Judicial Communications Office

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COURT DELIVERS JUDGMENT ON FUNDING FOR LEGACY INQUESTS

Summary of Judgment

Sir Paul Girvan today held that the former First Minister, Arlene Foster's decision not to permit a paper on legacy inquests to go before the Executive Committee meeting 24 March 2016 was unlawful as she erroneously took into account the absence of an overall agreed package to deal with legacy issues as being relevant and left out of account that there was an obligation on State authorities to ensure that the Coroners Service could effectively comply with Article 2 irrespective of whether an overall package was agreed to deal with all legacy issues. He directed that the NI departments and the Secretary of State must reconsider the question of the provision of additional funding for legacy inquests and that this cannot be postponed until an outcome to a political agreement is resolved.

Brigid Hughes ("the applicant") challenged the ongoing failure of the Executive Office ("the EO"), the Executive Committee, the Department of Justice ("the DoJ"), the Minister of Justice ("the MoJ") and the Secretary of State for Northern Ireland ("the Secretary of State") ("the respondents") to put in place adequate funding to prevent further delays to the holding of legacy inquests relating to deaths during "the Troubles". She contended that the effect of the failure has been to cause inexcusable delay to the listing and completion of numerous inquests, including the inquest into her husband's death. Part of her case was that the former First Minister, Arlene Foster, ("the FFM") unlawfully prevented the tabling and discussion of a paper put forward by the MoJ which attempted to advance the securing of additional funding for the coronial system to assist it in progressing the legacy inquests and reducing systemic delays.

The applicant's husband, Anthony Hughes, died on 8 May 1987 when innocently caught in the cross-fire between soldiers and police officers and the IRA at Loughgall RUC station. Despite the fact that the applicant's husband died over 30 years ago, there has been no Article 2 compliant investigation into his death. On 23 September 2015, the Advocate General ordered a fresh inquest into the death of Anthony Hughes. The inquest has not yet taken place.

Inquests should be conducted and proceeded with in accordance with the requirements of the law. Rule 3 of the Coroners (Practice and Procedure) Rules (NI) 1963 ("Rule 3") provides that "every inquest shall be held as soon as practicable after the Coroner has been notified of the death". Both Article 2 ECHR and the common law require that inquests are conducted with reasonable expedition and efficiency. If not, remedies such as damages may be available to an aggrieved party. The Supreme Court's decision in Re McCaughey extended the effect of Article 2 so that if the UK authorities decided to hold an inquest into a death which had occurred before 2 October 2000 (the date on which the Human Rights Act 1998 was commenced) there was an obligation to ensure that it complied with the procedural obligations arising under Article 2 so far as that was possible under domestic law.

Sir Paul Girvan commented that the law on inquests has developed in an unstructured and piecemeal way. He said the underlying statutory provisions and rules are outdated and clearly were not drafted with the ECHR in mind. Further, costly and time consuming litigation has taken the place of sensible, rational and structured reform of coronial law.

In the course of submissions in this case the parties did not demur from the proposition that each of the legacy inquests could cost over £1m and this may be a conservative estimate. Sir Paul Girvan commented that against such a background the question might be asked as to the wisdom of directing a large number of inquests in situations in which there were no obligations under Article 2 to establish them and where in the absence of adequate public funding there was inevitably going to be gross delay and disappointment of next of kin's legitimate expectation of a reasonably expeditious process:

> "The fact remains that the unchallenged decisions of the Attorney General and the Advocate General to direct legacy inquests has produced the unavoidable consequence that the inquests should comply with the Article 2, Rule 3 and common law procedural requirements. For present purposes these include the duty to carry out the inquests as soon as practicable and with reasonable expedition. The decisions inevitably led to a need for resources to be made available if the State is to comply with its obligations to have timely inquests."

