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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **28/03/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

BRIGID McCAUGHEY (No 2)

McCaughey's (Brigid) Application (Leave Stage) (No 2) [2012] NIQB 23

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WEATHERUP J

[1] This is an application for leave to apply for judicial review of a ruling of the Coroner on 23 March 2012 at an inquest into the deaths of Martin McCaughey and Dessie Grew on 9 October 1990, which application is brought by the next of kin of Martin McCaughey. As the inquest is at hearing there is urgency in addressing the issues raised and the application which was heard today was treated as a 'rolled up' hearing. Ms Quinlivan QC and Ms Doherty appeared for the applicant, Mr Daly for the proposed respondent, the Coroner, and Mr Maguire QC for the notice party, the Ministry of Defence.

[2] Evidence has been given at the inquest by soldier A, a member of the SAS, who was involved in the operation that led to the deaths of the deceased. The applicant seeks a declaration of the admissibility at the inquest of evidence from soldier A concerning his involvement in another operation that led to the death of a Francis Bradley on 18 February 1986. Further the applicant seeks a declaration of the admissibility of evidence of soldier A in relation to the operation that led to the death of a Seamus McIlwaine on 28 April 1986.

[3] The grounding affidavit on this application states that a significant number of controversial deaths occurred as a result of SAS operations in Northern Ireland and have given rise to allegations of what is described as a 'shoot to kill' policy, a matter that the next of kin of the deceased seek to have investigated at this inquest. By a shoot to kill policy is meant, as stated on behalf of the applicant, whether the Army as an institution operated a policy to kill those who might otherwise have been arrested or whether individual soldiers, such as soldier A or other members of the patrol or those instructing the patrol, operated such an approach to their task or whether the training of the soldiers who were engaged in operations was of such a character that it promoted an outcome that resulted in unnecessary deaths.

[4] The Coroner has included in the evidence at the inquest that of a soldier K in relation to the concept of military operations and the planning and control of operations involving the use of lethal force.

[5] Further to an earlier application for judicial review reaching the Supreme Court in 2011 (McCaughey and Grews Application [2011] UKSC 20) arrangements were made for the conduct of the present inquest in a form that is described as 'Article 2 compliant', that is that the inquest would satisfy the procedural aspects of the Article 2 right to life for an effective investigation into the death.

[6] Issues were raised with the Coroner in correspondence from the applicant's solicitors in October 2011 about the soldiers involved in this incident having been involved in other fatal shootings. Statements were provided by the soldiers, including soldier A, on 13 February 2012. Some of the statements included references to their involvement in other similar incidents. Soldier A referred to an incident now identified as involving Bradley and to an incident now identified as involving McIlwaine. The Coroner has had to deal with issues about documents and information to be furnished to the next of kin in relation to the soldiers involvement in other incidents.

[7] At the Bradley inquest soldier A had not been a compellable witness but his statement about the incident had been read at the inquest. In the Bradley incident 19 shots had been discharged and the deceased had been hit a number of times. The grounding affidavit states that information provided in relation to the death by Dr Carson, the pathologist, indicated that Bradley had been shot in circumstances that are inconsistent with the statement made by soldier A and that the evidence suggested that lethal shots struck Bradley when he was lying on his back on the ground.

[8] Accordingly, in this inquest the applicant seeks to cross examine soldier A about the Bradley incident because of the similarities between the two incidents and to rely on the information obtained from soldier A to address the shoot to kill issue. Further the applicant seeks to cross examine soldier A about the McIlwaine incident where soldier A states that he rendered first aid to another man injured in that

incident, a claim that is disputed by the applicant. In this instance the applicant seeks to attack the credibility of soldier A. Soldier A's evidence has been given already but he is subject to recall on another issue and remains available to give evidence about the above matters should he be required to do so.

