Coroner's Inquest – Extra Statutory Scheme -representation by junior counsel – whether scheme to be applied to compliance with Article 2 ECHR – duty to provide information- reduction because of failure to give information.

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(subject to editorial corrections)

2004 No. 18794

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY OWEN McCAUGHEY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS TAKEN BY THE LORD CHANCELLOR

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GIRVAN J

Introduction

[1] The applicant in this judicial review application is Owen McCaughey the father of Martin McCaughey ("the deceased") who died on 9 October 1990 as did Desmond Grew. The deceased and Desmond Grew were shot dead close to some outbuildings near Loughgall, County Armagh by members of the security forces in circumstances which it is alleged by members of the deceaseds' families and others evidenced a so called shoot to kill policy on the part of members of the security forces. As yet no inquest has been held into the deceaseds' deaths.

[2] As a result of representations made by solicitors on behalf of the deceased the coroner decided to hold a preliminary hearing in January 2003. The deceased's father applied for funding from the Lord Chancellor under the

Extra Statutory Scheme ("the Scheme") operated by the Lord Chancellor. A decision to provide funding was made but the applicant challenges the decision in two respects. Firstly, he challenges the decision refusing the applicant funding for senior counsel to represent his interest as an interested party at the preliminary hearing before the coroner. Secondly, he challenges the decision of the Lord Chancellor restricting the applicant's funding for junior counsel and solicitor to 75% of the maximum grant because of the applicant's failure to provide the Lord Chancellor with information on the financial means of the deceased's siblings.

The Scheme

[3] In March 2001 the Lord Chancellor published criteria to be used to decide whether people qualify for public funding to be represented by lawyers at coroners' inquests in Northern Ireland. The consultation period for those criteria ended on 30 June 2001. Amongst the criteria to which the Lord Chancellor was to have regard were whether the applicant would be qualified financially for full civil legal aid in other circumstances; whether an effective investigation of the deceased's death was needed; whether the inquest was the only means to conduct it; whether the applicant was in a sufficiently close relationship to the deceased to warrant funding; whether alternative funding was available; and the views of the coroner if expressed. Subsequently, the Lord Chancellor issued a Statement of General Policy for administering applications for funding under the Scheme for representation at exceptional inquests in Northern Ireland. Under the terms of the policy statement paragraph 3 set out details of matters which should be included by way of information in applications for funding under the Scheme. Paragraph 4 indicated that applications must be accompanied by the prescribed CLA4 form in which the applicant's financial eligibility details must be set out. Under paragraph 5 the applications must satisfy the civil legal aid financial eligibility test and paragraph 6 required that there must be no source of alternative funding available. The latter infelicitously drafted. Paragraph 8 is relevant in the present applications. It stated:

> "The applicant should be of a sufficiently close relationship to the deceased to warrant funding. In the first instance information would be required on the following terms:
>
> (a) if the deceased was a child, means forms from the parent or parents;
>
> (b) if the deceased was an adult, means forms from his or her partner;

(c) if the deceased was an adult who had not a partner, means information concerning the deceased's parents, children and siblings,

(d) where (a) - (c) does (sic) not apply other applicants may be considered."

Under paragraph 10 where there are other family members, some of whom are not financially eligible, it may be appropriate to refuse funding or restrict it to a proportion of the costs of representation. Under paragraph 12 it was provided that the grant would cover only advocacy at the hearing but this may be taken to include fees for acting as advocate at the hearing including solicitor advocacy, the costs of any other legal representative attending the hearing, the cost of instructing counsel for the hearing, the cost of any conference at or immediately before the hearing and costs in relation to any preliminary hearing in which advocacy is required. Under paragraph 15 grants will be made for one counsel normally at junior counsel rates unless there are compelling reasons to the contrary. Paragraph 18 stated that the views of the coroner will be sought on the suitability of the case for funding and level of representation required.

The impugned decision making

[4] Application was made to the Lord Chancellor on 6 December 2002 for funding for the inquest into the death of the deceased. The Lord Chancellor sought information on certain matters. Eventually on 3 April 2003 the Court Service indicated the Lord Chancellor's decision on the application. The Court Service letter stated that the relevant Minister had authorised payment of a sum not exceeding £4,100 plus VAT and travel by way of an ex gratia payment to be used solely for the costs of solicitors and junior counsel only representing the applicant at the preliminary hearing in respect of costs incurred after 26 March 2003. This was calculated on the basis of the preliminary hearing lasting twelve hours. The funding was restricted to 75% of the maximum grant representing a reduction of 25% on the basis that information about the means of siblings was not provided. The applicant's solicitors indicated dissatisfaction with the Minister's decision and sought a reconsideration. On 8 July the Court Service wrote to indicate that the Minister had affirmed the previous decision.

