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Judgment: approved by the Court for handing down | *Delivered:* **07/05/2014**
*(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)

Jordan's (Hugh) Applications [2014] NICA 36

IN THE MATTER OF THREE APPLICATIONS BY HUGH JORDAN FOR JUDICIAL REVIEW

JORDAN'S APPLICATIONS 13/002996/1; 13/002223/1; 13/037869/1

PRELIMINARY ISSUE

Before: Morgan LCJ, Girvan LJ and Gillen J

MORGAN LCJ (delivering the judgment of the court)

[1] The inquest into the death of Patrick Pearse Jordan concluded on 26 October 2012. The jury was unable to reach a unanimous verdict on a number of the issues in contention. The deceased's father ("the applicant") lodged four separate judicial review applications arising out of decisions made by the Coroner or the PSNI either before or during the inquest. Following a conjoined hearing on 31 January 2014 Stephens J granted three of the applications for judicial review and quashed the inquest verdict. Both the Coroner and the PSNI have lodged appeals against those decisions and the applicant has lodged a cross appeal. The applicant submitted, as a preliminary point, that it was not appropriate for the Coroner to participate as an adversarial party in the judicial review proceedings and that he should not, in any event, be permitted to bring an appeal. Mr MacDonald QC and Ms Quinlivan QC appeared for the applicant, Mr Simpson QC and Mr Doran appeared for the Coroner and Dr McGleenan QC appeared for the PSNI. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] On 25 November 1992 Patrick Pearse Jordan was shot and killed on the Falls Road, Belfast, by an officer in the Royal Ulster Constabulary ("the RUC"). Following many legal challenges an inquest into the death commenced on 24 September 2012 before the Coroner, HHJ Sherrard, sitting with a jury and concluded on 26 October 2012. The learned Coroner posed a number of questions to the jury to be answered in their verdict. The jury could not agree on unanimous findings in relation to several of these questions.

[3] Prior to the commencement of the inquest, the applicant made an application for judicial review of a decision by the learned Coroner that the Stalker-Sampson Report was not relevant to the inquest and, therefore, need not be disclosed to the deceased's family. By a judgment dated 26 September 2012 Deeny J refused leave to apply for judicial review. Following the conclusion of the inquest the applicant lodged a further three applications for judicial review. Stephens J heard these three applications together and granted judicial review on the following grounds:

(i) The learned Coroner erred by not disclosing the Stalker-Sampson reports; by not disclosing underlying material from a Police Ombudsman's investigation into the death of Neil McConville in 2003; by deciding to sit with a jury; by not discharging a particular juror; and by accepting the verdict of the jury.

(ii) The PSNI erred in refusing to disclose to the applicant two statements made by Officer AA to the Police Ombudsman for Northern Ireland relating to her investigation into the death of Neil McConville; and

(iii) The PSNI breached the applicant's Article 2 ECHR procedural rights by causing unreasonable delay in the hearing of the inquest.

In light of these findings Stephens J quashed the verdict of the inquest jury.

[4] The applicant has appealed the ruling of Deeny J refusing leave to apply for judicial review. That appeal has been held in abeyance awaiting the outcome of the inquest and the subsequent judicial review applications. On 7 March 2014 the Coroner lodged a notice of appeal from the decision of Stephens J on the following grounds:

> "1. That the Learned Trial Judge was wrong to conclude that the decision of the Coroner not to order disclosure to the Next of Kin of the Stalker/Sampson reports was inconsistent with an Article 2 compliant

inquest and was wrong, as a result of that conclusion, to quash the verdict;

2. That the Learned Trial Judge was wrong to quash the decision not to permit deployment of parts of the Stalker/Sampson reports and to go on to quash the verdict on the basis that the evidence might have been admissible and that its potential impact could have been significant;

3. That the Learned Trial Judge was wrong to conclude that the decision of the Coroner not to order disclosure of two statements of Officer AA to the Police Ombudsman for Northern Ireland relating to her investigation into the death of Neil McConville in April 2003 was irrational;

