Neutral Citation No. [2012] NIQB 20 | *Ref:* **WEA8440**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **12/03/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY

BRIGID McCAUGHEY

McCaughey's (Brigid) Application [2012] NIQB 20

WEATHERUP J

[1] This is an application for leave to apply for Judicial Review of the decision of the Coroner of 8 March 2012 concerning disclosure to the applicant, as next of kin of the deceased, of documents in relation to seven soldiers involved in the shooting incident that gave rise to the death of Martin McCaughey, the deceased, over 20 years ago. Ms Doherty appeared for the applicant, Mr Daly for the Coroner, the proposed respondent, and Mr Maguire QC for the Ministry of Defence, a notice party.

[2] The applicant's Order 53 Statement seeks a declaration that the applicant is entitled to information about the involvement of the soldiers in other lethal force incidents; a declaration that the failure to provide such information to the next of kin denies the next of kin an opportunity to make representations on the probative value of the other incidents and thereby denies them their right to participate in the Inquest; a declaration that denying the next of kin access to the information about the involvement of soldiers in other incidents of lethal force deprives them of equality of arms; and a declaration that the Coroner's ruling was reached in a procedurally unfair manner.

[3] The issue of the role of the soldiers in other incidents involving the use of lethal force arose in a letter from the applicant's solicitors on 4 October 2011 in which the solicitors requested the Coroner to secure information in relation to the

involvement of the soldiers in any such incidents. A preliminary hearing was convened by the Coroner on 17 October 2011 and the representatives of the MoD indicated that further statements were to be prepared by the soldiers and the statements would provide information in relation to other incidents. The statements were to be produced by 23 December 2011. The statements were eventually produced in February and March 2012. The statements of the seven soldiers, known as A, B, C, D, E, G and I, were then disclosed to the applicant.

[4] Soldier A disclosed his involvement in two incidents, in one of which he had opened fire. Soldiers C, D and G disclosed that each was involved in another incident, however none disclosed whether he had fired in those incidents nor were any details given about the incidents. Soldiers D, E and I were silent about their involvement in other incidents.

[5] The Coroner, after prompting from the applicant's solicitor, sought further particulars in relation to the statements. Further to a letter from the Coroner, the Crown Solicitor's Office, on behalf of the MoD, forwarded to the Coroner a table which outlined the position of each of the seven soldiers in relation to other incidents in which each had been involved, what role each had in that incident and whether each had fired on those occasions.

[6] There was an exchange of written submissions by the applicant and the MoD in relation to the disclosure of information about any other incidents. The Coroner made his ruling on the basis of all the information that he had in relation to the Inquest and in particular he had the personnel files for each of the seven soldiers, the MoD table which set out the connections between the soldiers and other incidents and the role of those soldiers and he had the Inquest papers in relation to deaths that had occurred in the other incidents. The personnel files, MoD table and other Inquest papers were not available to the applicant.

[7] The Coroner made his ruling on 8 March 2012. By that ruling he indicated that he could confidently state that no reasonable avenue of enquiry about the witnesses that might yield material relevant to the issues in the Inquest had been left unexplored; that he was conscious of his duty to keep all decisions on relevance under review; that whether each incident was relevant or potentially relevant to the issues was the question to be addressed at the hearing; that the question would be "Is evidence relating to the other incident capable of being logically probative of an issue to be determined by the jury at this Inquest?". The Coroner stated that he took account of the nature of the other incidents, the evidence concerning the witnesses' involvement in the present case and information concerning witnesses' involvement in other incidents. He determined that there was one soldier, soldier A, who was involved in a fatal shooting and whose statement made for the purposes of the other incident and the findings of the Inquest into the death that occurred as a result of the other incident should be disclosed to the applicant.

[8] The Coroner emphasised that his ruling did not represent a final determination on whether the material disclosed could be deployed in the examination of witnesses in the course of the Inquest, thus indicating that he will be revisiting the issue of relevance and the use of the material at the Inquest. He further stated that prior to the evidence of soldier A he would hear further submissions on whether evidence relating to the other incident was relevant and if so whether the material should properly be introduced at the hearing or whether it should be excluded. It is against this ruling of 8 March 2012 that this application is made for leave to apply for Judicial Review.

[9] Further to the Coroner's ruling there has been disclosure to the applicant of the statement made by soldier A in relation to the other incident in which he opened fire and the finding of the jury at the Inquest into the death that occurred in that other incident.

