

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

**PAUL McILWAINE'S APPLICATION
FOR JUDICIAL REVIEW**

KERR J

[1] This is an application by Paul McIlwaine, the father of the deceased, David McIlwaine for judicial review of decisions of the Coroner and the Police Service for Northern Ireland in relation to the inquest to be held into the death of his son.

[2] Mr Treacy QC on behalf of the applicant has focussed on the relief's that are set out in paragraph 3, sub-paragraphs 5, 6 and 7 of the Order 53 Statement and I intend to deal with sub-paragraph 7 first. It appears to me that two particular forms of relief are sought in that sub-paragraph. The first can be identified as a declaration that the Coroner for Armagh and Craigavon erred in law in holding that Article 2 of the European Convention on Human Rights was not engaged in relation to the death of David McIlwaine.

[3] Mr Hanna QC on behalf of the Coroner has argued that until the promulgation of the recent case of *Manson v The United Kingdom* it was not clear that Article 2 was engaged in cases where the death had not been caused by someone other than Estate Agents or had not occurred in custody. I do not accept that submission for reasons that I will give in a judgment. It appears to me, that the Coroner ought to have been aware that Article 2 applied equally to other cases where an investigation of the death was necessary. For the various purposes that had been outlined by the European Court of Human Rights in a series of cases preceding and certainly in *Jordan* itself. Among those purposes it is allaying of public concern about the circumstances of the death. This is a case in which public concern, and certainly the concern of the family, was very actively engaged unsurprisingly and it appears to me that

the Coroner should have recognised without the benefit of the *Manson* decision that this was a case which engaged Article 2. The second aspect in sub-paragraph 7 relates to the failure to recognise that the inquest could and should proceed as an Article 2 compliant enquiry. The Coroner has signalled his intention to proceed with the inquest according to what is described as "existing law and practice", but perhaps might be better portrayed as "law and practice" which did not require an Article 2 inquiry and the basis on which the Coroner had reached that decision was largely a judgment that I had given in one of the *Jordan* cases in which I said:

"That if the State had not indicated that the inquest was the means by which it intended to comply with Article 2 the Coroners could and should proceed to conduct the inquest according to existing law and practice".

But I am satisfied from my consideration of the package of measures that were presented by the United Kingdom Government to the Council of Ministers in March 2002 and which were published in October 2002 that the State had clearly signified that where Article 2 was engaged and an inquest was to be held that that inquest was to be conducted in compliance with Article 2. I will have to examine in the judgment the correspondence from the Minister in July 2002, but that does not in my view, derogate from the irresistible conclusion that as of October 2002 when this package of measures was published that the Coroner should have been aware that he was required to conduct the inquest in compliance with Article 2. The occasion may arise in the judgment to deal with what Mr Hanna understandably has strongly argued was the wholly unsatisfactory situation that the package of measures was not drawn directly to the attention of the Coroners, but its publication of October 2002 in my view removed any basis for an argument that the Coroners generally were unaware that where Article 2 was engaged and where an inquest was to be conducted that that inquest had to be Article 2 compliant.

[4] The applicant also seeks a declaration that the failure to hold an inquest or other prompt effective and independent investigation into the death of David McIlwaine is a breach of Article 2 of the European Convention on Human Rights. Mr Treacy has been able to demonstrate that there has been a failure to hold a prompt effective and independent investigation and he has been able to show that a principle among the causes for that, if not indeed the exclusive cause, has been the delay in the furnishing of statements to the Coroner in the first instance, and delay in the Coroner in dealing with those statements. It appears to me for reasons that I will develop in the judgment that that claim cannot be resisted, there has not been a prompt investigation and I am not satisfied that such explanation has been offered for the failure to provide those documents is acceptable. Finally, Mr Treacy seeks

a declaration that the refusal of the Coroner and/or the Police Service to provide the applicant with copies of written statements relating to the death of David McIlwaine is a breach of Article 2. I do not intend to make that declaration as of today, I will want to reflect on its propriety, because it seems to me to be clear now, that the Coroner will release the statements to the applicant. It is therefore questionable whether a declaration requires to be made. But for the avoidance of doubt, let me make it clear, that I believe that the documents should be released at the earliest possible moment. Mr Treacy makes the not unreasonable point that these documents have been with the Coroner for some significant time and their contents, one would have thought should have been considered by him. One hopes that that is the position so that they can be released promptly.

[5] It is now clear from the submissions of Mr Morgan QC for the Police Service for Northern Ireland that they accept that they are not in position to countermand the release of these documents. They are in a position to assert a public interest immunity claim, but none has been asserted and none is intended. Mr Morgan submits that it is open to the Police Service to draw it to the attention of the Coroner the concerns that they have, first about the possible impact of the release of these documents on a subsequent prosecution; and secondly the concerns that they have about individual statement makers and the possible engagement of their Article 2 rights. As to the first of those, I must confess considerable reservations; the only circumstances in which it would be proper for the Police Service to bring such concerns to the attention of the Coroner are where they consider reasonably that the Coroner could react to them. I very much doubt that the Coroner is in a position to react to them, because I believe quite simply, that he is not in a position to decide whether or not the release of these statements will have an impact on the subsequent prosecution. I do not consider that he is equipped to make that sort of judgment. In those circumstances it does not appear to me that it is proper for the police to draw that to the Coroner's attention, but that is a matter on which I would like to reflect further. As to the second, it is undoubtedly true, that the Police Service constituted as it is a public authority under Section 6 of the Human Rights Act has an obligation to ensure that a possible breach of any individuals convention rights is to be avoided and I am quite certain that it is open to them to draw that to the attention of the Coroner. Whether their duties end there is another question. If they are the repository of knowledge on which a judgment, as to whether the statement-makers Article 2 rights might be violated by the release of the statement and it seems to me that they have a duty pro-actively to provide the Coroner with that information and it may well be that they have a duty also to put forward and assert a public interest immunity claim, but those are matters on which I would like to reflect further. So I will not at this stage make the declarations sought in sub-paragraph 6 and I will if course in any event want to consider further the declarations that I have decided to make and it may be that they will be refined somewhat. But the purpose of giving this short ex tempore

summary of my conclusions is, I hope, to allow the inquest now to proceed with all dispatch.