[9] Further to the applicant's application to the Coroner to admit the evidence of soldier A in relation to his involvement in the Bradley incident and the McIlwaine incident the Coroner gave his ruling on 23 March 2012. He set out the history of events, stated his view that there were similarities between the incident which is the subject of the inquest and the Bradley incident and concluded that soldier A's involvement in the Bradley incident was 'potentially relevant' to the present deaths or, as the Coroner put it, given the similarities the previous incident could not reasonably be dismissed as irrelevant. I read the Coroner's remarks as indicating that the Coroner reached the conclusion that the similarities with the Bradley incident indicated that the incident was potentially relevant to the issue arising at the present inquest about what has been described as the shoot to kill policy.

[10] Having considered that the Bradley incident was potentially relevant the Coroner proceeded to consider whether soldier A's evidence in relation to the Bradley incident should be admitted. He decided that it should not. His reasons involved consideration of whether or not there were obstacles which would render it unfair or improper to permit soldier A to be questioned about the death of Francis Bradley. The first reason was based on unfairness to soldier A. The Coroner stated that the inquest into the Bradley incident did not express any criticism of soldier A, nor were the papers referred to the Director of Public Prosecutions; he pointed out that the death remained contentious and the Attorney General for Northern Ireland had directed that a new inquest be convened; accordingly he assumed that new statements would be taken from all the witnesses including soldier A and that the new inquest would be Article 2 compliant and therefore of much wider remit than the earlier inquest. These considerations led the Coroner to conclude that there was a very real danger of unfairness in putting questions to soldier A regarding his involvement in the present incident in the context of another contentious and unsettled death, namely the Bradley incident, and he stated that to allow material about that other incident would be more prejudicial that probative.

[11] The second reason for refusing to admit evidence from soldier A about the Bradley incident was based on the implications of admitting that evidence. The Coroner stated that it was difficult to contextualise the various incidents within soldier A's career history; there was a risk that the jury may over estimate the significance of the previous similar incident; the focus of the present inquest must remain on the deaths of McCaughey and Grew on 9 October 1990; the Coroner had no jurisdiction to conduct a general inquiry into SAS deaths in Northern Ireland and that to admit reference to Bradley's death would have substantial potential to both distract and dilute attention from consideration of the central issues to be addressed by the jury.

[12] In relation to the McIlwaine incident the Coroner concluded that the incident was not a relevant previous lethal force incident for the purpose of the present inquest. Accordingly the Coroner ruled that soldier A would not be examined about the incident and the reference to the incident in soldier A's statement would be deleted.

[13] The proposed respondent and the notice party object to this application for judicial review. Their initial emphasis is on the character of this application as amounting to satellite litigation that should be rejected pending the conclusion of the inquest. I was sympathetic to such an approach in an application involving this same inquest last week (McCaughey's Application [2012] NIQB 20) where I refused leave on an application that I considered otherwise had merit but where the grant of leave on the issue raised would have interfered with the ongoing inquest and was not appropriate in the course of the inquest.

[14] The respondents also refer to O'Brien v. The Chief Constable of South Wales Police [2005] UKHL 26 in relation to the admissibility of similar fact evidence in civil proceedings. Mr Maguire for the MoD emphasised that the inquest was concerned with the second stage of the inquiry in relation to similar fact evidence, namely, having found the evidence to be potentially relevant, whether or not the evidence should be admitted. Lord Bingham at paragraph 5 stated that the second stage would often be a very difficult and sometimes a finely balanced judgment. At paragraph 6 he said this:

> "While the argument against admitting evidence found to be legally admissible will necessarily depend on the particular case, some objections are likely to recur. First, it is likely to be said that admission of the evidence will distort the trial and distract the attention of the decision-maker by focusing attention on issues collateral to the issue to be decided. This is an argument which has long exercised the courts (see *Metropolitan Asylum District Managers v Hill* (1882) 47 LT 29, 31 per Lord O'Hagan) and it is often a potent argument, particularly where trial is by jury. Secondly, and again particularly when the trial is by jury, it will be necessary to weigh the potential probative value of the evidence against its potential for causing unfair prejudice: unless the former is judged to outweigh the latter by a considerable margin, the evidence is likely to be excluded. Thirdly, stress will be laid on the burden which admission would lay on the resisting party: the burden in time, cost and personnel resources, very considerable in a case such as this, of giving disclosure; the lengthening of the trial, with the increased cost and stress

