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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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McDonnell's (Elizabeth) Application [2014] NIQB 66

IN THE MATTER OF AN APPLICATION BY ELIZABETH McDONNELL FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS OF THE SENIOR CORONER CONCERNING THE INQUEST TOUCHING ON THE DEATH OF JAMES McDONNELL

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TREACY J

Introduction

[1] By this application the applicant challenges decisions taken by the Senior Coroner in connection with the anonymity and screening of certain prison service witnesses at the inquest touching the death of James McDonnell. There are two decisions involved. The first is the decision to grant anonymity and screening to all prison service witnesses who applied for those measures. This decision was made finally on 17 April 2013. The second is the decision taken after the inquest that the Coroner is *functus officio* for the purposes of reviewing whether or not the anonymity decision should remain in place. That decision was communicated by letter dated 15 August 2013.

Background

[2] The background to the death of James McDonnell is outlined in detail in the open affidavit of Padraig O'Muirigh. In summary, Mr O'Donnell died in prison on 30 March 1996 after suffering a heart attack. He had, a short time earlier, been subject to a control and restraint procedure by Prison Officers. At post mortem he

was found to have suffered injuries to his neck and lumbar regions inconsistent with authorised control and restraint procedures and consistent with an assault.

[3] An inquest into his death was held by the senior Coroner sitting with a jury between 17 April 2013 and 16 May 2013. The jury delivered a verdict which included findings that the control and restraint procedure had not been carried out correctly or only insofar as necessary. The jury also found that it is probable that during the initial restraint Mr McDonnell was grabbed by the neck and sustained the injuries found at post mortem.

[4] In relation to the cause of death, the jury found that neck compression and the initial restraint contributed to Mr McDonnell suffering a fatal heart attack. The jury also found the prison service had not explained the injuries found at post mortem and that excessive force had been used.

[5] The Coroner has referred the case to the DPP as he is required to do pursuant to section 35(3) of the Justice (NI) Act 2002 which states:

> "Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must as soon as practicable send to the Director a written report of the circumstances."

Order 53 Statement

[6] The applicant sought the following relief:

> "(a) An order of certiorari to bring up into this Honourable Court and quash the decision of the Coroner made on 17 April 2013 whereby he adjudicated that virtually all applying Prison Officers giving evidence at the inquest touching the death of James McDonnell should be granted anonymity.
>
> (b) An order of certiorari to bring up into this Honourable Court and quash the decision of the Coroner made on 17 April 2013 whereby he adjudicated that Officer H, who gave evidence at the inquest touching the death of James McDonnell, should be granted anonymity.
>
> (c) An order of certiorari to bring up into this Honourable Court and quash the decision of the Coroner communicated to the applicant by letter dated 15 August

2013 whereby he concluded that he was *functus officio* for the purposes of reviewing whether or not anonymity should remain in place.

(d) A declaration that the decisions, both individually and cumulatively, to grant anonymity and screening to virtually every member of the Prison Service who gave evidence at the inquest, meant that the inquest was not compliant with Article 2.

(e) A declaration that the said decisions are unlawful, *ultra vires* and of no force or effect.
..."

[7] The grounds on which the above relief was sought included:

(a) In circumstances where the Coroner had concluded that the risk assessments were inadequate and afforded him incomplete information, the Coroner erred in concluding that giving evidence without the benefit of anonymity engaged the Officers' Article 2 rights and consequently the Coroner ought not to have acceded to their applications for anonymity.

(b) The Coroner erred in concluding that Officer H's Article 2 rights were engaged by the requirement to give evidence without anonymity for the following reasons:

(i) Officer H's name had appeared in the papers disclosed to the applicant and in witness-lists produced in open Court by the Coroner over a period of years.

(ii) Officer H did not apply for anonymity until very shortly prior to the commencement of the inquest, and no or no adequate explanation for his change of stance was provided to the Coroner.

(iii) The conclusion that requiring Officer H to give evidence without the benefit of anonymity met the Article 2 threshold, is unsustainable, in circumstances where:

- Officer H had a high public and media profile as a Prison Officer, and his name and photograph are readily and publicly accessible.