[5} In the course of the decision-making process the Court Service was in contact with the coroner. On 23 December 2002 the coroner wrote to the Court Service stating that he would be "uneasy" about senior counsel being funded at the preliminary hearing which he did not envisaging taking a long time. For the substantive hearing he considered that senior counsel would be assigned. On 9 January 2003 he stated that he would not see the preliminary hearing taking much longer than the morning. He had asked for junior

counsel as counsel for the inquiry and he would not see the need for senior counsel at this early stage as it was unlikely that the inquest would commence in the near future. The coroner repeated a similar view on 24 April 2003.

[6] In relation to the decision to fund only junior counsel in his affidavit Paul Andrews, Head of Reform Branch of the Public Legal Services Division of the Northern Ireland Court Service stated that the Minister making a decision in respect of the Scheme enjoyed discretion to determine whether an offer of grant was to be made and the level of any representation to be allowed. In some cases it might be appropriate only to grant representation by way of a solicitor. In other cases, in addition to funding for a solicitor, junior counsel might be provided. Paragraph 15 of the statement of general policy indicated that where a barrister was required junior counsel and solicitor only would be the normal approach. Exceptionally, however, senior and junior counsel together with a solicitor would be allowed. In the applicant's case it was not considered appropriate by the Minister to allow funding for senior counsel in respect of the preliminary hearing. Representation by solicitor and junior counsel was however sanctioned. In taking this view the Minister had regard to the totality of the circumstances in respect of the application and took into account in particular the views expressed on behalf of the applicant was initially before the first decision was made and afterwards when the initial decision was reviewed. The view expressed by the coroner to the effect that senior counsel was not necessary for the preliminary hearing was also considered. The Minister's view was that a reasonably senior junior counsel would be able to deal with the preliminary hearing especially as many of the issues which might arise had been or were the subject of judicial review proceedings.

[7] In relation to the decision to restrict funding to 75% of the maximum grant Mr Andrews stated that the reason for the decision was the failure of the applicant to provide information in respect of the financial means of the deceased's siblings. The view of the Court Service was that such information was relevant to the making of a funding decision as, in some cases, it would not be appropriate to grant funding from public funds if there were members of the deceased's family who were in a position to contribute to or pay for legal representation of the interests of the family of the next kin in connection with the inquest. The applicant's solicitors had been asked to provide information sought and despite reminders they had resolved against providing any such information.

The applicant's case

[8] Ms Quinlivan on behalf of the applicant argued that the Lord Chancellor was not acting consistently in that he was prepared to fund senior counsel in relation to preliminary hearings into the death of two other

deceased persons McKearney and Doris who died in circumstances where it was alleged that a shoot to kill policy was being operated. There was, it was contended, no distinction in terms of complexity between the inquests into the deaths of McKearney and Doris on the one hand and the inquests into the deaths of the deceased in this case. The Lord Chancellor gave undue weight, it was argued, to the opinions of the coroner (who had no knowledge of the comparative complexity of other inquests in which authority for senior counsel had been granted). In seeking the coroner's views the respondent did not provide the coroner with a copy of the applicant's application for funding which would have enabled him to consider the detailed reasons for the applicant's contention that senior counsel was appropriate. The applicant's solicitors represented the next of kin in both sets of inquests and accordingly were in the best position to make the assessment. It was contended the respondent failed to take into account relevant considerations in determining whether it was an appropriate case for funding senior counsel. In particular it was contended that the respondent failed to give any or adequate weight to the fact that the inquest was the only fact finding mechanism whereby the applicant could establish the circumstances of his son's death, the fact that the State had made a commitment that the inquest was the mechanism whereby it would provide compliance with the judgments of the European Court; the complexity of the legal issues raised by the inquest; the complexities of the factual issues raised by the inquest; the application for funding; and counsel's opinion.