The problem of the lack of resources

Sir Paul Girvan commented that the delay in dealing with legacy inquests arises from a lack of resources to fund a timely and efficient system to manage and run them given their nature, likely length and complexity. On 12 February 2016, the Lord Chief Justice ("the LCJ") who is now President of the Coroners Courts said that the existing Coroners Service was not adequately resourced to carry the weight of these cases but he was confident that, if the necessary resources were provided and with the full cooperation of the relevant statutory agencies, it should be possible to hear all the remaining legacy cases within five years. He proposed the creation of a Legacy Inquest Unit and was satisfied that his plan would fulfil the criteria that need to be met in order to discharge the UK Government's Article 2 obligations. The resources, however, have not been forthcoming and at the time of hearing this case there were 54 inquests (in relation to 94 deaths) outstanding[1].

In December 2014, the Stormont House Agreement ("the SHA") included a commitment to address legacy inquest issues and create a Historical Investigations Unit in order to comply with Article 2 obligations. A funding package of £150m was to be made available by the UK Government. On 11 February 2016, the Secretary of State suggested that the UK Government would consider releasing funding early to support inquests as he was "acutely aware that we have a responsibility to do all we can to tackle the legacy of the past". Following that speech, the DoJ prepared a draft paper for the Executive Committee in which the MoJ sought approval to make a request to the Secretary of State for the funding sought by the LCJ ("the MoJ's paper").

[1] Of these, 30 inquests (51 deaths) had been directed by the Attorney General and one by the Advocate General. Twenty seven (27) of the 31 directed inquests relate to 53 deaths as a result of direct force by State agents. The Court asked if the AGNI and the Advocate General were considering directing any further inquests and if so, how many. The AGNI declined to answer on the basis that he was acting as counsel to the FFM.

The Applicant's case

The applicant challenged the decisions and ongoing failures of the EO, the Executive Committee, the DoJ, the Secretary of State and the relevant ministers to put in place adequate funding to prevent further delays in legacy inquests. She sought:

- An order quashing the decisions of the FFM, the DoJ and the EO made since January 2016 preventing the Executive Committee from considering and arranging the provision of additional funding;
- An order to compel the EO, Executive Committee, the DoJ, the Secretary of State and the relevant ministers to arrange the provision of additional funding to ensure the hearing of legacy inquests within a reasonable time in accordance with the LCJ's proposal and specifically to ensure the establishment of a Legacy Inquest Unit; and/or
- An order to compel the EO, the Executive Committee, the First Minister, the MoJ, the DoJ and the Secretary of State to reconsider their respective duties regarding the provision of additional funding to the Coroners Service for legacy inquests.

The applicant further sought declarations that:

- The EO, the Executive Committee, the DoJ and the Secretary of State in their failure to ensure additional funding were and continue to be in breach of their respective legal obligations to act with reasonable expedition in the matter and are acting unlawfully;
- The conduct of the EO and in particular the FFM in preventing the Executive Committee from considering and arranging the provision of additional funding was contrary to s.24(1)(a) of the Northern Ireland Act 1998 ("the 1998 Act"), constituted discrimination against the applicant on the grounds of religious belief and/or political opinion and was in breach of the Ministerial Code;
- By preventing the Executive Committee from considering and arranging the provisions of additional funding the FFM acted unlawfully in that she failed to take into account the State's obligations under the ECHR and took into account irrelevant considerations;
- The Secretary of State ought to provide such additional funding in the exercise of her powers and/or direct the DoJ and Executive Committee (if in existence) to take action to arrange additional funding pursuant to s.26(2) of the 1998 Act.

The Applicant's case against the FFM

The applicant's challenge involved a broad point incorporating narrower attacks on individual ministers and departments. The broad point was that State authorities owe a duty to ensure the timely conduct of the legacy inquests and to fulfil that duty the State needs to provide the means necessary to do this. The Court said that while primarily the duty lies on the DoJ, the department responsible for the Coroners Service, other agencies must play a role in unlocking the necessary funding.

