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*(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Attorney General's Application [2013] NIQB 52

IN THE MATTER OF AN APPLICATION BY THE ATTORNEY GENERAL OF NORTHERN IRELAND FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] This is a challenge by the Attorney General to a decision of the Senior Coroner of Northern Ireland on 1st August 2012 in which the Senior Coroner declined to comply with a direction of the Attorney General under S14(1) of the Coroners Act (NI) 1959.

[2] The Direction was that the coroner should conduct an inquest into the death of Axel Desmond who was stillborn on 16th October 2001. The Coroner declined to do so as he believed such an inquest to be outside his jurisdiction and ultra vires.

Background

[3] Axel Desmond was stillborn on 16th October 2001 after having been carried to full term. It was expected that he would be born alive.

[4] A medical negligence investigation took place as part of a civil action into the circumstances of the stillbirth. That action was settled and thus neither of the conflicting opinions as to the cause of the stillbirth were decided upon.

[5] Axel's mother requested an inquest as she did not feel that the circumstances surrounding the stillbirth of her son had been adequately investigated.

[6] Ultimately the Attorney General made a Section 14 order to the Coroner directing him to perform an inquest.

[7] The historical perception among Coroners has been that Coroner's in Northern Ireland do not have the jurisdiction to perform inquests in the event of a stillbirth but will merely pronounce on whether or not the child was in fact stillborn.

[8] On this basis the Coroner in the instant case refused to perform the requested inquest as he believed it to be ultra vires.

Relief Sought

[9] The Applicant seeks the following relief:

(i) An order of Certiorari to quash the decision of the Coroner of 1st August 2012 in which he declined to comply with the direction of the Attorney General pursuant to Section 14(1) of the Coroners Act (Northern Ireland) 1959.
(ii) A Declaration that the impugned decision is unlawful, ultra vires, and of no force or effect.
(iii) A Declaration that a Coroner does have jurisdiction to hold an inquest into the death of a stillborn child.
(iv) An Order of mandamus compelling the Coroner to comply with the direction of the Attorney General

Grounds Upon Which Relief Sought

[10] The Applicant relies on the following grounds:

(v) The Coroner erred in law and/or misdirected himself in concluding that an inquest into a stillbirth would be ultra vires.
(vi) The Coroners Act, properly construed, does confer jurisdiction in appropriate cases for a Coroner to hold an inquest into a stillborn child. Therefore it was not lawfully open to the Coroner to decline to comply.

The Relevant Statutory Scheme

[11] Section 14 of the Coroners Act (Northern Ireland) 1959 provides that:

> "Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct a coroner… to conduct an inquest into the death of that person and the Coroner shall proceed to conduct an inquest in accordance with the provisions of this Act,"

[12] Section 7 of that Act provides that:

> "Every [person]… who has reason to believe that the deceased person died, … from any cause other than natural illness or disease… shall immediately notify the Coroner within whose district the body of such deceased person is, of the facts and circumstances relating to the death"

[13] Section 8 provides that:

> "Whenever a dead body is found, or an unexpected or unexplained death occurs … the [superintendent] shall give immediate notice to the coroner."

[14] Section 13 provides that:

> "Subject to subsection (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… occurs
>
> may hold an inquest"

[15] Rule 12(1) of the Coroners (Practice and Procedure) Rules 1963 ("the 1963 rules") provides that:

> "If the superintendent requests a coroner to adjourn an inquest on the ground that a person may be charged with the murder, manslaughter, child destruction … of the deceased … the Coroner shall adjourn the inquest"

[16] Rule 13 provides:

> "1. If …. The Coroner is informed that some person has been charged… with the … child destruction … of the deceased… he shall adjourn the inquest…
>
> …
>
> 4) If the Coroner decides not to resume the inquest … he shall furnish the registrar of deaths with the particulars necessary for the registration of death so far as … ascertained at the inquest."

[17] Section 25 of the Criminal Justice Act (1945) provides in 'Punishment for Child Destruction':

> "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, shall be guilty of … child destruction."

[18] Article 16(1) of the Births and Deaths Registration (Northern Ireland) Order ("the 1976 Order") provides that the coroner shall provide a certificate to the registrar of deaths indicating the cause of the stillbirth.

[19] Article 2(2) of the 1976 Order provides that a stillbirth is:

> "The complete expulsion or extraction from its mother after the 24th week of pregnancy of a child which did not at any time after being completely expelled or extracted breathe or show any other evidence of life"

[20] Article 2 ECHR provides

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally…"

[21] Article 14 ECHR provides:

> "The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground"

[22] Article 8 of the ECHR provides

> "Everyone has the right to respect for his private and family life, his home and correspondence.
>
> There shall be no interference by a public authority with the exercise except for….."

Arguments

Applicant

[23] The Applicant argues that as a matter of construction the statutory scheme supports the interpretation that the Coroner has jurisdiction to perform an inquest into a stillbirth. This argument is founded on four pillars:

(i) There is nothing in the 1959 Act that expressly denies the Coroner jurisdiction to perform an inquest into a stillborn.

(ii) The concept of a child 'dying' by an act of 'child destruction' was acknowledged in the Criminal Justice Act 1945, and in the 1963 Rules there is express reference to performing and inquest in the event of 'child destruction'. However it is acknowledged that this is persuasive only and could not enlarge the jurisdiction of the Coroner if it was found that such jurisdiction did not exist in the main Act.

(iii) Section 14 is a public safeguard, and the purpose of an inquest in general is to bring the full facts to light. Thus it would be appropriate for this remedy to be available in cases where there is a suspicion that there were issues with maternity or pre-natal care.