> inevitably involved; the potential prejudice to witnesses called upon to recall matters long closed, or thought to be closed; the loss of documentation; the fading of recollections. It is, I think, recognition of these problems which has prompted courts in the past to resist the admission of such evidence, sometimes (as, perhaps, in *R v Boardman* [1975] AC 421) propounding somewhat unprincipled tests for its admission. But the present case vividly illustrates how real these burdens may be. In deciding whether evidence in a given case should be admitted the judge's overriding purpose will be to promote the ends of justice. But the judge must always bear in mind that justice requires not only that the right answer be given but also that it be achieved by a trial process which is fair to all parties."

[15] The three matters referred to by Lord Bingham are echoed by the proposed respondent and the notice party as applicable in the present application and matters that should apply to the admissibility of similar fact evidence in inquests in the same manner as they apply to civil proceedings. Thus it is contended that the admission of the proposed evidence of soldier A would amount to distortion of the hearing and distraction of the inquest jury, would be evidence that was more prejudicial than probative and would place an unfair burden on all concerned.

[16] The applicant challenges the reasons given by the Coroner for refusing to admit the evidence of soldier A in relation to the other incidents.

[17] The Coroner recognised that the Bradley incident was potentially relevant. However he ruled against admissibility on two broad grounds. The first ground was unfairness to soldier A. The Coroner considered that examination of soldier A in relation to the Bradley incident would be more prejudicial than probative. I interpret that to mean that there would be unfairness to soldier A by reason of an inadequate inquiry into soldier A's involvement in the incidents. Mr Maguire contended that were the questioning of soldier A limited to Counsel for the next of kin that would be inadequate and prejudicial to soldier A as it would involve a one sided examination of the witness. However that it is not what I envisage would happen. Counsel for the Coroner and Counsel for the Ministry of Defence are also involved in the inquest and would be in a position to question soldier A about the Bradley incident. Thus soldier A may be examined in a manner that reflects all of the interests of those involved in the inquest namely the next of kin, soldier A, the other soldiers, the Ministry of Defence representing the department and the Army and Counsel to the inquest representing the public interest and the Coroner. The inquiry would certainly be inadequate if it were limited to Counsel for the next of kin questioning soldier A on the Bradley incident and I do not expect that the Coroner would approach the matter in that manner. In a broader sense the Coroner seems to be suggesting that the examination of soldier A by all interested parties would be inadequate to secure fairness to soldier A.

[18] Without straying into the Coroner's second reason for refusing to admit this evidence I accept that the examination of soldier A about the Bradley incident may well lead to an application for the admission of further evidence on the Bradley incident. The Coroner may be invited to admit other evidence from the Ministry of Defence or others in order to give a fuller account of what happened in the Bradley incident in so far as that pertains to the issue of a shoot to kill policy. Were that to happen it would be for the Coroner to determine whether or not to allow, and if so to what extent, such further witnesses. The Coroner will have control of the scale of the examination of soldier A's involvement in the Bradley incident and its impact on the operation of a shoot to kill policy being applied in the present incident. If this issue is otherwise relevant the Coroner could secure for soldier A an *adequate* inquiry into his involvement in the incidents that would not be unfair to soldier A.

[19] The Coroner has taken a limited approach when he concluded that the admission of the evidence of soldier A on the Bradley incident would be more prejudicial than probative. The prejudicial basis for rejecting the evidence because of unfairness to soldier A could be addressed in the inquest. Whether the measures that may be required to address that prejudice would have a disproportionate impact on the inquest has yet to be considered by the Coroner.

[20] A second comment in relation to unfairness. The ruling contains no mention of fairness for anyone other than soldier A. Fairness of course extends to all concerned and applies to the next of kin who have an interest in seeking an examination of the Bradley incident and its relevance to the inquiry into shoot to kill in the present inquest.