- Even during the currency of the inquest, the media were publishing articles about Officer H, using his name and identifying him as a Prison Officer.

- There was no suggestion that the extensive media coverage about his conduct in his role as a Prison Officer, which coverage, included photographs, television interviews, as well as critical newspaper articles, had in anyway increased the risk to his life.

- Officer H had never in the context of the publicity surrounding him, much of which was adverse, sought the protection of the Courts in preserving his anonymity and protecting his Article 2 rights.

- His employers had never, in the context of the publicity surrounding him, sought to grant him anonymity in order to protect his Article 2 rights.

(c) The Coroner further erred in granting anonymity to all those Prison Officers who applied, (17 April decision) for the following reasons:

(i) Even if the Prison Officers' Article 2 rights were engaged, which is not accepted, the Coroner thereafter failed to consider whether the grant of anonymity would be a proportionate response or strike the appropriate balance.

(ii) As a result the Coroner failed to give any or adequate weight to the following relevant matters:

- The applicant's Article 2 rights.

- The impact on public scrutiny of the proceedings.

- The impact on the next-of-kin's ability to participate in the proceedings and make legitimate out of court enquiries about the witnesses.

- The effect of anonymity on the witness, including his insulation from scrutiny and the resultant increase in the likelihood that he would give untruthful evidence.

(iii) The Coroner further failed to have regard to the fact that he granted anonymity to every single Prison Officer who applied, thus, with one exception, every witness whose conduct was to be the subject of scrutiny. This was unfair on the applicant and amounted to a violation of the applicant's Article 2 rights for the reasons set out at (ii) above, and because

- It was such a wholesale and fundamental departure from open justice as to compromise the public nature of the inquest, and to fundamentally undermine public confidence in the ability of inquests to secure accountability from state agents.

(d) The Coroner granted anonymity on the basis of incomplete information in that he failed to make adequate inquiry into the content of the risk assessments grounding the applications, in circumstances where he had expressed concern about the inadequacy of the risk assessments.

(e) Giving evidence without the benefit of screening did not engage the officers' Article 2 rights and consequently the Coroner ought not to have acceded to their applications for screening.

(f) There was no evidential basis upon which the Coroner could have concluded that giving evidence with anonymity but without screening engaged the officers Article 2 rights.

(g) In circumstances where giving evidence without screening did not engage the officers' Article 2 rights the Coroner's decision to accede to the officers' applications for screening was unfair on the applicant and breached his Article 2 rights because:

- It compromised the public's ability to follow the inquest proceedings, denied as they were the ability to see witnesses give evidence.

- It was a further encroachment of open justice compromising the public nature of the inquest and

undermining public confidence in the ability of inquests to secure accountability from state agents.

(h) The Coroner ought not to have acceded to any application for screening on common law grounds, for the reasons set out at (g) above, and because in relation to those cases where screening was granted on common law grounds, the grounds relied upon were insufficient to justify departure from open justice on the facts of this case.

(i) Even if the Prison Officers' Article 2 rights were engaged, which is not accepted, the Coroner thereafter failed to consider whether the grant of anonymity would be a proportionate response or strike the appropriate balance and failed to have regard to the following relevant matters:

- The applicant's Article 2 rights.

- The fact that screening compromised the public's ability to follow the inquest proceedings, denied as they were the ability to see witnesses give evidence.

- The fact that screening amounted to a further encroachment of open justice compromising the public nature of the inquest and undermining public confidence in the ability of inquests to secure accountability from state agents.

- The effect of screening on the witness, including his insulation from scrutiny and the resultant increase in the likelihood that he would give untruthful evidence.

(j) Further even if the officers' Article 2 rights were engaged, the decision to grant screening to every witness (who applied) and whose conduct was to be the subject of scrutiny, amounted to a violation of the applicant's Article 2 procedural rights for the reasons set out at (g) above.