[10] The material sought by the applicant is this. In relation to soldier A the Coroner has ordered production of the soldier's statement and the Inquest finding in the other incident in which soldier A discharged his weapon and nothing further is required in relation to that incident. However soldier A admitted involvement in another incident in which he did not open fire and the applicant seeks information in relation to the identifying features of that case and the role of soldier A. Secondly, in relation to soldiers C, D and G who indicated their involvement in other matters but gave no details, the applicant seeks information as to the identifying features of the other incidents and the role of each soldier. Thirdly, in relation to soldiers B, E and I who were the silent soldiers, the applicant contends that they should be required to make statements which would indicate whether they had any involvement in any other such incidents resulting in death and where that is so they too should provide the identifying features of the incident and the role of the soldier.

[11] The applicant relied on O'Brien v Chief Constable of South Wales Police [2005] UKHL 26, a claim for damages for misfeasance in public office and malicious prosecution. The issue arose of the relevant police officers having been involved in similar previous incidents. Lord Bingham stated –

> "4. That evidence of what happened on an earlier occasion may make the occurrence of what happened on the occasion in question more or less probable can scarcely be denied. …And if those engaged in the recent event had in the past been involved in events of an apparently similar character, attention would be paid to those earlier events as perhaps throwing light on and helping to explain the event which is the subject of the current inquiry. To regard evidence of such earlier events as potentially probative is a process of thought which an entirely rational, objective and fair minded person might, depending on the facts, follow. If such a person would, or might, attach

> importance to evidence such as this, it would require good reasons to deny a judicial decision-maker the opportunity to consider it. … Thus in a civil case such as this the question of admissibility turns, and turns only, on whether the evidence which it is sought to adduce, assuming it (provisionally) to be true, is in Lord Simon's sense probative. If so, the evidence is legally admissible. That is the first stage of the enquiry.
>
> 5. The second stage of the enquiry requires the case management judge or the trial judge to make what will often be a very difficult and sometimes a finally balanced judgment: whether evidence or some of it (and if so which parts of it), which ex hypothesi is legally admissible, should be admitted."

[12] The applicant translates Lord Bingham's approach into the Inquest setting and argues that information relating to similar incidents in which the soldiers were involved is potentially probative and relevant to the present Inquest and further that such material should be admitted in evidence. However the present issue, as Ms Doherty for the applicant was at pains to emphasise, precedes the two stages discussed by Lord Bingham in that she seeks information to be disclosed to the applicant to enable submissions to be made to inform the Coroner's decision in the present Inquest as to the relevance of each soldier's involvement in other incidents. Ms Doherty therefore contends that the Coroner's ruling of 8 March 2012, which was made without the benefit of the applicant's informed submissions, the applicant not having access to the information requested, should be set aside.

[13] It appears to be the position that the Coroner made his ruling with knowledge of the nature of each incident in which each soldier was involved and the role of each soldier in that incident, the MoD having provided that information in the table sent to the Coroner, the Coroner having the personnel file for each soldier together with the Inquest papers in respect of each incident. Ms Doherty questioned whether that was indeed the case because the letter from the Coroner to the Crown Solicitor's Office seeking further particulars might have been interpreted as referring only to those soldiers who disclosed involvement in other incidents and not extending to the soldiers who were silent in relation to other incidents. However the Coroner indicated in his ruling that he looked at the personnel files of all the soldiers and examined the other incidents and I assume therefore that the Coroner considered the material in relation to the three silent soldiers as well as the others.

[14] Thus the material that is now sought by Ms Doherty on this application for leave to apply for Judicial Review is cast in much narrower terms than appears in the Order 53 Statement.

[15] The Inquest commenced today, a schedule of witnesses having been drawn up for some time, soldiers have been identified as witnesses, some of them no doubt

have left the army and are no longer subject to the instructions of the MoD, some may still be serving in the army and may be abroad, some will be present to give evidence and some are available by video link from other parts of the world. Detailed arrangements have been put in place. All parties are anxious that nothing should be done to interfere with the conduct and progress of the Inquest finally taking place after 20 years.

[16] The proposed respondent, the Coroner, contends that he has complied with his obligations in relation to the disclosure of information and has made a decision that should not be set aside. The notice party, the MoD, agrees and adds that this application amounts to satellite litigation and that accordingly the Court should not interfere with the decision of the Coroner or the conduct of the Inquest while it is at hearing and that any challenge in relation to issues arising in the course of the Inquest should await the conclusion of the Inquest. At that stage it might be determined whether the overall proceedings warrant review by the Court. Mr Maguire for the MoD contended that, were it to be otherwise every ruling made by the Coroner would potentially provide a basis for a challenge by way of Judicial Review, an outcome that would be potentially disruptive to the conduct of the Inquest.

