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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Gribben's (Sally) Application [2014] NICA 42

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY SALLY GRIBBEN AND IN THE MATTER OF DECISIONS MADE BY THE CORONER FOR BELFAST IN THE INQUEST TOUCHING ON THE DEATHS OF MARTIN McCAUGHEY AND DESMOND GREW

Before: Morgan LCJ, Coghlin LJ and Deeny J

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against the decision of Weatherup J in relation to the appellant's application for leave to apply for judicial review of decisions made by the Coroner and jury in the inquest into the fatal shooting of Martin McCaughey and Desmond Grew in October 1990 by British Army soldiers. Ms Quinlivan QC and Ms Campbell appeared for the appellant, Mr Simpson QC and Mr Doran for the Coroner, Mr Perry QC and Ms Cumberland for the Ministry of Defence and Mr McGleenan QC for the PSNI. We are grateful to all counsel for their helpful written and oral submissions.

[2] The appellant seeks leave to apply for judicial review on the following grounds:

(i) the Coroner failed to disclose to the next of kin relevant, or potentially relevant, material relating to the involvement of military witnesses in other lethal force incidents in Northern Ireland;

(ii) the Coroner refused to permit the next of kin to cross-examine military witnesses as to their involvement in other lethal force incidents in Northern Ireland;

(iii) the Coroner redacted statements of military witnesses so as to remove all references of their involvement in other lethal force incidents in Northern Ireland;

(iv) the questions posed by the coroner to the jury failed to ensure an Article 2 ECHR compliant inquest;

(v) the Coroner misdirected the jury in relation to whether the use of lethal force was justified;

(vi) the Coroner failed to direct the jury to consider the "absolute necessity" of the force used by the soldiers;

(vii) the Coroner misdirected the jury when responding to a question posed by the jury as to the impact on their determination of excessive force of a soldier shooting into a corpse;

(viii) the Coroner failed to discharge a juror who was showing inattention and demonstrated apparent bias;

(ix) the Coroner failed to correct errors made by the parties during closing submissions and failed to present the evidence to the jury in a complete and accurate manner in his own closing speech to the jury;

(x) the inquest was conducted in a manner unfair to the next of kin;

(xi) the anonymity of the jury and requirement for a unanimous verdict was not compliant with Article 2 ECHR; and

(xii) the jury's conclusion as to Grew's position when he was shot was perverse given the pathology evidence.

Whilst refusing leave on the above grounds, Weatherup J did grant leave on the single ground that the Coroner failed to secure Soldier A's return to permit the next of kin to cross-examine him following disclosure to them of his involvement in another lethal force incident.

Background

[3] On the night of 8 October 1990, as part of an on-going surveillance operation by the RUC, soldiers from the specialist SAS unit of the British army were

conducting a surveillance operation on a mushroom shed containing a stolen car at a farm complex at 91 Lislasley Road, Moy. Shortly after midnight two men, Martin McCaughey and Desmond Grew, appeared outside the mushroom shed. Both were armed with AK47 rifles and wearing gloves and balaclavas. A confrontation between the British soldiers and McCaughey and Grew ensued and resulted in McCaughey and Grew being shot dead by the soldiers. The IRA subsequently stated publically that McCaughey and Grew were IRA volunteers on active service at the time of their deaths.

[4] There were a total of nine soldiers involved in the operation. Soldiers A, B, C and D were located in the field observing the mushroom shed and all four fired shots at the two deceased. Soldiers E and F were positioned observing a laneway leading to the mushroom shed and did not fire any shots. Soldiers G and I were providing mobile support. They did not arrive at the scene until after the shooting and did not fire any shots. Soldier H was the officer in charge of the surveillance operation, was located in the headquarters of the RUC Tasking and Coordination Group ("TCG") and was in radio contact with Soldier A.

[5] The RUC conducted an investigation into the shooting at the time. They interviewed the soldiers involved. Soldier A confirmed he fired 20 rounds, Soldier B 17 rounds, Soldier C 19 rounds and Soldier D 16 rounds. Soldier D also confirmed that the last two of his shots were fired into one of the deceased on the ground. On 2 April 1992 the Director of Public Prosecutions issued a direction of no prosecution in respect of the soldiers.