(k) The Coroner failed, in determining these applications, both individually and collectively, to distinguish between anonymity and screening, routinely

granting screening when anonymity has been granted, and conflating anonymity and screening, without properly addressing the differing impact of each measure. In particular:

(i) When determining whether Article 2 is engaged, the Coroner failed to address the extent to which giving evidence with anonymity, but without screening, would impact upon any risk posed to the officers, and has failed to obtain such information from the Security Services.

(ii) In granting screening, the Coroner failed to evaluate the extent to which giving evidence with anonymity, and without screening would impact on the officers claimed 'subjective' fears, so as to engage their common law rights.

(iii) The Coroner failed to address the extent to which screening amounts to an additional, and significant, inroad into open justice and in Article 2 compliance, in that screening means that the next of kin and the general public will be denied an opportunity to observe a witnesses' demeanour in open court.

(l) The Coroner erred in law in his decision of 15 August by concluding that he is *functus officio* for the purposes of reviewing whether or not the grant of anonymity should remain in place for the following reasons:

(i) The request made in no way requires the Coroner to revisit the verdict on inquest or the findings made by the jury, it is a purely procedural matter;

(ii) The Coroner's conclusion fails to appreciate that the grant of anonymity results from a balancing exercise and therefore should be kept under review (see eg Girvan LJ stated in Re C & Ors [2012] NICA 47 at [15](c) and Deeny J in Re C & Ors [2012] NIQB 62 at [69]).

(iii) The Coroner's conclusion is incompatible with the applicant's rights pursuant to Article 2 ECHR.

(iv) The findings of the jury in this case are such that the grant of anonymity should be reviewed.

(m) The Coroner's decisions were unfair, unreasonable and unlawful."

Discussion

[8] The context of the present application is vitally important. Significantly the applicant is not challenging the verdict of the inquest jury. Far from it - the verdict was not only welcomed by the next of kin but the jury were expressly thanked by Senior Counsel on behalf of the next of kin for the decision they had arrived at.

[9] One of the questions which arises in this judicial review is whether it is open to the applicant, when it is not challenging the verdict, to challenge the rulings on anonymity and screening made during the inquest. In this connection Mr Lyttle QC, on behalf of the Prison Officers, emphasised certain portions of the ruling of the Court of Appeal in Re C's Application [2012] NICA 47. As the Court there observed the task of the Coroner was to ensure that the inquest provides the degree of participation for the next of kin set out by the ECHR in Anguelova v Bulgaria (2008) 47 EHRR at para 140. The Court of Appeal recognised that issues of anonymity and screening can of course be material to whether this obligation is fulfilled but they are not decisive. The Court referred to the overriding objective in Rule 1(a) of the Rules of the Supreme Court which requires the Court to deal with cases justly pointing out that what is just in any case will depend upon the context but it clearly includes avoiding, if possible, a proliferation of litigation which is likely to cause delay in the vindication of substantive rights and considerable cost to the participants or the public purse.

[10] The Court then referred with approval to the decision of Higgins LJ in Re McLuckie [2011] NICA 34 where at para 26 the Court drew attention to the fact that in the context of criminal proceedings the law and practice of the Court in judicial review proceedings has been to discourage satellite judicial review proceedings leaving challenges to decisions made during the course of the criminal proceedings in the main to be considered at the conclusion of the trial process. In McLuckie the Court stated:

> "26. ... We feel compelled to question why different considerations should apply in the context of coroners' inquests. Where an inquest results in a verdict, that verdict may itself be challenged through an application for judicial review but that will be at a time when the Court will have the benefit of appreciating the whole context of the inquest. What may appear to be of potential or theoretical importance during preliminary hearings or inquest proceedings before the Coroner, and which often

> leads to satellite litigation, may turn out to be of no such importance in the overall context of the inquest. Procedural errors during the course of the inquest, if and when they occur, may not undermine the ultimate integrity of the inquest or the ultimate verdict."

[11] In Re C the Court of Appeal acknowledged that there may be exceptions to the general rule against satellite litigation [see para 18]. It was also accepted that the rule against satellite litigation cannot inhibit the entitlement of those whose rights, whether under the Convention or common law, would be immediately infringed by the ruling to pursue a challenge.

