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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

THE ATTORNEY GENERAL FOR NORTHRN IRELAND

and

SIOBHAN DESMOND

Appellants;

-and-

THE SENIOR CORONER FOR NORTHERN IRELAND

Respondent.

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Before: Morgan LCJ, Girvan LJ and Coghlin LJ

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MORGAN LCJ (delivering judgment of the court)

[1] The appellants are the Attorney General for Northern Ireland ("the Attorney") and Siobhan Desmond. The appeal is against the decision of Treacy J given on 8 May 2013 where he dismissed a judicial review challenge by the Attorney to a decision of the Senior Coroner for Northern Ireland ("the Coroner") on 1 August 2012 declining to comply with a direction by the Attorney given pursuant to Article 14(1) of the Coroners Act (Northern Ireland) 1959 (the 1959 Act) to conduct an inquest into the death of Axel Desmond who was born stillborn on 16 October 2001. Ms Desmond, the mother, was a notice party. The Attorney appeared with Mr Scoffield QC. Ms Anyadike-Danes QC and Ms Fiona Doherty appeared for the mother. Mr Hanna QC and Mr Doran appeared for the Coroner and Ms McMahon prepared the written submission on behalf of the Royal College of Midwives. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] Axel Desmond was stillborn at Altnagelvin Hospital on 16 October 2001. At that time his mother had completed the full term of her pregnancy and was overdue. A foetal heartbeat was detected until shortly before the stillbirth. A number of reports have been prepared in relation to the circumstances surrounding the latter stages of the mother's pregnancy which demonstrate considerable divergence of opinion between senior medical professionals as to the reasons for the stillbirth. One report places the blame with the mother while another takes the view that the hospital was solely responsible. The areas of dispute include whether the mother was given appropriate advice about the need to come to hospital and whether in any event appropriate care was given within an appropriate timeframe when she did attend hospital.

[3] No inquest was carried out in relation to the circumstances of the stillbirth because coroners in this jurisdiction believe they have no power to do so if the child is stillborn. Ms Desmond requested the Attorney to exercise his power under the 1959 Act to direct the holding of an inquest into the stillbirth. On 4 July 2012 the Attorney issued a direction pursuant to section 14 (1) of the 1959 Act and attached a letter of the same date setting out in some detail his reasons for concluding that the Coroner had power to carry out the inquest. The Coroner responded by letter dated 1 August 2012 indicating that he believed he would be acting ultra vires by accepting jurisdiction to hold an inquest into the stillbirth and stated that there was an absence of jurisdiction in relation to stillbirths not only in England and Wales but also in the Republic of Ireland. He expressed his sympathy for the parents and indicated that he would engage in litigation in a constructive and non-confrontational way if the Attorney decided to pursue the matter in the High Court.

[4] The Attorney issued proceedings on 26 October 2012 seeking an order of certiorari to quash the decision of the Coroner made on 1 August 2012 and an order of mandamus compelling the Coroner to comply with the Attorney’s direction to conduct an inquest into the death of Axel Desmond. Treacy J dismissed the application. He found that there was no express jurisdiction in the 1959 Act empowering coroners in Northern Ireland to conduct an inquest into the death of a stillborn child. For at least 50 years coroners in this jurisdiction have not carried out inquests into stillborn children apparently because of the absence of any express jurisdiction. He noted that there was persuasive evidence in the Coroners (Practice and Procedure) Rules 1963 and the Criminal Justice Act (Northern Ireland) 1945 to suggest that the understanding at the time of the enactment of the 1959 Act was that the coroner did have jurisdiction to conduct such an inquest. He considered, however, that given the consequences of such a jurisdiction in areas such as abortion, reproductive rights, infertility treatment, cloning, stem cell research, artificial intelligence and other areas of science the legislature would have expressly provided for such a power if it was intended that the coroners should have it.

[5] For those reasons the learned trial judge concluded that the 1959 Act did not give the coroners jurisdiction to perform an inquest into stillborn child. The notice party had argued that articles 2, 8 and 14 ECHR required the holding of such an inquest. The learned trial judge concluded that in light of his conclusions on the interpretation of the 1959 Act it was not necessary to address the arguments of the notice party.