[21] The second ground for ruling inadmissible the evidence of soldier A in relation to the Bradley incident concerned the implications of introducing the evidence. It was said first of all that there would be difficulty in properly contextualising the incidents within soldier A's career history. There would be such a difficulty if it was examined in the narrow way suggested by Counsel in relation to the unfairness ground. However that is not how the inquest would develop and if there is an adequate inquiry into the involvement of soldier A then the necessary context would be provided. Exactly what that would require would be a matter for the Coroner to consider in the conduct of the proceedings. This has not yet been examined.

[22] The Coroner stated that he considered that to admit evidence in relation to Mr Bradley's death would have the potential of distracting and diluting consideration from the central issues to be addressed by the jury. What are the central issues? Formally they are the who, where, when and how under the statutory scheme. There is really no doubt as to who, when and where or indeed as to how, in the older sense that the two deceased were shot by the soldiers. In the newer sense the how is a broader issue. That broader 'how' concerns the

background circumstances and whether the deaths were unnecessary in that they were brought about by a shoot to kill policy. That is the effective central issue. The circumstances of the Bradley incident may inform that central issue in the present case. The Bradley incident cannot be described as a distraction. It is an important aspect of a proper inquiry into whether or not there was a shoot to kill policy. It is recognised as potentially relevant to that issue. If the case of a common soldier in two similar incidents cannot permit of examination of the shoot to kill policy by reference to the other incident then it would seem that there will never be an inquest that extends beyond the facts of the particular case. There is a public interest in inquests serving to allay suspicion and rumour about how deaths occur. One suspicion or rumour that arises in relation to this shooting is that the approach of the soldiers resulted in unnecessary deaths.

[23] As to distracting the jury and diluting the focus on the present case the Coroner will instruct the jury as to the central issues. Of course the Coroner must guard against this simply becoming another inquiry into the Bradley incident.

[24] A further consideration is that the jury may over estimate the significance of the previous similar incident. That it always a danger as a jury in any case might give undue attention to some matters, as with the admission of previous convictions in a criminal trial. Directions must be given to the jury as to the manner in which they are to treat all the information that is put before them.

[25] A further consideration was stated to be that the focus must remain on the deaths that took place on 9 October and that the inquest is not a general enquiry into SAS deaths in Northern Ireland. The Coroner is not being invited to conduct such a general inquiry but he is being asked to admit evidence in relation to soldier A's involvement in the Bradley incident as that bears on the issue that arises in this inquest.

[26] I conclude that the objections of the Coroner to the admissibility of the evidence of soldier A in relation to the Bradley incident are not well founded and are capable of being addressed in the course of the inquest and do not warrant the exclusion of the evidence on the shoot to kill issue which is a fundamentally important issue in the inquest and one that may be informed by the potentially relevant evidence of soldier A as to the Bradley incident.

[27] I have considered the refusal of leave on the ground of rejecting satellite litigation and preventing the disruption of ongoing proceedings. However this challenge goes to the essence of the inquest that is underway. The witness remains available and if the Coroner were to conclude that the evidence was admissible soldier A could be examined about the matter tomorrow. If it were sought to admit further evidence that might be arranged without disrupting the present schedule. I recognise that it may have the effect of extending the inquest and perhaps bringing about an interruption in the completion of the inquest. However I conclude that as

the issue raised is so fundamental to the character of the inquest this is an exceptional case where judicial review should intervene prior to the conclusion of the proceedings.

[28] I propose to refer the ruling of 23 March 2012 on the evidence of soldier A in connection with the Bradley incident back to the Coroner for reconsideration in the light of the comments I have made.

[29] The second matter concerns the McIlwaine incident. The Coroner has decided that this incident is irrelevant to the present inquest. The applicant wishes to challenge soldier A's account of what happened at the scene in relation to first aid being rendered to an injured man. The object is to set up a challenge to the credibility of soldier A. This matter is of a different character to the proposed Bradley evidence. This matter does not go to the essence or indeed the substance of the present inquest. This is a collateral challenge within the inquest going to the credibility of soldier A. The Coroner was right to reject the application. There are no grounds to grant leave to apply for judicial review on the refusal by the Coroner to admit the evidence of soldier A on actions at the scene of the McIlwaine incident.