[12] The Court went on to observe in para 18:

> "I consider, however, that absent some exceptional circumstances of this nature, leave should not be granted to issue judicial review proceedings in relation to procedural or preliminary matters relating to the conduct of an inquest. It follows, of course, that the same principle applies with even greater force where the issue arises in the course of the inquest. If there is any defect in the procedure which affects the integrity of the *outcome* that can be assessed at the end of the inquest where all relevant factors can be taken into account. The next of kin will have every entitlement to vindication in any challenge, if necessary, at that stage." [emphasis added]

[13] In reliance on those paragraphs the respondent and the Notice Party contended that any challenge must ordinarily be something that affects the outcome. However, in this case the outcome is not challenged.

[14] The effect of Re C, it is agreed, is that rulings in relation to anonymity and screening cannot generally be challenged during the occurrence of the inquest by the next of kin. Different considerations apply to individuals who have been refused anonymity/screening who can apply to the Court to overturn adverse decision on the basis of the alleged immediate threat to their right to life. The next of kin are in a different position because the Court of Appeal appears to rule out any challenge by them to such rulings. They are generally expected to wait until the end of the inquest because whether any impugned procedural ruling undermined the ultimate verdict could best be assessed at that point. Any challenge to procedural rulings in respect of, for example, anonymity/screening must, it was submitted, be related to the outcome of the verdict. Mr Lyttle questioned why an interested party, such as the next of kin, happy with the verdict, would seek to challenge procedural rulings which did not impact on the verdict. Ms Quinlivan, on the other hand, says that the applicants are entitled to a proper process in terms of transparency, ability to

participate and public confidence. The absence of such a proper process, it was submitted, undermines the integrity of the inquest.

[15] But if Ms Quinlivan is right, procedural rulings that have had no adverse impact on the outcome can nevertheless be judicially reviewed – at considerable cost to the participants or the public purse – all the way to the Supreme Court if necessary. If this contention were correct it would seem to undermine the logic of the Court of Appeal decision in Re C which is intended to prohibit or discourage unnecessary satellite litigation.

[16] As far as screening is concerned no benefit can accrue to the applicants in this case even if their arguments are well founded for the prosaic reason that they cannot be "unscreened" and the applicants are not seeking a new inquest. As for anonymity, if the applicant's arguments were well founded the Court would be faced with a number of choices. On the one hand, the Court could quash and remit the anonymity decisions or retake the decision itself. In either scenario the change in circumstances including the adverse verdict and the passage of time would require fresh risk assessments to be made to be obtained either by this Court or by the Coroner triggering another round of submissions, decisions and possible further judicial reviews or appeals in respect of those fresh decisions. Even the grant or refusal of declaratory relief could trigger a fresh round of litigation by the unsuccessful party in respect of rulings which had become largely academic. Academic in the sense that, as events in this case have shown, the impugned rulings have had no bearing on the effectiveness of the inquest or its outcome. Allowing such applications yields the real prospect of almost endless litigation at public expense in respect of such procedural rulings. Such a prospect seems inconsistent with the approach of the Court of Appeal in Re C.

[17] I do not accept that the impugned decisions are inconsistent with the applicants' Art 2 rights. As previously pointed out, the applicants are happy with the verdict and indeed thanked the jury for the outcome. The impugned decisions have not undermined the integrity of the verdict. The proceedings were also attended by a raft of important safeguards: (1) the officers (whilst anonymous and screened from the public) gave their evidence in public; (2) they were not screened from the Coroner or the jury who were therefore able to see, observe and hear them give evidence and be cross-examined by counsel for the next of kin;(3) the officers gave evidence in the sight of the family's lawyers and (4) the officers gave evidence in the sight of the family of the deceased. The respondent relied on Bubbins v UK (2005) 41 EHRR 24 and in particular paras 153-158. That case arose from an inquest into the fatal shooting of a man by police officers in Bedford. Four police officers were granted both anonymity and screening by the Coroner (see paras 88-89). At para 157 the ECHR noted the procedural safeguards (which were the same as those at (1)-(3) above but did *not* include the additional safeguard of the evidence being given in the sight of the family of the deceased). At para 158 the Court said "that these considerations lead the Court to conclude that the effectiveness of the inquest was not undermined on account of the decision to grant anonymity".

