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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McCaughey and Quinn's Application [2010] NICA 13

RE McCAUGHEY AND QUINN'S APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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HIGGINS LJ, COGHLIN LJ AND DEENY J

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DEENY J

[1] This is the judgment of the Court in an appeal from the decision of Weatherup J reported as McCaughey and Quinn's Application at [2009] NIQB 77. This was an application for leave to apply for judicial review arising out of the intended inquest into the deaths in 1990 of Martin McCaughey and Desmond Grew. The learned judge granted leave to bring judicial review proceedings on one issue with regard to delay in holding the inquest contrary to Rule 3 of the Coroners (Practice and Procedure) Rules (NI) 1963, as amended. However, he refused leave to bring judicial review proceedings on the alternative grounds: i) that the coroner was obliged to conduct the inquest in a way which was compliant with Article 2 of the European Convention on Human Rights and ii) to consider the issue of delay as a breach of Article 2.

[2] The applicants' submissions were based on the decision of the European Court of Human Rights in Silih v Slovenia [2009] ECHR 571 (brought to their attention by the Senior Coroner for Northern Ireland). This was a decision of the Grand Chamber of the Court. The applicants complained of the death of their son as the result of alleged medical negligence. The death occurred before the ratification by Slovenia of the European Convention on Human Rights, but the investigation of his death, which was the subject of considerable delay, took place mainly after the date of ratification. A principal issue in the proceedings was whether the

European Court had jurisdiction to hear a complaint about the delays and imperfections in the investigations into the death, even though ratification had taken place on 28 June 1994, more than a year afterwards. As there appeared to be conflicting decisions of different chambers of the European Court, the matter was referred to the Grand Chamber for adjudication.

[3] The Court, at paragraphs 152 ff. of the judgment considered this issue and (by a majority) reached this conclusion at paragraph 159.

> "The procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. Although it is triggered by the acts concerning the substantive aspects of Article 2 it can give rise to a finding of a separate and independent "interference" within the meaning of the Blecic judgment (ECHR 2006). 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."

[4] The appellants drew attention to an apparent conflict between that decision and the decision of the House of Lords in Re McKerr [2004] 1 WLR 807. This was summarised by Weatherup J at para. 3 of his judgment where he said –

> "that Article 2 of the European Convention on Human Rights does not have retrospective effect in relation to deaths that occurred before the commencement in the United Kingdom of the Human Rights Act on 2 October 2000. Their Lordships found that the substantive and the procedural aspects of Article 2 were not severable and that a death occurring before the commencement of the Act could not attract the procedural requirements of Article 2 after that date. There was found to be no free standing 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."

[5] It was contended by Miss Quinlivan, who appeared on behalf of the appellants, that McKerr is no longer good law in light of the decision of the European Court in Silih. She relied on the decision of the House of Lords in Kay v Lambeth [2006] UKHL 10 as giving guidance as to the correct approach

in such circumstances. Lord Bingham of Cornhill addressed that issue in the following terms at paragraph 43 of the judgment of the House –

> "The present appeals illustrate the potential pitfalls of a rule based on a finding of clear inconsistency. The appellants, the First Secretary of State and the Court of Appeal in the lead case find a clear inconsistency between Quazi and Connors. The respondents and the Court of Appeal in the Lambeth case find no inconsistency. Some members of the House take one view, some the other. The prospect arises of different county court and High Court judges, and even different divisions of the Court of Appeal, taking differing views of the same issue. As Lord Hailsham observed (Broome v. Cassell [1972] AC1027, 1054) – 'in legal matters, some degree of certainty is at least as valuable a part of justice as perfection'. 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 the Strasbourg authority, they may express their views and give leave to appeal, as the Court of Appeal did here. Leapfrog 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 as again the Court of Appeal did here."