[6] The soldiers contended that while carrying out surveillance on the mushroom shed, armed men approached their position and, perceiving them to be a risk to their lives, the soldiers opened fire. The next of kin, however, contended that the supposed surveillance operation was in actual fact an ambush, as evidenced by how the soldiers had positioned themselves and their response to the changing circumstances. It was not contended that there was any evidence that the RUC prompted or instructed the ambush.

[7] In 1994 the RUC provided a limited number of the investigation papers to the Coroner. Many years of disputes and legal challenges relating to the disclosure of documents by the police to the Coroner, disclosure of those documents by the Coroner to the deceased's next of kin and the scope of the inquest followed. This culminated in the Supreme Court ruling on 18 May 2011 that the inquest was subject to the State's procedural obligations under Article 2 ECHR and, therefore, the inquest had to consider in what circumstances the deceased came by their deaths.

The issues in the appeal

[8] This is an application for the grant of leave to issue judicial review proceedings. The general test is that the court will refuse permission for judicial

review unless satisfied that there is an arguable ground for judicial review on which there is a realistic prospect of success (see Omagh District Council v Minister for Health, Social Services and Public Safety [2004] NICA 10). The extent to which the court will be able to form a clear view on the merits of the application will vary according to the issues and the material available at the leave stage. There is a useful discussion about this at paragraph 3.25 of Professor Anthony's Judicial Review In Northern Ireland (Second Edition). Where the parties confirm that all of the relevant material is before the court it may be appropriate to hear substantial argument on the leave test or alternatively proceed directly by way of a rolled up hearing. Leave to apply for judicial review can also be granted in highly exceptional circumstances where the issue raised is one of considerable public importance where public concern has been aroused (see JR1's Application [2008] NIQB 125). This is not such a case.

[9] In this case there was very extensive material before us in relation to the conduct of the inquest which reflected particularly upon grounds (iv) to (x) and ground (xii). There was, therefore, substantial argument on those grounds both at the lower court and before us. The first three grounds concerned alleged failures of disclosure in respect of the involvement of soldiers in previous incidents where lethal force was used and the prohibition of any cross examination in respect of such matters.

[10] Weatherup J considered the approach that the Coroner should take in cases of this type at paragraph 13 of his judgment. We agree that it is for the Coroner to decide in each case whether other incidents are potentially relevant to the issues to be determined in the inquest. We also agree that where the next of kin are making the case that the death was the result of a shoot to kill policy by the security forces it is highly likely that any information concerning any other similar incident in which any soldier was involved and the soldier's role in the subject incident and the other such incident will invariably be likely to be potentially relevant and should be made available to the next of kin so that they can make representations on whether the material is relevant to the issues arising in the inquest.

[11] Weatherup J concluded that there should have been disclosure of the identifying information to the next of kin but he refused leave on two grounds. The first was that disclosure should have been dealt with sooner than on the eve of the inquest and the second was that he was satisfied that the Coroner was keeping the issue under review as he carried out the inquest and depending upon the evidence he would consider whether there was a need to reopen any of the decisions on the potential relevance of the other incidents.

[12] The appellant takes issue with the first reason given by Weatherup J for the refusal of leave. Subsequent to the decision of the Supreme Court the appellant's solicitor wrote to the Coroner on 4 October 2011 expressing his concern about the inadequacy of the disclosure served to date. The second page of that letter indicated

the appellant's allegation that this was a shoot to kill incident and sought disclosure in particular of details of the involvement of each of the soldiers concerned with this operation in previous or subsequent lethal force incidents. The appellant also sought details about the training of SAS soldiers as it related to the use of lethal force.

[13] At a preliminary hearing held on 17 October 2011 brief oral representations were made by the appellant about the involvement of military personnel in other lethal force incidents. In an affidavit sworn on behalf of the Ministry of Defence ("MOD") Mr Duke-Evans stated that the Coroner asked at this hearing that the soldiers be re-interviewed to establish any involvement they may have had another incidents in which lethal force was used. There was no discussion about the entitlement of the families to see the statements and the position of the MOD was that the material was not relevant although that was not communicated to the Coroner or any of the parties at that time.