The submissions of the parties

The appellants' case

[6] The Attorney submitted that section 14(1) of the 1959 Act provided a wide discretionary power to direct the holding of an inquest where the Attorney considered it advisable in the public interest. The coroner is required to comply with such a direction but it was accepted that a direction from the Attorney cannot enlarge the jurisdiction of the coroner under the 1959 Act. Sections 7 and 8 of the 1959 Act deal with the obligation of various people to give information to the coroner. Section 7 of the 1959 Act creates a duty to notify the coroner where there is reason to believe that a deceased person has died as a result of negligence, misconduct or malpractice on the part of others. Section 13 of the 1959 Act empowers the coroner to hold an inquest where a dead body is found or an unexpected or unexplained death in any of the circumstances mentioned in section 7 occurs. As a matter of the ordinary and natural meaning of words the Attorney argues that a child who dies in utero can be said to have died, is a deceased person and his body represents a dead body.

[7] Section 18 of the 1959 Act deals with the circumstances in which coroners are required to summon a jury. As originally enacted a jury was required where the deceased person came by his death by murder, manslaughter, child destruction or infanticide. This provision was repealed by the Criminal Justice (Northern Ireland) Order 1980 in order to narrow the class of inquests in which a coroner is required to sit with a jury.

[8] Child destruction is an offence contrary to section 25 of the Criminal Justice Act (Northern Ireland) 1945 and is committed by:

> "..any person who, with intent to destroy the life of a child then capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother."

The Attorney submitted that by requiring the empanelling of a jury in a case of child destruction section 18 of the 1959 Act clearly contemplated the conduct of an inquest into the demise of a foetus in utero capable of being born alive and such a foetus must, therefore, fall within the definition of "deceased person". In any event a foetus

which was the victim of child destruction was inevitably stillborn and section 18 was, therefore, incompatible with the Coroner's view that he had no jurisdiction to conduct an inquest into a stillbirth.

[9] The Attorney sought further support for his submission that the Coroner had power to conduct an inquest into a stillbirth in Rules 12 and 13 of the Coroners (Practice and Procedure)) Northern Ireland) 1963 (the 1963 Rules). Both Rules deal with the obligation on the coroner to adjourn an inquest where a police superintendent requests the coroner to do so on the ground that a person may be charged with the murder, manslaughter, child destruction or infanticide of the deceased or a person is so charged. The Attorney submitted that the inclusion of child destruction as one of the offences in the Rules was consistent with section 18 of the 1959 Act.

[10] It was also contended that support for this interpretation could be derived in particular from the provisions of Article 16 of the Births and Deaths Registration (Northern Ireland) Order 1976 ("the 1976 Order"). That provision requires a coroner who examines the body of a child and is satisfied that the body is that of a stillborn child to send a completed certificate to the registrar concerning the stillbirth. Article 16 (2) provides that if an inquest is held on the stillborn child the particulars on the certificate can be entered on the register. If no inquest is held an informant has to provide the relevant information. This provision contemplates an inquest taking place in respect of the stillborn child.

[11] The notice party submitted that the adjectival obligation to conduct an investigation in respect of the stillbirth arose by virtue of Article 2 ECHR. Vo v France (2005) 40 EHRR 12 was a case in which the ECHR considered a submission that an unborn child had Article 2 rights. In that case as a result of medical negligence the applicant mother had to undergo a termination of pregnancy when the foetus was between 20 and 24 weeks. The doctor who treated her was charged with causing unintentional injury but was acquitted on the ground that the foetus was not at that stage a human person. The Court indicated that in the context of abortion the case law indicated that an unborn child did not have a right to life and was not a person within the meaning of Article 2. In this situation the abortion had been necessitated by the negligence of a third party. The Court concluded that it was legally difficult, if not inappropriate due to the lack of a European consensus, to impose one exclusive answer to the question. It was within the margin of appreciation enjoyed by the contracting states to determine when the right to life begins.

[12] The notice party submitted that although the Court felt unable to conclude that the foetus in that case had a right to life it nonetheless recognised that its case law on abortion may have to be revisited in light of different circumstances. It followed, therefore, that the court did not exclude the possibility of Article 2 rights prior to separation from the mother. In this case it was agreed that the stillborn child

was capable of being born alive. The circumstances of this case therefore supported a broader view of Article 2 rights and since five members of the court in Vo concluded that the foetus in that case had Article 2 rights this court should follow that approach in this case.