[7] Miss Quinlivan therefore accepts that this court, like Weatherup J, is bound by the decision of the House of Lords in McKerr. But she invites the court, although obliged to refuse her substantive relief, to express views about the matter, to grant leave to bring the judicial review proceedings and to grant leave to appeal to the Supreme Court from our refusal of substantive relief. In support of her submissions in favour of, at least, giving her leave to apply for judicial review she suggested that there had been a doubt as to whether she could appeal against a refusal of leave by this court to the Supreme Court. But we note that Larkin and Schofield: Judicial Review in Northern Ireland 15.15 suggests that any such doubt has been removed by the decision of the House of Lords in Re (Burkett) v. Hammersmith LBC [2002] 1 WLR 1593. The test for the granting of leave has been expressed most succinctly in this jurisdiction by Kerr J in Re Morrow and Campbell's application [2001] NI 261 (QBD):-

> "On an application for leave to apply for judicial review an applicant faces a modest hurdle. He need

> only raise an arguable case; or, as it is sometimes put, a case which is worthy of further investigation."

[8] Mr Sean Doran appeared for both the senior coroner and the coroner charged with the inquest. Mr Paul Maguire QC appeared with Mr McGleenan for the Police Service of Northern Ireland. We have taken their helpful submissions into account. One submission on the part of Mr Doran was that this application was premature because the coroner had indicated a willingness to adopt a broad and inclusive approach to the inquest which he will hold, which was akin to an inquest which would be held subject to Article 2. However, the Police Service of Northern Ireland object to that approach on the part of the coroner who has not finally ruled on the issue of scope. In the circumstances therefore Miss Quinlivan's application could not be premature because the coroner may alter his preliminary ruling or may find himself the subject of proceedings brought by the police. We make no comment on the rightness or otherwise of the preliminary assessment made by the coroner.

[9] We express our views with relative brevity in the circumstances. Firstly we are bound by the decision of the House of Lords in McKerr. The issue of post-Act investigation of a pre-Act death was expressly considered by their Lordships. I refer to paragraphs [20] to [22] of the judgment of Lord Nicholls in McKerr:-

> "20. Thus article 2 may be violated by an unlawful killing. The application of section 6(1) of the Human Rights Act to a case of an unlawful killing is straightforward. Section 6(1) applies if the act, namely, the killing, occurred after the Act came into force. Section 6(1) does not apply if the unlawful killing took place before 2 October 2000. So much is clear.
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> 21. The position is not so clear where the violation comprises a failure to carry out a proper investigation into a violent death. Obviously there is no difficulty if the death in question occurred post-Act. The position is more difficult if the death occurred, say, shortly before the Act came into force and the necessary investigation would fall to be held in the ordinary course after the Act came into force. On which side of the retrospectivity line is a post-Act failure to investigate a pre-Act death?
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> 22. In my view the answer lies in appreciating that the obligation to hold an investigation is an obligation triggered by the occurrence of a violent

> death. The obligation to hold an investigation does not exist in the absence of such a death. The obligation is consequential upon the death. If the death itself is not within the reach of section 6, because it occurred before the Act came into force, it would be surprising if section 6 applied to an obligation consequential upon the death. Rather, one would expect to find that, for section 6 to apply, the death which is the subject of investigation must itself be a death to which section 6 applies. The event giving rise to the article 2 obligation to investigate must have occurred post-Act."

[10] Furthermore at paragraph 25 Lord Nicholls emphasised the distinction between rights arising under the European Convention itself and rights created by the 1998 Act by reference to the Convention:-

> "The extent of these rights, created as they were by the 1998 Act, depends upon the proper interpretation of that Act."
>
> [See also the comments of Lord Hoffman at paragraphs 62 and 63.]