Moving on from the applicant's broad attack, she challenged the decision of the FFM not to allow the MoJ's paper to go on the agenda for the Executive Committee meeting on 24 March 2016. She claimed this deliberate decision was unlawful because the FFM took into account

irrelevant considerations (namely that it was proper to require a linkage between the provision of additional funding for legacy inquests and the achievement of an overall package of agreement in relation to the legacy of the past) and that to secure additional funds for the legacy inquests would be to create an imbalance between investigations into State killings as opposed to paramilitary killings. The applicant claimed this amounted to direct and indirect discrimination against persons on the grounds of their perceived religious or political belief or opinion and that the FFM was actuated by her political opinion that current legacy investigations were unfairly skewed against members of the Armed Forces and police. It was further claimed that her refusal to permit consideration of the LCJ's request constituted an improper obstruction of the LCJ in the discharge of his statutory functions as President of the Coroners Courts. The applicant's counsel claimed the FFM's actions were "a blatant refusal to uphold the rule of law and to support the court".

The FFM's response

Counsel on behalf of the FFM argued that in the absence of an agreement between the FFM and the former Deputy First Minister (the "FDFM"), it was perfectly proper for her to conclude that no useful purpose was to be served by the MoJ's paper being advanced to the Executive Committee for consideration at a time when it would have failed to gain support. He argued that the FFM had articulated a view about a genuinely held perception of imbalance which was something with which the Secretary of State agreed. The FFM's view that more discussion was required was a political judgment in relation to the timing, financing and relevant prioritisation of the proposal along with larger legacy consideration.

In her affidavit, the FFM said she had been informed by her special advisor, Richard Bullick, that the Northern Ireland Office ("NIO") had expressed a view that the finances did not stack up behind the MoJ's paper. His view was that the paper had been rushed given the impending end of the Assembly's mandate and that advancing the paper was "a purely political move on the part of the MoJ". In an affidavit, Mr Bullick said he had no specific recollection of the matter but assumed the paper had not been placed on the Executive Committee's agenda as it would not command the requisite majority as the DUP was "disinclined to support the advancement of only one aspect of the legacy issues". He also felt there was no way that the NIO would support the MoJ's proposals.

An affidavit from Colin Perry, a Director within the NIO, referred to telephone conversations he had with Mr Bullick on 15 February 2016 and 8 April 2016. He said that officials in the NIO had identified weaknesses within the paper including a lack of detail on issues of broader reform of the inquest system, no detailed business case detailing how the money would deliver best public value, and the potential for the overall costs of dealing with all legacy inquests to be much higher than estimated. In his call on 8 April 2016 Mr Perry said the process of obtaining Treasury approval for funding was not to be underestimated. The Court noted that no further request from the DoJ or the Executive for funding was received thereafter.

The case against the FFM

Sir Paul Girvan commented that the evidence filed in support of the FFM's case made it clear that her reasoning was motivated by her view that the legacy inquests created an imbalance in relation to State killings as opposed to paramilitary killings, that the LCJ's proposals and the MoJ's paper did not address the issues of innocent victims and that the funding of legacy

inquests should be deferred until resolution of all legacy issues. He said the FFM's viewpoint was an understandable political viewpoint were it not for the duties of the State under Article 2, Rule 3 and the common law to ensure the determination of inquests with reasonable expedition. The Court said that in the absence of those obligations it would be entirely legitimate for the FFM to believe that the focus on a large number of legacy inquests dealing with death in circumstances of State involvement could give rise to a false impression of the history of the Troubles (in which of course the great preponderance of deaths and injury were caused by the crimes of terrorist organisations):

> "However, the duty of the State to ensure the timely disposal of inquests does not entitle the State authorities to delay a proper consideration of the question of the provision of resources to enable the duties to be fulfilled until agreement to an overall package to resolve all legacy inquests can be found. Negotiation of such an overall package evidently presents problems and has generated much delay. The linking of the two has the potential for putting off indefinitely the resolution of the question of funding to enable the State to comply with its obligations to ensure timely conduct of inquests. To postpone consideration of the issue … is to create a linkage that does not exist at law and produces a result which is contrary to the law. The FFM misdirected herself when concluding that it was permissible to make the linkage."