4. That the Learned Trial Judge was wrong to conclude that the decision of the Coroner not to permit deployment of the aforesaid statements and the Ombudsman's report was Wednesbury irrational and was wrong to quash the verdict for the reasons set out;

5. That the Learned Trial Judge was wrong to conclude that in the so-called legacy inquests which are controversial and involve security and terrorist issues there is inevitably a real risk of a perverse verdict from a jury;

6. That the Learned Trial Judge was wrong to grant a declaration that the inquest should not have been conducted with a jury and to quash the verdict on this ground;

7. That the Learned Trial Judge was wrong to conclude

a. that the correct construction of the note from Juror J was that the juror was complaining about the cross-examination by counsel for the Next of Kin of a police witness and that the view of the juror was that the entire inquest was unfair to members of the security services and that the juror was not prepared to keep an open

mind when listening to the evidence and the directions and admonitions of the Coroner;

b. that the fair minded and informed observer would conclude that there was a real possibility of bias;

c. that the Coroner ought to have discharged Juror J; and

d. that the verdict of the jury should be quashed on this basis;

8. That the Learned Trial Judge was wrong to conclude

a. that the Coroner's decision to accept the verdict was irrational and to quash the verdict of the jury on that basis;

b. that the Coroner's decision to accept the verdict, in the light of his original decision to sit with a jury, was irrational;

c. that the Coroner's decision to accept the verdict, in the light of his decision not to discharge Juror J, was irrational and to quash the verdict on the basis of the matters at 8 (b) and (c) above;

9. That the Learned Trial Judge was wrong to quash the verdict of the jury in any event, whether on a cumulative or individual basis. "

The PSNI subsequently lodged a notice of appeal on 13 March 2014. It is common case that the PSNI's notice of appeal broadly covers the issues contained in grounds 1, 2, 3, 4 and 9 of the Coroner's notice of appeal as well as other matters.

The applicant's submissions

[5] The applicant principally relied upon the decision of the Court of Appeal in Re Darley's Application [1997] NI 384. That was a case in which the claimant issued judicial review proceedings in respect of the striking out of his claim by an industrial tribunal. The employer did not appear in the judicial review and the defence of the claim was undertaken by those representing the industrial tribunal. The claimant succeeded at first instance and the industrial tribunal appealed. The issue concerned

the jurisdiction of the tribunal to review its own order. Carswell LCJ made the following observations on the role that the industrial tribunal should play where its decision was the subject of judicial review proceedings.

> "In our opinion the proper party to contest an appeal from a decision of an industrial tribunal or an application for judicial review is normally the opposing party in the proceedings before the tribunal whose decision is challenged. There may be circumstances when it is appropriate for a tribunal to be separately represented, for example if there were an allegation of personal misconduct on the part of the members of the tribunal, but such cases will be very rare. In the ordinary way we consider that the opposing party is the correct person to undertake the task of upholding the tribunal's decision and putting forward any necessary defence of its procedures. If in any case the opposing party does not appear to contest the appeal, it will be for the appellate court to determine whether it wishes to ask for other representation in some form so that the contrary case can be properly argued."

[6] The applicant recognised that proceedings before the Coroner were inquisitorial rather than adversarial and that there was often no opposing party. It was submitted, however, that in this case the reality was that the police and the next of kin were opposing parties and that the examination of witnesses at the inquest and speeches to the Coroner's jury reflected that reality. In those circumstances it was for the PSNI rather than the Coroner to determine whether to pursue an appeal.

[7] Mr MacDonald submitted that the principle underlying Darley was that the court should not descend into the arena and enter the fray on the side of one party against the other. He relied upon the decision of the Supreme Court in Re Reilly and others [2013] 3 WLR 1020 where in a case concerning the right to an oral hearing before the Parole Commissioners Lord Reed, giving the lead judgment, said that it was fundamental to procedural fairness that the Commissioners must be, and appear to be, independent and impartial. In these coronial proceedings the Coroner had been the arbiter and may again perform that function depending on the outcome of the case. Mr MacDonald accepted, however, that the principle upon which he relied could not be applied strictly. Where there was an issue of importance to the coronial jurisdiction and no opposing party was available to pursue the point the Coroner would usually be the appropriate party to contest the claim and if necessary pursue any appeal.