[9] Counsel further challenged the decision to restrict the grant to 75% as being a decision that was incompatible with the State's obligations under Article 2 of the Convention. It was wrong in principle to demand information about the means of other members of the family who were not participating in the inquest and it was because the principle was wrong that the applicant did not seek or provide information about the means of the sibling. It was argued from authorities such as R (Khan) v Secretary of State for Health [2003] 4 All ER 1239 that the Court of Appeal in England had made clear that the next of kin ought not to be required to fund, even partially, an inquest into the death of a deceased son in circumstances where the state was responsible for the death, where Article 2 was engaged and where the soldiers responsible for the lethal force would be receiving publicly funded representation without having to satisfy any means test. Notwithstanding the decision of the House of Lords in McKerr v Secretary of State [2004] 1 WLR 807 the applicant was entitled to rely on Article 2 of the Convention having regard to the legitimate expectation engendered by the Government's package of measurements produced in October 2002 in response to the Strasbourg rulings in cases such as Jordan v UK. In any event if the applicant was prevented from participating in the inquest to the extent necessary to protect his legitimate interests his fundamental rights would have been violated. The discretionary decisions were thus subject to heightened scrutiny on the part of the court. The applicant is entitled to access to a

scheme which provides sufficient funding to enable him to have the requisite level of representation necessary to protect his legitimate expectation. It was contended that the respondent's decision breached the applicant's fundamental right and absent justification for so doing the decision must be quashed.

The decision in relation to representation

[10] In Re Hemsworth [2005] NICA 12 the Court of Appeal held that in light of the decision in Re McKerr the Lord Chancellor was not obliged by the Human Rights Act 1998 to act in a manner compatible with the Convention in the provision of funding for legal representation where the inquest related to a pre-Human Rights Act death. As rights under the Convention were not engaged the appropriate test was the usual Wednesbury test. The Court of Appeal in that case concluded that the Scheme was a rational scheme and that the Lord Chancellor had properly applied it. In that case I held that the applicant was not a victim under the Human Rights Act. If the ex gratia Scheme failed to satisfy Article 2 the applicant did not have a remedy under domestic law. Her only legitimate expectation was that the scheme as formulated would be properly applied. Even if the Lord Chancellor was bound to formulate a Scheme which was compliant with Article 2 the overall Scheme formulated and applied by the Lord Chancellor did not infringe Article 2. It provided a system that was reasonably practical and effective as Kerr J (as he then was) had held at first instance.

[11] Under the Scheme the Lord Chancellor enjoys a discretion as to the level of representation funded for the purpose of the inquest on any preliminary hearing in connection with it. The norm is intended to be representation by junior counsel. The Scheme envisaged that the coroner's views would be taken into account in deciding the level of representation. As Mr Maguire contended the question in the present case was whether the decision to fund junior counsel, but not senior counsel, at the preliminary hearing was one which would work an injustice to the applicant preventing him from being able to properly present his case on behalf of the applicant. The clear reality is that there are experienced junior counsel competent and able to deal with the kind of issues likely to be raised at the preliminary hearing. The Court of Appeal in Attorney General's Reference (No. 82A of 2000), R v Lee, R v Shatwell [2002] 2 Cr. App. R. 24 rejected the argument that the principle of equality of arms demanded that if the Crown is represented by senior counsel in a prosecution that the defence counsel should be represented by a senior counsel. The importance is to have an advocate who can ensure that the party's interests are properly and adequately represented. In fact, at the first preliminary hearing on 31 January 2003 (which pre-dated the grant of funding) the Ministry of Defence was represented by solicitors as were the police. There is nothing to support the view that the decision was

irrational or arrived at otherwise than after due consideration of all relevant factors.

[12] In relation to the argument that the Lord Chancellor was guilty of inconsistency and that he should have treated this case in the same way as the cases in McKearney and Doris, as I stated in Re Croft, [1997] NI 457 to succeed in a challenge to a decision based on the argument of unequal treatment the challenger must be able to demonstrate that the decision was such that no reasonable decision-maker could have reached the decision. Proper regard must be accorded to the decision-maker's proper margin of appreciation. If the decision-maker may tenably consider that there are points of distinction between two classes of person or two situations he is entitled within this margin appreciation to treat them differently. In this case the views of the coroner clearly weighed with the decision-maker who was entitled to take them into account under the terms of the policy. The fact that senior counsel were funded in the other matters did not inevitably lead to the conclusion that in the present instance senior counsel was necessary. It has not been demonstrated that the Lord Chancellor did not have tenable grounds for concluding that he should follow his norm of representation by junior counsel notwithstanding that in the cases of Doris and McKearney representation for senior counsel was permitted at the preliminary hearing.