Sir Paul Girvan then looked at the applicant's claim that the FFM had breached the Ministerial Code. He said the clear need for the provision of additional funding for legacy inquests cut across the responsibilities of the MoJ and the FM and DFM (the latter being responsible for human rights and equality). The Code provides that both the FM and DFM have to agree to the placing of an item on the agenda for the Executive Committee. Sir Paul Girvan said that in this case, according to the FFM's affidavit, the DFM did not discuss the matter with her. He said that this implies that the FFM did not discuss the matter with the DDFM either:

> "The DFM's agreement to the paper going on the agenda and to be treated as an urgent matter is properly recorded. Since the FFM did not make any conscientious effort to seek agreement as to what should be done about the MoJ's paper it is unnecessary to resolve the apparent conflict between [the FFM's affidavit and that of Ms McCann, a member of Sinn Fein and a Junior Minister in the EO]. The decision to refuse to put the paper on the agenda was procedurally flawed."

The Court next considered the discrimination claim. Sir Paul Girvan said the FFM considered that the legacy inquests would produce an imbalance outcome between different categories of victims and, if anything, her decision favoured members of the security forces involved in the killings:

> "This is not discrimination on the grounds of the religious or political opinion of the next of kin even though a preponderance of them may have come from one section of the community. The case for discrimination has thus not been made out."

Sir Paul Girvan finally dealt with the claim in respect of breach of Convention rights. He said this claim was a difficult one to sustain as there were legitimate grounds on which the FFM could have properly concluded that the paper should not have been put on the agenda Sir Paul Girvan considered that neither the Secretary of State nor the Treasury would have recommended the provision of funding along the lines proposed in the paper without further work on the proposal – "at best it would have been sent back for improvement". He said that proper procedures must be gone through to secure the release of public funds which cannot be paid over without a rigorous examination of the justification for the figures sought:

> "While the Court has concluded that the reasoning that prevailed with the FFM was legally flawed and that there was procedural irregularity in reaching the decision to exclude the paper, this is a case in which the Court would decline to grant certiorari to quash the decision since … in all likelihood the matter would not have been put on the agenda. If it had been it is unlikely to have resulted in a favourable decision by the Executive Committee because of the shortcomings in the paper. If it had gone to the Secretary of State and the Treasury money would not have been released even if they put to one side the erroneous belief that it was legitimate to link between questioning of funding the coronial services and the other issues relating to the past."

Sir Paul Girvan concluded that the appropriate remedy in relation to the claim against the FFM was in the form of a declaration to the effect that the decisions of the FFM to refuse to permit the MoJ's paper to be put on the agenda of the Executive Committee for discussion or permit the matter to be pursued under the urgent procedure were unlawful by reason of the fact that she:

- Erroneously took into account the absence of an overall agreed package to deal with legacy issues as being relevant to the question whether additional funding should be sought to enable the Coroners Service to carry out inquests compliant with Article 2, Rule 3 and the common law so that inquest could be carried out within a reasonable time; and
- Erroneously left out of account that there was an obligation on the State authorities to ensure that the Coroners Service could effectively comply with Article 2, Rule 3 and common law in carrying out inquests within a reasonable time irrespective of whether an overall package was agreed to deal with all legacy issues.

Sir Paul Girvan said he would hear counsel on the appropriate wording of the declaratory relief.

The case against the Executive Office, the Minister for Justice, the Department of Justice and the Executive Committee

Sir Paul Girvan commented that unlimited resources cannot obviously be provided to the coronial system but that, at times, the arguments put forward on behalf of the respondents sounded like an attempt to escape individual liability on the basis that the fault for not dealing with the problem was attributable to some other public body. Strasbourg, however, makes a finding against the UK and it is left to the UK authorities to sort out the national system to avoid the repetition of breaches of the ECHR:

> "The relevant organs must conscientiously and properly consider the issue of the need for additional funding leaving out of account the legally flawed proposition that the question must await the outcome of an overall package. If they do not approach the question correctly they are contributing to an ongoing breach of the procedural obligations arising under Article 2."