[13] The notice party also contended that her Article 8 rights were engaged and relied upon Znamenskaya v Russia (ECHR 2 June 2005) to support that proposition. Although that case was concerned with the naming of the stillborn child the court noted:

> "the applicant must have developed a strong bond with the embryo whom she had almost brought to full-term and that she expressed the desire to give him a name and bury him, the establishment of his descent undoubtedly affected her private life, respect for which is also guaranteed by Article 8."

The notice party argued that she had a status as the mother of a stillborn child which was different from that of the mother of a living child. The failure to carry out an investigation into the circumstances of the stillbirth when an investigation would have been carried out in respect of a live birth fell within the ambit of Article 8 and was discriminatory contrary to Article 14 ECHR.

The respondent's case

[14] The Coroner expressed his sympathy with Ms Desmond's desire to have an enquiry into the circumstances surrounding the stillbirth and has always made clear that if there was jurisdiction to conduct an inquest this was an entirely appropriate case in which to do so. It was submitted on his behalf that section 13 (1) of the 1959 Act was crucial because it was the provision giving jurisdiction to the coroner to hold an inquest. It required either the finding of a dead body or an unexpected or unexplained death or a death in suspicious circumstances. That provision was closely related to section 11 (1) of the 1959 Act, which provided for the circumstances in which a coroner could take possession of the body of a deceased person.

[15] The starting point with any statutory interpretation was to look at the plain meaning of the words. It was submitted that it was not normal to refer to a viable foetus as a person. Such a child was not a person for the purposes of the common law. That plain meaning had been applied by coroners since the passing of the 1959 Act. It was also the meaning that had been applied to the same words in the corresponding English legislation.

[16] The provisions in the 1963 Rules dealing with the adjournment of inquests in cases of child destruction did not assist in the interpretation of the 1959 Act. These were Rules governing practice and procedure. They did not affect the substantive

law. The circumstances in which subordinate legislation could assist in the interpretation of substantive provisions were exceptional as discussed in Hanlon v The Law Society [1981] AC 124.

[17] The 1976 Order did not assist the appellants either. The registrar maintained three separate registers for births, deaths and stillbirths. A child who showed evidence of life immediately after birth and then expired was registered as both a birth and death. Stillborn children were not registered as dead. While it was accepted that Article 16 of the 1976 Order contemplated an inquest being held on a stillborn child such an inquest would be required in order to determine the preliminary issue in some cases as to whether the child showed evidence of life after separation. The form of certificate required from the coroner under the Registration (Births, Still Births and Deaths) Regulations (Northern Ireland) 1973 ("the 1973 Regulations") only included the requirement to indicate the cause of the stillbirth. By contrast that required in death cases essentially included the information necessary under an inquest verdict. The Coroner submitted, therefore, that the 1976 Order and the 1973 Regulations were consistent with his submission that any inquest was initially to determine whether the child showed evidence of life after separation and it was only if the child did so that the inquest could proceed further.

[18] The ECHR points added nothing. Vo made it clear that it was a matter for the domestic legislature as to whether or not Article 2 rights were engaged. The adjectival duty to investigate was ancillary to Article 2 and not Article 8. The notice party was unable to produce any authority for the proposition that Article 8 could give rise to a positive obligation to carry out any such investigation. The comparators that the notice party used for Article 14 were not in relevantly similar situations. In the case of a live birth Article 2 rights were engaged, in the case of the stillborn child they were not.

[19] In light of those submissions the Coroner submitted that the reference in section 18 (1) (a) to child destruction was incongruous. The plain meaning of the rest of the statute did not give jurisdiction for the holding of an inquest into a foetus in utero because such a foetus did not constitute a person. The only reason for departing from that plain meaning was the need to accommodate the pressing inference from section 18 that an inquest could be held into the demise of such a foetus which had been subject to child destruction. Mr Hanna submitted that if it had been intended to extend the jurisdiction of the Coroner to include a foetus in utero capable of being born alive that would have been made explicitly clear. To find the jurisdiction of the coroner extended by virtue of section 18 was so contrived that he submitted that the court should conclude that the inclusion of child destruction was an inadvertent mistake.