[11] The Strasbourg court in Silih has decided that, in certain circumstances, a party may have a right to complain before that court about the investigation of a death which took place just before Slovenia had become a party to the European Convention. But that is a very different thing from saying that a party has a right under U.K. domestic law to require an authority of the State such as the coroner, to apply post-2000 Article 2 standards when investigating a death years prior to the passing of the 1998 Act. One of the reasons why a line ought to be drawn in these circumstances was pointed out by Lord Hoffman when he said at paragraph 67 -

> "Otherwise there can in principle be no limit to the time one could have to go back into history and carry out investigations . . . Either the Act applies to deaths before 2 October 2000 or it does not. If it does, there is no reason why the date of accession to the Convention should matter. It would in principle be necessary to investigate the deaths by State action of the Princes in the Tower."

[12] It is right to say that the European Court recognised this as a problem and acknowledged at paragraph 161 in Silih that "the Courts temporal jurisdiction as regards compliance with the procedural obligation of Article 2 in respects of deaths that occur before the critical date is not open ended."

However it must be acknowledged that the means of addressing this issue introduces the very uncertainty that Lord Bingham and Lord Hailsham would have been minded to avoid. See also Hurst v UK [2007] UKHL 13; Baroness Hale at paragraph 17 and Lord Mance at paragraph 71. As the latter said, the right to a proper investigation is an ancillary right to the right to life.

[13] It should further be borne in mind that this decision of the European Court in Silih is not actually binding on the United Kingdom. Article 46 of the European Convention reads as follows:-

> "Binding force and execution of judgments
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> (1) The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
> (2) The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."
>
> (Our underlining.)

[14] The United Kingdom was not a party to Silih; nor was Article 36 invoked. Article 36 (1) affords a High Contracting Party a right to take part in hearings but only if one of its nationals is an applicant. By contrast the President of the Court under Article 36(2) may invite any High Contracting Party which is not a party to the proceedings or any party concerned, who is not the applicant, to submit written comments or take part in hearings. However there is no suggestion that the President chose to do so in Silih. The matter was argued before the European Court only by lawyers from Slovenia. McKerr and the earlier decisions of the House of Lords were not cited in argument. One would therefore hesitate to presume that it was intended to apply to the domestic law of another Member State and to widely differing factual circumstances. The decisions of the Strasbourg court are often strongly fact based, as here. For example, at paragraph 165 of its judgment in Silih the court notes that " the death of the applicant's son occurred only a little more than a year before the entry into force of the Convention in respect of Slovenia. . ." is a relevant factor.

[15] This Court was given a list of some 20 inquests yet to be heard into deaths in circumstances involving members of the security forces, which pre-date the coming into effect of the 1998 Act. If Miss Quinlivan is right, it is likely that broader and more intensive investigations of the circumstances surrounding those deaths might be called for. The events in question range from 1998 back to 1982, some 28 years ago. Such broader investigations of increasingly historical events may have serious implications, not least in respect of time and the availability of witnesses and resources. These seem like policy issues which a court would address with great caution, but which

necessarily arise here if the courts changed their interpretation of the 1998 Human Rights Act, from the view taken in McKerr et alia. Furthermore, the circumstances here present a factual background which could not be more different from that which presented itself to the court in Silih. Other arguments apart, one might therefore consider the decision in Silih could be distinguished from the inquest which concerns the applicants here.

[16] Pursuant to Section 2(1) of the Human Rights Act 1998 we take into account the judgment of the European Court in Silih and the cases cited therein. We are also conscious of our duty under Section 3 of the Act to read and give effect so far as possible to any relevant legislation in a manner compatible with Convention rights. We conclude that it is arguable, given the constructive dialogue engaged in by the highest court in the United Kingdom with the European Court of Human Rights, that the Supreme Court may choose to extend Silih to our domestic law. We therefore consider it proper to grant the applicants leave to apply for judicial review on the additional two grounds not permitted by Weatherup J. As envisaged by Higgins LJ at the hearing of the appeal, without dissent, we consider it proper to treat the appeal on the refusal of leave as a substantive hearing of the judicial review application, on which we have clearly heard full argument. Having heard that argument we refuse the substantive reliefs sought by the applicant and find for the respondents for the reasons set out above.