The case against the Secretary of State

Sir Paul Girvan said that one of the most contested and difficult issues in this case related to the powers and obligations of the Secretary of State in relation to the issue of the provision of funding for legacy inquests. Counsel for the Secretary of State argued that responsibility for compliance with the Article 2 obligations lay with the devolved authorities alone. It was claimed that the applicant was incorrectly proceeding on the basis that the Secretary of State could unilaterally, in the absence of ministers since the election in March 2017, allocate funds to the Northern Ireland Executive to address specific issues falling within the devolved domain. Counsel claimed that the Secretary of State has no power to direct the exercise of executive powers which are the prerogative and other executive powers of the Crown in Northern Ireland. The extent of the Secretary of State's power is to make additional payments into the Consolidated Fund from funds provided by Parliament but cannot direct how it may be appropriated.

Sir Paul Girvan considered counsel's analysis to be correct in the context of a working devolved administration. He said, however, that the absence of such has created a vacuum at the heart of the devolved system of government:

> "The problem of the lack of funding for the legacy inquests remains and if central government maintains the policy of requiring an agreed Executive approach on the issue of the release of funds … there is no way in which central government would see its way to release additional funding to deal with the problem of legacy inquests. The longer the absence of a working devolved administration the longer the problem will continue and the greater it will become."

Counsel for the applicant contended that in the absence of a working devolved administration, the executive power which continues to be vested in the Crown must be exercisable by the Secretary of State. Sir Paul Girvan commented that there is a legal conundrum at the heart of this issue: "If there are no ministers and if functions are supposed to be exercisable subject to direction and control of ministers how is a department supposed to exercise its powers?" He said the 1998 Act did not envisage a lengthy vacuum of power in NI and therefore does not provide the Secretary of State with power to exercise the powers of as yet un-appointed ministers of the devolved administration:

> "Undoubtedly a vacuum in which there are rudderless departments without ministers, the lack of a functioning Executive Committee and the absence of a sitting Assembly produces an essentially undemocratic system of unaccountable government provided effectively by senior civil servants who find themselves in an uncomfortable situation. The extent of their powers to take pressing policy decisions is unclear. The departments cannot … work in the way envisaged under the [1998] Act. In Northern Ireland ministers are accountable to the

> Assembly but in the absence of an Assembly there is no democratic accountability in respect of civil servants exercising departmental powers."

Sir Paul Girvan considered that the sovereign government and the Secretary of State have a power and a duty to ensure the lawful proper governance of Northern Ireland and are as accountable to Parliament for that as they are on questions such as whether direct rule should be reintroduced or whether changes need to be made in the constitutional arrangements for the government of Northern Ireland. He said that ultimately Parliament can legislate to ensure the proper and lawful government of Northern Ireland if devolved government is not being provided in a way which is compatible with the principles of democratic and accountable government.

Counsel for the Secretary of State and the EO accepted that it is legally possible for the DoJ to take steps to present a funding proposal in respect of the systemic failure in the coronial system to deal with legacy inquests. It was argued that senior civil servants would need to consider inter alia the previous ministerial approaches, the wider political circumstances and the utility of making such a request in light of the currently expressed NIO attitude. Sir Paul Girvan said that in exercising the power to present such a funding proposal, the DoJ would be bound to take account of the terms of this judgment which establishes that the previous ministerial approach was infected by the identified legal error that it was permissible and desirable to put off the question of seeking funds to enable the Article 2 and other procedural obligations to be carried out until a package in respect of all matters is achieved. Sir Paul Girvan said the wider political circumstances do not of themselves remove the obligation from (inter alia) the DoJ to reduce delays in respect of the legacy inquests or the obligation on the EO as guardian of human rights to work towards the fulfilment of the State's obligation to achieve Article 2 compliance in respect of the legacy inquests: "The absence of ministers in these departments does not mean that the departments are in the meantime discharged from their Convention law obligations as public authorities".

Sir Paul Girvan further commented that the NIO policy approach must take account of the prevailing circumstances. If called on to make a decision following a request for funding from the DoJ the Secretary of State would be bound to take account of the proper relevant considerations. These would include the terms of this judgment; the absence of an Executive Committee to present an agreed approach; the absence of ministers in Northern Ireland to formulate such an agreed approach; the undesirability of policy issues being made by unelected civil servants; the need for political leadership to be provided by the Secretary of State in the absence of ministers in Northern Ireland; and a recognition that the on-going delay in the determination of the legacy inquests will continue unless additional resources are provided. Sir Paul Girvan said the Secretary of State would be bound to take account of the fact that, in the absence of a solution to the problem, the UK faces, yet again, the likelihood of being found in breach of its Article 2 obligations by renewed applications to Strasbourg: A failure to grapple with the problem may effectively leave the UK open to a complaint and finding at Strasbourg that the State is providing no just satisfaction in respect of ongoing breaches of Article 2."