[20] If the court was not persuaded that it should treat the inclusion of the words as an inadvertent mistake he submitted that they should be given the narrowest possible meaning and that the jurisdiction of the coroner should only extend to a

foetus in utero capable of being born alive which was suspected of being subject to child destruction.

[21] The intervention on behalf of the Royal College of Midwives set out current practice in the certification of stillbirths. That was based on Guidance on Death, Stillbirth and Cremation Certification issued by the DHSSPS in 2008. At present a stillbirth certificate is issued in all births after 24 weeks gestation where there is no sign of life at the time of birth. If some or all stillbirths should be referred to the coroner further guidance would urgently be required to ensure that qualified midwives acted in accordance with law and the training regimes for those coming forward were altered.

Consideration

[22] The purpose of an inquest was described by Bingham MR in R v North Humberside Coroner, ex p Jamieson [1995] 1 QB 1.

> "An inquest is a fact-finding inquiry conducted by a coroner, with or without a jury, to establish reliable answers to four important but limited factual questions. The first of these relates to the identity of the deceased, the second to the place of his death, the third to the time of death. In most cases these questions are not hard to answer but in a minority of cases the answer may be problematical. The fourth question, and that to which evidence and inquiry are most often and most closely directed, relates to how the deceased came by his death."

Where Article 2 rights are engaged the investigation into the "how" question is more wide ranging and the procedural safeguards for the involvement of the relatives of the deceased are more intense.

[23] The involvement of the coroner is generally initiated by the reporting obligations in the 1959 Act. Section 7 imposes a notification obligation where an identified person:

> " …who has reason to believe that the deceased person died, either directly or indirectly, as a result of violence or misadventure or by unfair means, or as a result of negligence or misconduct or malpractice on the part of others, or from any cause other than natural illness or disease for which he had been seen and treated by a registered medical practitioner within twenty-eight days prior to his death, or in such

> circumstances as may require investigation (including death as the result of the administration of an anaesthetic)…"

Section 8 requires a senior police officer to notify the coroner whenever a dead body is found or an unexpected or unexplained death or a death attended by suspicious circumstances occurs.

[24] The coroner's jurisdiction is determined by section 13 (1).

> "13.- (1) Subject to sub-section (2) a coroner within whose district-
>
> (a) a dead body is found; or
>
> (b) an unexpected or unexplained death, or a death in suspicious circumstances or in any of the circumstances mentioned in section seven, occurs;
>
> may hold an inquest either with a jury or, except in cases in which a jury is required by sub-section (1) of section eighteen, without a jury."

[25] The jurisdiction under section 13 and the reporting obligations under section 7 and 8 of the 1959 Act proceed on the basis that there is a dead body, a death or a deceased person. The common law has addressed this issue in the context of murder, the leading authority being the House of Lords decision in Attorney General's Reference (No 3 of 1994) [1998] AC 245. The offender stabbed a woman in the abdomen knowing her to be pregnant. Sixteen days after the stabbing she went into labour and give birth to a grossly premature child who survived for 121 days. On the death of the child the offender was charged with murder. The trial judge directed an acquittal because the facts could not give rise to a conviction for either murder or manslaughter.

[26] Lord Mustill set out the established principles in relation to murder. These included the proposition that except under statute an embryo or foetus in utero cannot be the victim of a crime of violence. In particular violence to the foetus which causes death in utero is not murder as there is no independent person to constitute a victim. Violence towards a foetus which results in harm suffered after the baby has been born alive can, however, give rise to criminal responsibility even if the harm would not have been criminal if it had been suffered in utero.

[27] In the civil sphere the issue arose in Re MB (An Adult: Medical Treatment) [1997] FLR 426. Butler- Sloss LJ carried out an extensive review of the common law

authorities which indicate that a foetus cannot have a legal right of its own at least until it is born and has a separate existence from its mother. Accordingly the interests of the foetus would not have been a material consideration preventing the refusal of medical treatment by caesarean section for a mother who was otherwise competent to make the decision to refuse such treatment despite a risk to the successful birth of the child.

