Neutral Citation No.: [2008] NIQB 117 | *Ref:* **McCL7302**

Judgment: approved by the Court for handing down | *Delivered:* **24/10/2008**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Siberry's Application [2008] NIQB 117

AN APPLICATION FOR JUDICIAL REVIEW BY HAZEL SIBERRY

McCLOSKEY J

[1] The impugned determination is set out in paragraph 2A of the Statement and is to the effect set out immediately below.

[2] The impugned ruling of the Senior Coroner for Northern Ireland was made on 27 August 2008 whereby he determined that he was going to call the Prisoner Ombudsman for Northern Ireland at the inquest due to begin on 20 October 2008, touching upon the death of Mr Ronald Davey at Magilligan Prison on 7 October 2005 and permit the Prisoner Ombudsman to refer to any part of his Report which includes findings, opinions, conclusions and recommendations, some of which are critical of Dr Siberry.

[3] The background is formed by the synopsis that appears in the Preface to the Report of the Prisoner Ombudsman, Mr Coulter. In paragraph 2 he says that he has performed a duty to investigate and report on the circumstances and events arising to the tragic death of Mr Ronald William Davey, aged 24 years, in Murlough B Wing of House 1, Magilligan Prison, on the evening of 7 October 2005.

[4] There are two issues to be determined by the court at this preliminary stage. The first is whether the threshold for the grant of leave has been satisfied and, linked to that, is the second question, which is delay. The threshold for the grant of leave in judicial review proceedings is well settled and uncontroversial. It has frequently been described as a modest hurdle. In the IRC case Lord Diplock said:

> "Leave should be granted where on a quick perusal of the material then available, the court thinks that it discloses what might, on further consideration, turn out to be an arguable case"

Conversely it has been said, by the Privy Council, that leave should be refused "… where the case seems to be manifestly untenable": see the more recent case of Matalulu v Director of Public Prosecutions.

[5] Is the leave threshold overcome in the present case? I have regard, firstly, to the objectives which Mr Coulter set himself in compiling his Report, as set out in the Preface to that Report (paragraph 5) and I also take into account the extensive conclusions and recommendations in the Report, beginning at paragraph 247.

[6] Against that background I consider the letters written by Mr Leckey, the Senior Coroner for Northern Ireland. Firstly, his letter dated 20 May 2008, where he says:

> "In relation to the evidence of the Prisoner Ombudsman, my approach would be not to provide each juror with a copy of the entire Report. However, the Prisoner Ombudsman would be asked to give evidence upon it."

It continues:

> "I would allow the Prisoner Ombudsman and other witnesses to state their views on certain issues, those include reasonable precautions, defects in the existing system of working and any other facts relevant to the circumstances of the death."

And it continues further:

> "… and, of course, each would be liable to be examined in relation to what they say".

[7] Mr Leckey, in subsequent correspondence, emphasised that that was his ruling and then, elaborating somewhat in his more recent letter of 27 August 2008, he said:

> "The Ombudsman will be asked to give evidence based on the contents of his Report. That Report does contain what may be termed 'opinion evidence' but then the report of any person or body charged with investigating a death would contain evidence that would be classified in that way. For example, I would refer you to the reports prepared by the Police Ombudsman, Health and Safety Executive, The Marine Accident Investigation Branch and The Rail Accident Investigation Branch. Also, as you will be aware, the report of any independent expert tasked by a coroner to prepare a report into the circumstances of a death will inevitably contain opinions based on facts".

This portion of the Coroner's letter, in my view, points up a distinction of potential importance between the opinions expressed by someone who might be called a mere investigator, albeit with the assistance of others including those with expertise and secondly, and by contrast, the freestanding report of an expert witness. The Coroner continues:

> "For the purpose of giving evidence at the inquest, the Prisoner Ombudsman would be able to refer to any of the contents of his Report. The Report contains recommendations. As you are aware, neither the Coroner nor a jury is able to make recommendations".

[8] In these passages, the Senior Coroner proffers his justification for proposing to produce evidence in this way at the inquest from the Prisoner Ombudsman.

[9] The grounds of challenge in this case are set out in paragraph 3 of the Order 53 Statement. These, in my view, resolve to two central complaints. One is that the Senior Coroner's ruling is vitiated by error of law and the second is that it is vitiated by an improper exercise of discretion. I merely observe, very much in passing at this stage, that there may not be any major distinction of substance between these two grounds.

[10] I am conscious that in a variety of cases, such as Jamieson and Dallaglio and, most recently, in Jordan, per Lord Bingham at paragraph 24, the courts have emphasised that in performing its function, the Coroner's inquest, whether it is the Coroner by himself or the Coroner with a jury, has a reasonably wide discretion and can roam more widely than the narrow contours of what they are charged to do would appear to require. Fundamentally, what they are required to do is to discharge their functions under Section 31 of the Coroners Act and Rule 15 of the 1963 Rules.

[11] But it seems to me that those authorities do not speak directly to the two central grounds of challenge in this case. On further examination they may be found to speak to them indirectly. Indeed, on further examination they may be bound to be determinative of these grounds of challenge. But at this stage of the proceedings, they do not provide the kind of response which would make the Applicant's case unarguable. In my view the Applicant's case gives rise above all to issues of admissibility of evidence and, linked to that, fundamentally, the possible contamination of the inquest jury's findings.

[12] I consider that only in a comparatively rare case would the High Court be properly equipped to intervene in advance on issues which have a bearing on how an inquest is going to be conducted and issues relating to evidence which will be adduced at the inquest. But the present case, in my opinion, is rather unusual in this respect. I have before me, subject to such further evidence as may sound on the issues debated already, a reasonably complete factual framework which enables me

to form a judgment about the desirability or undesirability, the propriety or impropriety, of this court intervening before the inquest gets under way.