[8] Although this objection to the participation by the Coroner in adversarial judicial review proceedings was taken before Deeny J in the earlier judicial review the point had not been argued before Stephens J in the subsequent judicial review proceedings. The Coroner was made a respondent in those proceedings and had fully participated as an adversarial party without objection. An order for costs was made against him. If he was prevented from appealing he would be fixed with that order, although Mr MacDonald submitted that some undefined accommodation might have to be made in relation to that.

[9] The final point made by the applicant was that the decision to appeal was taken by HHJ Sherrard alone without consultation with the other coroners. It was submitted that this gave rise to an impression that the party appealing had no interest other than a personal interest in vindicating his own rulings. At one stage in the proceedings it was suggested that the Coroner had effectively ceased to sit as a coroner subsequent to his appointment as a County Court Judge but it was accepted that he continued to act as a coroner and had sat as a coroner as recently as 28 March 2014.

The respondent's submissions

[10] The Coroner submitted that he was not seeking to defend one party's interests against another. Darley was concerned with the adversarial context of an industrial tribunal but had no application to the inquisitorial nature of the inquest. There were numerous cases in England and Wales where a Coroner had appealed an adverse decision from the Divisional Court to the Court of Appeal. In some of these, such as ex parte Worch [1988] 1 QB 513 and R (Touche) v Inner London Coroner [2001] QB 1206, there was no opposing party and the Coroner was seeking to establish an issue of principle.

[11] R(Sacker) v West Yorkshire Coroner [2004] 1 WLR 796 was a case arising from the death of the deceased by hanging in prison. At the inquest the deceased's mother asked the coroner to give the jury an opportunity to add that the deceased's death had been contributed to by neglect. He refused. The mother challenged the decision by way of judicial review and lost. She appealed to the Court of Appeal who decided that the riders should have been left to the jury and ordered a fresh inquest. The coroner appealed to the House of Lords with the leave of the Court of Appeal. Lord Carswell who had given the decision in Darley was part of the panel but there was no criticism of the coroner's decision to pursue the appeal which he eventually lost.

[12] The respondent also submitted that R v Coroner for Lincoln ex parte Hay [2000] Lloyds Rep Med 264 demonstrated the range of options open to a coroner where adversarial legal proceedings had been commenced. The coroner might choose not to be participate at all, might file an affidavit setting out the decisions made and the reasons for them, might choose to appear in order to assist the court or might contest the making of an adverse order in an *inter partes* adversarial mode.

Where the coroner adopted the latter approach he would be at risk of an order for costs against him. That analysis was also supported by the remarks of Simon Brown LJ in Touche.

[13] In this case the Coroner has played an active part in the proceedings below in seeking to uphold his rulings. He has suffered the adverse effect of an order for costs against him which he would seek to reverse on appeal. Mr Simpson indicated that he was content to allow the PSNI to deal with the issues in respect of grounds 1, 2, 3, 4 and 9 of his notice of appeal subject to his entitlement to raise any matter which he felt ought to be drawn to the attention of the court. Dr McGleenan was content to take the lead in respect of those matters and also to examine the extent to which he could take the lead in relation to the cross-appeal.

Consideration

[14] Coroners are independent judicial office holders. Whether sitting alone or with a jury they must act impartially and their conduct of an inquest must not be affected by bias. The test for apparent bias was considered by the House of Lords in Porter v Magill [2002] 2 AC 359. Lord Hope's formulation was whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Inquest proceedings are inquisitorial rather than adversarial but there is generally no issue of apparent bias in the conduct of either kind of proceedings.

[15] The Divisional Court has a supervisory role in respect of inquest proceedings as it does in respect of many other courts and tribunals. The supervision is effected by way of the judicial review jurisdiction in which proceedings are generally adversarial. In many inquest cases the family of the deceased is the applicant and the coroner is the respondent. The danger is that participation by the coroner in such adversarial proceedings may give rise to a perception on the part of the family that the coroner is predisposed against their interest.