[28] We have already referred to the most recent decision of the ECHR on this issue in Vo v France (2005) 40 EHRR 12. As a result of the lack of consensus within the contracting states it is within the margin of appreciation of the states to determine when the right to life begins. It is, therefore, the domestic cases which determine the issue. We make it clear, however, that our acceptance of the determination of when legal rights begin does not indicate any view on the difficult and controversial moral issues around the right to life of the unborn child.

[29] On the basis of these authorities we conclude that the natural and plain meaning of the terms deceased person, dead body and death in sections 7, 8, 11 and 13 of the 1959 Act are references to a person separated from the mother and do not include a foetus in utero. That conclusion is supported by the interpretation placed on similar provisions in the Coroners Act 1988 in England and Wales.

[30] Domestic law does, however, protect the unborn child in other ways. Section 58 of the Offences against the Person Act 1861 makes it an offence to do any act with intent to procure a miscarriage but of more importance in this case is the offence of child destruction created by section 25 of the Criminal Justice Act Northern Ireland) 1945 (the 1945 Act), the relevant portions of which are set out at paragraph 8 above.

[31] There are three aspects of the section which are worthy of note. First the victim of the offence is described as a child then capable of being born alive. Secondly, the foetus in utero is described as a child with a life. Thirdly, the section contemplates that such a foetus can die in utero. That offence is of importance in this case because section 18 of the 1959 Act as originally enacted provides as follows: –

> "18(1) If it appears to the coroner, either before he proceeds to hold an inquest or in the course of an inquest began with a jury, that there is reason to suspect that-
>
> (a) the deceased person came by his death by murder, manslaughter, *child destruction*, or infanticide…
>
> he shall instruct [the relevant police officer] to summon a sufficient number of persons of full age and capacity to attend and be sworn as jurors upon

such inquest at the time and place specified by the coroner." (italics added)

There is no corresponding provision in the legislation in England and Wales.

[32] This provision was not drawn to the attention of Treacy J at first instance but it has assumed central importance in this appeal. Mr Hanna accepts that the plain meaning of the words contemplates the conduct of an inquest into a foetus in utero which was then capable of being born alive but which loses its chance of life as a result of the offence. His first submission is that the introduction of the words "child destruction" in section 18 was an inadvertent mistake. We do not accept that submission. If a word or phrase appears in a statute the ordinary principle of interpretation is that it was put there for a purpose and must not be disregarded (see Re James's Application [2005] NIQB 38). There are limited circumstances such as anomaly or illogicality where the principle can be avoided but this is not one of those cases. Where the legislature described the destruction of a foetus in utero then capable of being born alive as a child that died in the 1945 Act, it is not anomalous or illogical to describe such a foetus as a deceased person for the purposes of the 1959 Act.

[33] The second submission advanced by Mr Hanna was that the words should be given the narrowest possible construction so that it was only in cases of suspected child destruction that an inquest could be held. If that approach was taken it would mean that the term "deceased person" in section 18 (1) (a) of the 1959 Act would not depend upon the state of the foetus alone but would depend upon the suspected action of a third party. Such an outcome would be not be based on any principle but rather make the definition of "deceased person" dependent on something unrelated to the concept.

[34] We consider that the Attorney was correct in his submission that the effect of section 18 (1) (a) of the 1959 Act was to extend the definition of "deceased person" in the 1959 Act to include a foetus in utero then capable of being born alive. In Rance v Mid-Downs Health Authority [1991] 1 QB 587 it was held that the words "a child then capable of being born alive" in the 1945 Act meant capable of existing as a live child, breathing and living by reason of its breathing through its own lungs alone, without deriving any of its living, or power of living, by or through any connection with its mother. We are satisfied that the effect of section 18 of the 1959 Act as enacted is that the Coroner can carry out an inquest into a foetus in utero falling within that definition.

[35] In those circumstances it is unnecessary for us to explore the extent to which the 1963 Rules and the 1976 Order assist the appellants.

Conclusion

[36] For the reasons given the appeal is allowed. It has not been necessary for us to address the Convention points and we decline to do so since consideration of these points may in due course be informed by further decisions of the European Court of Human Rights.

[37] We consider that there is great force in the submission by the Royal College of Midwives that the Guidance on Stillbirths issued by the DHSSPS should be reviewed and reformulated as a matter of urgency. If there is likely to be any delay in the final formulation of revised guidance practitioners would doubtless benefit from interim guidance.