated would not be completed until the end of next year 2010. Dr McGleenan on behalf of the police described this investigation by the HIT as a flashpoint for further examination of the circumstances of these deaths and he will support the

adjournment of the Inquest pending the outcome of the HIT inquiry. The applicants on the other hand will resist any further adjournment. The dispute will be determined by the Coroner on 12 October.

[17] In relation to the ground that relies on Rule 3 delay in the conduct of the Inquest I propose to grant leave because of the undeniable inordinate delay that has occurred, a delay that may amount to a breach of the Rules. As presently drafted this ground incorporates a reference to Article 2 matters, which is not necessary and in any event not appropriate as I have refused leave on the Article 2 grounds. As there is the prospect of further developments in the progress of these cases, which may or may not proceed immediately after the hearing on 12 October, and while granting leave on the limited ground mentioned above, I propose to adjourn any further step in the Judicial Review until after the decision arising from the hearing before the Coroner on 12 October 2009. If the applicants' argument that the Inquest should proceed is not acceded to I am anticipating that there may be a further challenge to the adjournment of the Inquest until the end of 2010 and I will consider that issue if it materialises after 12 October. If it does not materialise and the Inquest is to proceed then the appropriateness of proceeding with this Judicial Review on the ground on which leave has been granted may have to be reconsidered.