[14] The appellant's solicitor received statements from Soldiers A, C, D, E, G and I on 13 February 2012. The inquest was due to start early in March and did in fact start on 12 March 2012. In a letter of 16 February 2012 the appellant's solicitor complained about the absence of full disclosure and made specific submissions in relation to various aspects of the statements provided. In a letter of 20 February 2012 the Coroner wrote to the Crown Solicitor's Office requiring the incidents referred to by the soldiers to be identified to him with particulars so that he could consider whether they were relevant to the inquest.

[15] A preliminary hearing of this issue was fixed for 29 February 2012. In submissions dated 28 February 2012 counsel on behalf of the appellant indicated that one of the issues to be explored before the jury was whether this was a shoot to kill incident, including the question of whether it was a pre-planned ambush and whether the soldiers were instructed in such a way as to reduce recourse to arrests and increase the likelihood of recourse to lethal force. A responding skeleton from the MOD dated 29 February 2012 submitted that the other incidents were irrelevant to the issues to be determined at the inquest. In the course of that submission the MOD noted that the case being made by the appellants was that the deaths occurred as part of a shoot to kill policy and/or that the soldiers' actions were deliberate or unjustified. A further written submission dated 5 March 2012 was lodged by the appellant at the Coroner's direction indicating how on the material available the other incidents were relevant to the issues in the inquest.

[16] The Coroner gave his ruling on 8 March 2012. He indicated that he had considered in respect of each incident whether it was relevant or potentially relevant to the issues to be addressed at the hearing. He determined that there was only one incident involving Soldier A that was potentially relevant. He said that he would hear further submissions on whether evidence relating to that incident was in fact relevant and if so whether the material should properly be introduced at the hearing. He recognised that he had a responsibility to keep all decisions on relevance under

review in the course of the hearing. It was that recognition that Weatherup J accepted as a safeguard.

[17] In the course of the hearing before us senior counsel on behalf of the Coroner indicated that there was nothing in the papers to show that the Coroner examined the issue of whether the scope of the inquest should be extended to include shoot to kill. Although everyone recognised subsequent to the decision of the Supreme Court that an Article 2 compliant inquest had to take place it does not appear that there was a specific ruling about the content of such an inquest. What is clear is that the appellants had pursued, from at least October 2011, the issue of shoot to kill as an issue in this inquest. That was recognised in the responding skeleton of the MOD when they lodged their submissions on 29 February 2012.

[18] In light of the submissions made on behalf of the Coroner in the appeal before us it appears that the Coroner may have proceeded on the basis that shoot to kill was not in issue in this inquest. That was not the position as understood by Weatherup J and, if correct, would completely undermine the efficacy of the safeguard of continuing review of disclosure by the Coroner. In those circumstances we consider that there is an arguable case with a reasonable prospect of success in relation to the matters set out at (i) – (iii) in paragraph 1 above and we grant leave on those issues. It is, therefore, unnecessary for us to express any view on the extent to which the delay in disclosure would have justified the Coroner in proceeding with the inquest.

[19] We intend no disrespect to the careful and persuasive submissions expertly presented by Ms Quinlivan on behalf of the appellants but we do not consider that the points raised at (iv) – (x) and (xii) give rise to any arguable case with a reasonable prospect of success for the reasons given by Weatherup J. We do not consider that there is anything to be gained from repeating the arguments advanced before him and his conclusions.

[20] The last point which the appellants have raised in this court but did not argue before the learned trial judge is the issue of whether the anonymity of the jury and the requirement to be unanimous meant that the process was not compliant with Article 2. In Hugh Jordan's Applications [2014] NIQB 11 Stephens J held that the inquest in that case ought not to have been held with a jury because there was a real risk of a perverse verdict. That case is now subject to appeal and will be heard in October 2014. The parties recognised that the appeal will give guidance on the approach to that issue. We consider, therefore, that we should not grant leave in relation to that issue but note that the appellant may wish to raise it with the judicial review judge once the judgment of the Court of Appeal is available.

Conclusion

[21] We grant leave on points (i) – (iii) in addition to the leave granted by Weatherup J and refuse leave on the other points for the reasons given by him.