The decision to reduce the funding

[13] Paragraphs 8-10 of the Statement of General Policy makes clear that the policy is that public funding is not intended to be provided when alternative funding is available or where the applicant has sufficient means. The applicant's case proceeded on the basis that as a matter of convention law where a death occurs in circumstances when the State's agents use lethal force the State is bound to meet the costs of the next of kin in the investigation into the circumstances of the death. As noted Ms Quinlivan relied on R (Khan) v Secretary of State [2003] 4 All ER 1239. She accepted that Khan, insofar as it related to a death before the Human Rights Act 1998, is no longer good law in the light of McKerr v Secretary of State. But she relied on the Government's representations contained in the Government package of measures produced in October 2003 outlining the Government's proposal to comply with the judgments of the Strasbourg court in Jordan v UK.

[14] Even assuming that the analysis in Khan still applies the decision does not go so far as to establish Ms Quinlivan's wide propositions. Brooke LJ giving the judgment of the court said that it was:

> "open to question whether a provision which requires someone like Mr Khan to fund the *entire* costs of his lawyers in appearances at the inquest into his daughter's death *entirely* out of his own pocket in a

> case as serious and as complex as this (without any possibility of reimbursement by the state) is compatible with the requirements of the Convention. With a wife and four other children to support it seems absurd, on the information presently available to the court that he could reasonably be expected to fund the *whole* of the costs of his own representation himself in order to enable the state to perform the obligation that lies on it and not on him." (italics added).

Brooke LJ was speaking in the context of that particular case and in context of that particular family although the decision does highlight an important point, namely, that the next of kin in an inquest are in a very different position from ordinary litigants vindicating or defending claims in ordinary litigation where there is a lis inter partes.

[15] In the case of pre-incorporation deaths McKerr made clear that the next of kin cannot rely on Article 2 under domestic law. The Scheme was clearly brought in at a time when the understanding was that the Article 2 duties applied to pre-Human Rights Act deaths. The state's duty in *international law* in the light of Jordan v United Kingdom to provide an Article 2 compliant investigation and to set in place procedures and mechanisms (including, where appropriate funding arrangements for next of kin) that would ensure that the state was fulfilling its obligations. Under *domestic law* a citizen has no right as such to enforce the international legal obligations of the state in the absence of express incorporation into domestic law or in the absence of a domestic law provision that he can be called in aid. The policy that was introduced as a policy on the part of the state is to fulfil its obligations but a question arises as to what obligations, obligations under domestic law or obligations under its international obligations? When it introduced the policy it appears that it considered that the obligations under an international law and domestic law were the same. McKerr shows that this was a misapprehension. Hemsworth indicates that the policy falls to be applied in accordance with the domestic law.

[16] If the policy falls to be applied in accordance with the current domestic law it is clear that the policy is perfectly rational and lawful. The terms of paragraph 4 et seq reflect ordinary legal aid practice and there is nothing to suggest that the decision-maker misapprehended his duties or arrived at a decision that was legally flawed or Wednesbury unreasonable. It was reasonable for the funder to have regard to alternative possible sources of funding from other members of the family. If other members of the family were wealthy and able to fund legal costs without difficulty then that would be a material consideration for the decision-maker. The applicant refused as a matter of principle to co-operate in obtaining and providing information.

Had the applicant been unable to obtain such information, for example if the siblings were refusing to co-operate or lived outside the jurisdiction, then it would have been open to the applicant to so inform the respondent and the decision on funding would have to have been made in the light of that information. Indeed, it may still be open to the applicant to seek a review of the decision if it supplies more information to the respondent.

[17] Even if the policy fell to be applied in an Article 2 compliant way, there is nothing in the terms and application of the policy so interpreted that would infringe the Article 2 rights of the applicant in seeking information about the means of other potentially interested parties. To take an extreme example, if the next of kin of the deceased comprise of a father and brother of the deceased and the father is a very wealthy businessman who is content to allow his penniless son to seek a grant under the scheme it might be entirely reasonable for the respondent to conclude that it would be reasonable to expect the father to make a contribution to the costs of the inquest. If the penniless son simply refused to give any information about his father's means he would be acting obstructively and the respondent, which is responsible for the administration of public funds, would be entitled to take that into account in deciding what grant, if any, should be paid. If an applicant not as a matter of principle but because of genuine difficulties or obstruction from other parties cannot provide further information or full information to the decision-maker that would be a matter which the decision-maker would have to take into account in arriving at the ultimate decision. In this case the applicant or perhaps the applicant's solicitors simply refused to provide any information and thereby prevented the respondent having access to information that was potentially of some relevance. In the present case the respondent acted in an entirely proportionate way by providing a substantial contribution to the applicant's costs notwithstanding the attitude taken by or on behalf of the applicant.

[18] Thus whether Article 2 applied or not it has not been shown that the respondent's decision was flawed.

[19] Accordingly the applicant's application on both issues will be dismissed.