In relation to the relief claimed by the applicant, Sir Paul Girvan commented that the Court cannot direct Government departments how to spend public funds in view of the polycentric issues involved. The use of significant public funds in dealing with legacy

inquests would have an impact on other aspects of the DoJ budget and the overall Northern Ireland budget. He said that funds dedicated to legacy inquests may result in less monies being available in other fields where other pressing human rights issues may arise and that finding the right balance is for the relevant authorities not for the court. Sir Paul Girvan said he was minded to issue a declaration compelling the respondents to reconsider their respective duties regarding the provision of additional funding to the Coroners Service for legacy inquests but said he would hear counsel further on the issue of the appropriate remedies in a hearing to be arranged.

Conclusions

- The applicant has established that there is systemic delay in the coronial system in respect of the determination of the legacy inquests including those directed by the Attorney General (which in fact represent the majority of legacy inquests) and the legacy inquest directed by the Advocate General in respect of the death of among others the applicant's husband;
- The legacy inquests are required to be conducted in a manner compliant with Article 2 procedural rights obligation and within a reasonable timeframe under Article 2, Rule 3 and common law;
- The current systemic delay is impacting on the applicant as the widow of the deceased in respect of the inquest directed by the Advocate General. Her Article 2 rights are not being vindicated and the delay engages her rights under Articles 2 and 8;
- The systemic delay is caused or significantly contributed to by a lack of adequate resources which are needed to speed up the process of carrying out the legacy inquests;
- Various public authorities in Northern Ireland have a role to play in ensuring the taking of effective steps to reduce the delays and to advance the timely carrying out of the inquests. These include the DoJ, the EO, the MoJ, the First Minister and the Deputy First Minister (when appointed) and the Ministers sitting on the Executive Committee (when appointed);
- In her decision not to permit the MoJ's paper to go before the Executive Committee the FFM was in error in concluding that it was legally proper to defer consideration of the question of seeking additional funding to deal with the systemic delays in relation to the legacy inquest until an overall package was agreed in respect of the outstanding legacy issues. She was in error in concluding that it was legally proper to defer consideration of the funding issue because in the absence of an overall package the provision of additional funds to deal with the systemic delays in the legacy inquests would favour victims who were not innocent as against innocent victims of the Troubles;
- The Secretary of State and central government have recognised the need to provide additional funding for legacy issues and have earmarked the sum of £150m for the purpose. It was recognised that part of that funding would need to be used in relation to dealing with the problems arising from the legacy inquests;
- The approach of the FFM and the Secretary of State has been infected by the legally erroneous view that dealing with the question of the provision of additional funds to deal with the systemic problems in respect of legacy inquests should await the outcome of an overall package in respect of all legacy issues. Their approach has

been infected by the erroneous legal view that there is a permissible linkage between the issues;

- This linkage and the present approach disregard the present and on-going breaches of Article 2, Rule 3 and common law in respect of the legacy inquests which require to be addressed and dealt with irrespective of whether an overall package can be agreed;
- Whether or not the devolved institutions recommence operations and new ministers are appointed, the on-going problem of breaches of Article 2, Rule 3 and common law in respect of the legacy inquests requires to be addressed;
- While the Secretary of State for Northern Ireland does not have executive functions in relation to the Northern Ireland departments during the absence of a devolved administration, she is responsible for an oversight of the functioning of government in Northern Ireland and is answerable to Parliament in respect of the discharge of that function;
- The relevant parties must reconsider the question of the provision of additional funding in light of the fact that finding a resolution of the funding issue cannot be postponed until an outcome to a political agreement on other legacy issues;
- The relevant decision-makers who will be involved in decision making in relation to whether additional funds should be provided, in what amount and at what time must take account of the contents of this judgment.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

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