[17] Reference was made to a number of cases where the courts have expressed concerns about Judicial Review coming into play in the course of other proceedings, although as Ms Doherty pointed out it is not apparent that there has ever been a case where that issue has been a ground for refusal to make an order in Judicial Review proceedings where that was thought to be appropriate.

For example in O'Connor and Broderick's Application [2005] NIQB 40, a Judicial Review challenge to police disciplinary proceedings, it was stated at paragraph 24 that only in exceptional circumstances would it be appropriate for Judicial Review proceedings to take place in the course of criminal proceedings and that all issues should be dealt with in the proceedings whether at trial or on appeal. Similarly in disciplinary proceedings the issues that arise should be dealt with in the proceedings, whether at the initial hearing or on review or on appeal where permitted, and normally Judicial Review would only be appropriate at the conclusion of those disciplinary proceedings.

Similarly in Howard's Application [2011] NIQB 125, a Judicial Review of Inquest proceedings, Treacy J stated at paragraph 41 that the introduction of public law challenges during the lifetime of an Inquest can seriously disrupt the progress of the inquest and endanger the requirement of promptitude. The proper course in most cases must be to wait until the conclusion of the inquest and, if unhappy with its outcome, to make a public law challenge if merited at that stage. In those necessarily exceptional cases where a challenge can be justified before the conclusion of the Inquest, adherence to the requirement of promptness in Order 53 is of particular importance.

Again in McLuckie's Application [2011] NICA 34, another Judicial Review of Inquest proceedings, Higgins LJ stated in the Court of Appeal –

> "[26] The application for judicial review in this case and the appeal therefrom are a further example of satellite litigation in relation to inquest proceedings. Such satellite litigation has caused many delays in the inquest system. A culture has developed whereby decisions by coroners in preparation for and during the conduct of inquest proceedings are frequently and immediately challenged by way of judicial review. On occasions this can lead to protracted delays in the inquest process frustrating the purpose of an inquest. In this instance the Inquest was about to commence with witnesses assembled, some coming from overseas, and time had been set aside for the inquest to be conducted. In the context of criminal proceedings the law and the practice of the court in judicial review proceedings have been to discourage satellite judicial review proceedings, leaving challenges to decisions made during the course of the criminal proceedings in the main to be considered at the conclusion of the trial process. We feel compelled to question why different considerations should apply in the context of coroners' inquests. When an inquest results in a verdict that verdict may itself be challenged in an application for judicial review but that will be at a time when the court will have the benefit of appreciating the whole context of the inquest. What may appear to be of potential or theoretical importance during preliminary hearings or inquest proceedings before the Coroner, and which often leads to satellite litigation, may turn out to be of no such importance in the overall context of the inquest. Procedural errors during the course of the inquest, if and when they occur, may not undermine the ultimate integrity of the inquest or the ultimate verdict."

[18] Had this Inquest not already commenced I would have been minded to grant leave in relation to the soldiers B, E and I, the silent soldiers, in relation to disclosure of further information by statement and in relation to all soldiers who identified their involvement in previous events, to provide the identifying features and their role in relation to the other incidents.

[19] However I have been persuaded that it would be not appropriate to do so because of the timing of the application for Judicial Review. The Inquest having commenced today I consider it to be inappropriate that there should be Judicial Review proceedings that may interfere with the conduct and progress of the Inquest. I appreciate that it may be said that the grant of leave or the making of the Order that is sought would not of themselves interfere with the progress of the Inquest. However any such step would open up issues in relation to other incidents beyond

the role of soldier A in the incident where he opened fire. Had this application been taken up months ago there might have been an opportunity to progress further inquiries in relation to other incidents and to complete those inquiries before the commencement of the Inquest. However once the Inquest has commenced, after years of waiting, it should not be disrupted by other proceedings unless there are exceptional circumstances. There is nothing exceptional about the present application that would warrant the grant of leave at this stage.

[20] Further the Coroner has expressed the view that he has not made a final decision in relation to relevance and presumably has not made a final decision in relation to the information that might be produced for his consideration or that he might require to be produced to the applicant or that will be put before the jury or in relation to the questions that might be asked of the witnesses. There remains scope within the present Inquest for a review of the information relating to the soldiers and their role in any incident. That would of course also have the potential for disruption of the Inquest but it places in the hands of the Coroner the management of the Inquest and the management of the information required to be produced. The Coroner, with day to day charge of the conduct of the proceedings, should be better placed to determine how to manage the process and the information required and the witnesses concerned. Ultimately he remains subject to the supervisory jurisdiction of the Court.

[21] The outcome is that I refuse leave to apply for judicial review of the decision of the Coroner of 8 March 2012.