[18] In light of the decision in Re C I do not consider that it is ordinarily open to an applicant to challenge such procedural rulings which have no impact on the verdict or the effectiveness of the inquest – any more than a successful litigant or defendant could not ordinarily challenge an adverse ruling during a trial which had absolutely no bearing on the outcome. The effectiveness of the inquest was not undermined on account of the decisions to grant anonymity and screening. The verdict is not challenged and has been publicly welcomed by very experienced senior counsel appearing on behalf of the next of kin.

[19] Unless the inquest is to be quashed and a new inquest ordered I question the utility of these proceedings brought at very considerable expense to the parties and the public purse.

[20] The inquest having been completed the Coroner is *functus officio* for most purposes and certainly in respect of his rulings in respect of anonymity and screening. This view is consistent with the judgment of Weatherup J in Re Bradley [2007] NIQB 98 and the authorities referred to therein. [See in particular para 12]. It was not open to the Coroner to reopen the rulings that he had previously given after the verdict had been given and signed.

[21] If the Coroner was not to be regarded as *functus officio* in circumstances such as prevail in the present case, it would mean, as the respondent submitted that some novel procedure would have to be devised. The inquest would have to be reconvened without the jury but with the attendance of the various legal representatives who were present during the inquest, including all representatives of the Prison Officers. The Senior Coroner would have to explain that he intended to revisit his ruling on anonymity and invite submissions. Presumably any Prison Officer who did not previously have legal representation would have to be advised to consider obtaining such representation. In view of the change of circumstances, both temporally and due to the existence of a critical narrative verdict, there would have to be a further request made to PSNI/the Security Service for a renewed and up to date risk assessment in relation to each relevant Prison Officer. Once received, all updated assessments would have to be provided to the various legal representatives (in suitably redacted form) and further submissions invited. The Senior Coroner would then have to make a further ruling – which might, or might not, be the same as the previous ruling.

[22] I agree with the Respondent that the Coroner is a creature of statute and his powers and duties spring from the provisions of the 1959 Act. There is no provision in the Act which would permit a Coroner to embark on any procedure such as the above.

[23] This judicial review was in any event not brought promptly or within 3 months of the impugned decisions on screening and anonymity. The verdict was issued and signed on 16 May 2013. That was the date on which the grounds, if any,

first arose and the application is clearly out of time. The application for leave was filed on 3 October. The time limit of 3 months expired on 16 August 2013. The application is some 6 weeks outside the mandatory time limit. I do not consider that there is any good reason for extending the period within which the application was made. I should add that there may be force in the point made by Mr Lyttle QC on behalf of the Notice Party that the applicant in focussing on the much delayed reply from the Coroner dated 19 August (confirming he was functus officio) is doing so in an attempt to move the starting date to accommodate the tardiness of this application for judicial review.

[24] Ms Quinlivan's relied on Order 3 Rule 3 which states:

> "Unless the Court otherwise directs, the period of the Long Vacation shall be excluded in reckoning any period prescribed by these Rules or by any order or direction for serving, filing or amending any pleading."

[25] She submitted in reliance on that provision that the application was made within 3 months of the conclusion of the inquest. I reject the contention that Order 3 Rule 3 has any bearing on the 3 month time limit in Order 53 Rule 4(1). The rule and its purpose would be completely undermined if Ms Quinlivan's submission were correct. The need for expedition in raising challenges to public law decisions which frequently impact on the rights of third parties does not suddenly evaporate on the commencement of the Long Vacation. Other than Order 3 Rule 3 itself Ms Quinlivan was unable to cite any authority or academic support for her novel proposition, which I reject.

[26] For the reasons given the applicant is not entitled to any relief and the application is dismissed.