(iv) There is reference in the Registrar of Deaths Act (1976) to a Coroner performing an inquest on a stillborn child and to forward the results to the registrar. On the form on which the Coroner may fulfil this obligation, there is also space to note the cause of the stillbirth.

[24] The Applicant argues that the only bar to jurisdiction based on the 1959 Act is whether or not a still born child can be said to have died or whether its body represents a dead body within the meaning of the 1959 Act. The Applicant urges that on an 'ordinary and natural' interpretation of these words it is clear that a still born child *can be* a dead body for the purposes of the 1959 Act.

Respondent

[25] The Respondent notes that the view of Coroners in Northern Ireland has always been that they do not have jurisdiction to perform an inquest in the event of a stillbirth.

[26] While the Respondent believes there is no real reason not to conduct an inquest he notes that if the jurisdiction does not exist on the proper construction of the statutory scheme then it is up to the legislature to change this.

[27] The Respondent argues that reliance on the 1963 Rules is impermissible because if the 1959 Act did not expressly confer this jurisdiction then the 1963 Rules cannot have added this jurisdiction in.

[28] The Respondent argues that the key requirement for the holding of the inquest is the death of a 'person'. It is argued that S11 of the 1959 Act – i.e. the existence of a deceased person is a condition precedent for the holding of an inquest. The Respondent also contended that the statutory interpretation of 'person' does not encompass a pre-natal child.

Notice Party

[29] The notice party encourages the court to consider the nature and scope of the rights protected by Articles 2, 8 and 14 of the convention in the instant case.

[30] In relation to Article 2 the notice party observes that it has not been ruled out that in certain circumstances some Article 2 safeguards may be extended to the unborn child. Further it is noted that it has been intimated that in certain circumstances it is possible to remain a victim for the purposes of Article 2 even after having accepted compensation. Finally it is noted that Article 2 puts a positive obligation on the state to ensure that there is a practical and effective investigation of the facts of a death arising from medical negligence in an NHS hospital. For these reasons the Notice Party submits that Article 2 is engaged in the present case, Ms Desmond remains a victim for the purposes of Article 2 and the current system does not fulfil the investigative obligation under Article 2.

[31] It is further submitted that it is a breach of Article 14/Article 2 as if Axel was born alive his family would have benefitted from an inquest. It is submitted that there is no reason in principle for the difference in treatment between a child that dies moments before it is born and a child that dies moments after it is born.

[32] Finally it is submitted that there is a further breach of Article 14 with Article 8 on the basis that pregnancy clearly falls within the wide ambit of Article 8. It is argued that there is an unjustified difference in the treatment of women who give birth to a stillborn child and women who give birth to a living child who dies moments later.

Discussion

Statutory Interpretation

[33] It is clear that there is no express statutory jurisdiction allowing Coroners in Northern Ireland to conduct an inquest into the death of a stillborn child.

[34] There is however substantial persuasive evidence on both sides. On the one hand the 1963 Rules and 1945 Act suggest that the understanding at the time of enactment would have been that a Coroner *did* have jurisdiction to conduct an inquest. However this cannot overcome the plain fact that this jurisdiction is not expressly referred to in the 1959 Act. On the other hand, it seems to be the case that for at least the last 50 years, Coroners in this jurisdiction have not been carrying out inquests into stillborn children almost certainly because it is not expressly provided for.

[35] There are important and weighty policy issues at the core of this challenge: what is a person? Is it possible to die before one has been born? Is there a legal difference in 'life' in the womb and 'life' out of the womb? For example does consciousness or having a social reality/being part of a social reality create something more than the sum of the physical parts that are a child moments before birth? While I have full sympathy for Ms Desmond and understand and in fact agree that stillbirth by medical negligence could be established in future as a special case (though I do not necessarily agree that an inquest is necessary), it cannot be the case

that the current understanding of these philosophically fundamental policy issues can or should be addressed by a first instance court in the instant case where the focus is so narrow - unless compelled as a matter of statutory construction to do so. The ramifications of such a change would reverberate widely and have far reaching consequences in areas such as abortion, reproductive rights, infertility treatment, cloning, stem cell research, artificial intelligence and areas of science that have probably not even been conceived yet.

[36] Given the ramifications of the jurisdiction contended for by the Attorney General I consider that had the legislature intended to confer such jurisdiction it would have expressly provided for it in the Coroners Act. It would not have been difficult to do so. It is common case that there is no such express statutory jurisdiction. Certainly the longstanding, and until now legally unchallenged, practice of the Coroners has been not to conduct inquests into stillborns because of the perceived absence of jurisdiction. Whilst clearly possible it may seem a little implausible that successive Coroners have for decades, and without legal challenge, misconstrued their own jurisdiction. Be that as it may I am clear that had the legislature intended to confer such a potentially wide ranging jurisdiction it would have said so clearly and unambiguously leaving Coroners and others in no doubt as the true scope of the coronial jurisdiction. That it did not do so in primary legislation, as all are agreed, points unmistakably in my view to the conclusion that the Coroner was correct in refusing to comply with the direction of the Attorney General on the basis that such an inquest would be outside the coronial jurisdiction.

[37] For this reason I uphold the Coroner's interpretation of the Act, that is that Coroners in Northern Ireland do not have jurisdiction to perform an inquest into a stillborn child. Accordingly the application for judicial review must be dismissed.

Notice Party Arguments

[38] Given the discussion above it is not necessary to decide upon the arguments raised by the notice party they will be best rehearsed again in a superior court.

Conclusion

[39] I reject the current application.