[16] It is apparent from the extensive litigation concerning the conduct of inquest proceedings that difficult and complex issues arise in such proceedings with some regularity. The coroner will often welcome the direction of the supervisory court on the law and procedure that he should follow. It is not difficult to conceive of a case stated procedure whereby the coroner could pose questions for the opinion of the Court of Appeal or Divisional Court as appropriate. By that mechanism the coroner could proactively determine the issues on which he sought guidance and his involvement need not be adversarial.

[17] However in the absence of such a mechanism the coroner, as in this case, generally becomes a party to an adversarial process. We agree with the Divisional Court in R v HM Coroner for Lincoln ex parte Hay [2000] Lloyds Rep Med 264 that the coroner should, where possible, assist the court by deposing to what took place

before him, setting out the reasons for his decisions, and if appropriate appearing in court to assist in an *amicus* role. The opposing parties should then conduct the adversarial argument. No perception of bias could arise in those circumstances.

[18] On occasions there may be no opposing parties concerned with coronial decisions. In those circumstances, if the supervisory jurisdiction of the Divisional Court is invoked, it may be that the coroner is the only realistic opposing party. There are also circumstances where an applicant raises in judicial review proceedings an issue of general importance to coroners concerning the substantive or procedural law governing the conduct of inquests. In such cases a coroner may feel it appropriate to support a particular view and thereby enter into the adversarial argument. The danger is that depending upon the circumstances a justified perception of bias may arise.

[19] The court's role in the management of the supervision of inquest proceedings is to enable the coroner to provide assistance as appropriate and avoid adversarial involvement in most cases. The applicant argued that the role of the court goes further and that the court should prohibit the coroner from becoming involved as an adversarial party other than in circumstances where the court considers that there is some important aspect of coronial law to be decided or there is no opposing party.

[20] We do not accept that submission. While recognising that the occasions on which the coroner will choose to become involved as an adversarial party will be limited as a result of the considerations set out above, we consider that the decision as to whether to participate and the manner of doing so must be for the coroner to decide. This court should not limit the coroner's access to the court. In this case Mr MacDonald was inclined to accept that the issues raised at paragraphs 5, 6 and 8 of the Coroner's notice of appeal were matters of general importance in inquest proceedings which would not otherwise be pursued. We consider that concession properly made. Where there is a perception of bias as a result of the participation of the coroner or it is otherwise in the interests of justice, the court can direct that the proceedings should be conducted by another coroner. That is the appropriate method of securing the independence and impartiality of the coroner hearing the inquest.

[21] We do not consider that any of this is inconsistent with Darley. That was a case in which the court was giving guidance to inferior courts about the manner in which they should generally participate in judicial review proceedings. The respondent was the industrial tribunal. Proceedings before the tribunal are invariably adversarial so there is normally an opposing party. The circumstances in which the tribunal would wish to actively participate in the judicial review proceedings are, therefore, even rarer than those in which the coroner may feel it necessary to intervene. Having given advice indicating that tribunals should normally not intervene in support of any party the court did not strike out the appeal but went on to deal with the merits. That supports the view that it is for the

tribunal to determine how it should participate taking into account the advice. Where the tribunal does intervene it leaves itself open to orders for costs and the possibility of a hearing before a different tribunal being directed by the court. We agree with all of that.

[22] The respondent in these proceedings was the coroner who heard the inquest. It was his responsibility to decide whether to appeal the judicial review decision and if so on which grounds. It would be quite inappropriate for that decision to be made by the Coroner's Service since in certain circumstances that might debar all of the coroners from hearing any further proceedings in respect of this death. In our view the same position would apply to an appeal by any inferior court or tribunal.

Conclusion

[23] For the reasons given we dismiss the application that the coroner's appeal be struck out or that he be prevented from participating in the proceedings as he deems appropriate. The coroner has, however, indicated his willingness to have the issues in grounds 1, 2, 3, 4 and 9 of the notice of appeal dealt with by the PSNI and the PSNI has also undertaken to deal with so much of the cross appeal as it can. We consider that is an arrangement that we should seek to facilitate. If there is any difficulty about that the parties can seek the direction of this court.