[13] Lying at the root of all of this is an issue of reception of evidence. The reception of evidence incontestably has a crucial bearing on how the central functions and responsibilities of the coroner and inquest jury, under Section 31 of the Coroners Act and Rule 15 of the Rules, will be performed in that present case. Thus, in my view, the subject matter of the Applicant's challenge, far from focusing on some incidental or ancillary or peripheral issue, belongs to the centre of what these inquest proceedings are going to be all about. I am quite satisfied that the arguability threshold is overcome in the present case.

[14] Next, I turn to the issue of delay and I consider that there are two questions to be posed. The first is whether there is any culpable or unjustifiable delay on the part of the Applicant. The second is, if so, should this operate to warrant a refusal of leave in the exercise of the court's discretion. Order 53, rule 4(1) provides:

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose, unless the court considers that there is good reason for extending the period within which the application shall be made".

[15] This provision is familiar to everyone and there is ample judicial guidance in this jurisdiction and in England on how the rule is to be interpreted. Fundamentally, the obligation on the moving party is to bring proceedings promptly and that, of course, will inevitably give rise to a contextual consideration of the expedition with which the Applicant has acted.

[16] The second part of the Rule establishes a 'backstop' of three months, beginning on the date when grounds for the application first arose and there is an exception to that, viz "… unless the court considers that there is good reason for extending the period in which the application shall be made. "

[17] In considering the application of Order 53, Rule 4 to the present case, the court must reflect on the sequence of events which, on the evidence that I have, really begins with the Senior Coroner's letter dated 20 May 2008 and his most recent letter dated 27 August 2008 which was followed by the initiation of these proceedings on 13 October 2008 that step having been previously notified to the court on 9 October 2008.

[18] It seems to me that there was a degree of misunderstanding between the Senior Coroner and the Applicant and his legal advisers. The letters which were complied on behalf of the Applicant were, in my view, responsibly and genuinely prepared and transmitted to the Senior Coroner accordingly. The applicant's legal representatives plainly were of the view that the Senior Coroner had not made a

final ruling and that emerges particularly in their letter dated 6 August 2008. I am not prepared to find they were acting other than genuinely and responsibly throughout this period. It was that approach which led them to submit a further written argument to the Senior Coroner and to continue to make representations to him in correspondence. As a matter of pubic law, the Senior Coroner, whether he had made a final ruling or not in his own mind, was, of course, duty bound to take these representations into account in any event and, therefore, I cannot consider this to be anything other than a serious and proper exercise throughout this period.

[19] That brings me to the end of August 2008 and the last month. It would have been a better reflection on the Applicant and her legal advisers if they had come before this Court more quickly but to delay for a period of approximately 7 weeks in doing so, in my view, does not amount to culpable or unjustifiable delay in the circumstances of this case. I also take into account had they moved sooner during that period it would probably have made no practical difference to the way forward in these proceedings or in the forum of the inquest given the timescales in play.

[20] I have taken into account the fact of the previous adjournment of the inquest, that has been brought to my attention, and it appears to be the case that the inquest was scheduled to proceed on 13 May 2008, but did not do so. I have also taken into account the date when the death occurred. That speaks for itself of course, the third anniversary of this death having just passed. I have rather unconventionally, allowed a non-party to present a written representation to the court and that comes in the form of the statement made by Marcella Allen. This has been provided by her solicitors, who acted expeditiously, and I commend them for that. Mrs Allen says:

> "I am the mother of Ronnie Davey whose death the inquest hearing is due to investigate. Ronnie died just over 3 years ago and since his death I have been unable to grieve for him as I am so preoccupied with the resolution of the circumstances surrounding his death. This is the second time that the inquest has been listed for hearing. I have taken time off work to attend and I was shocked when I heard on 13 October that judicial review proceedings had been lodged. Each time this inquest has been listed for hearing I have, for some weeks and months, attempted to prepare myself mentally and emotionally for the ordeal of sitting through the inquest and hearing the evidence about the circumstances of Ronnie's death. As a result my normally stable moods have been affected, as have my relationships with my other children, my husband and my granddaughter. It would be devastating for me and the rest of my family were the inquest to be adjourned again. The completion of the inquest will allow us all finally to come to terms with Ronnie's death and achieve some measure of closure".

[21] No compassionate court could fail to be significantly moved by the contents of Mrs Allen's statement. However, I must balance against that the following

factors. Firstly, I have ruled that there is an arguable case here. Secondly, the hearing of this case, if leave is granted, will be expedited by this Court, thereby minimising further delays in the forum of the coroner's court. I balance all of the interests in play including the interests of those who are involved in the inquest before the coroner and these include, not insignificantly, Mrs Allen and the bereaved family. I balance also the public interest and I take into account the following additional factors. The High Court exercises a supervisory jurisdiction over the Coroner's Court. Where there is a tangible risk of a potentially flawed jury verdict, it is, in my view, manifestly desirable that that be prevented in advance, rather than quashed in retrospect. The latter alternative is a demonstrably undesirable one. This is one of those comparatively rare cases where, in my view, the High Court can intervene at this stage and provide a judgment which one way or the other will ensure that as regards this very important issue concerning reception of evidence the jury's verdict should be robust and beyond challenge.

[22] The Senior Coroner has, in his most recent letter dated 13 October 2008, adopted what I would describe as the very responsible and proper stance that in the event of leave to apply for judicial review being granted, he, without any order of this Court, will adjourn the hearing of the inquest and I compliment him for that.

[23] Balancing all of these factors, I decline to refuse the grant of leave on the ground of delay. I am satisfied that in the wording of Order 53, Rule 4, taking everything into account, this application for leave has been brought promptly.

[24] I propose to finalise now a timetable for all of the steps that are required to be undertaken by the parties.