

INQUESTS AND HUMAN RIGHTS IN NORTHERN IRELAND

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The coronial landscape now is very different to what it was twenty years ago when I was appointed as Deputy Coroner for Greater Belfast. Then, some would have regarded it – unfairly in my view - as little more than a sinecure. Possibly, it was in some coroners' districts elsewhere in the United Kingdom, but the advent of "the troubles" in the late 1960s removed any basis for making such an assertion in relation to Northern Ireland coroners. They were confronted with the task of processing on top of their existing workload the very many troubles-related deaths and often that necessitated the holding of an inquest. Many deaths occurred in controversial circumstances, particularly where the death resulted from direct intervention by the security forces, and the subsequent inquests were often contentious. The adequacy of a coroner's inquest as the means of investigating such deaths was called into question, and from the mid 1980s this led to an exponential growth in legal challenges to coronial decisions. Whilst Northern Ireland led the way, the same exponential growth was experienced also in England and Wales. Within a few years a judicial review of a coronial decision was no longer a rarity but commonplace.

After many decades of stagnancy and inertia in coronial law one only had to sniff the air to know change was coming³. In my view there were a number of reasons for this. First, the coronial experience in Northern Ireland in relation to holding inquests into the troubles-related deaths was not a happy one: the remit of an inquest was strongly criticized by many bereaved families; the person suspected of causing the death was not a compellable witness⁴ and the short-form verdicts available at inquests in England and Wales⁵ – such as

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² Following a public consultation process undertaken by Northern Ireland Court Service in 2004 on the modernisation of the Coroners' service in Northern Ireland, a final position paper was published in April 2005: "*Modernising the Coroners Service in Northern Ireland: The Way Forward*". It is planned that by April 2006 Northern Ireland will be a single coroner's district. The author will be the senior coroner and two other coroners will be appointed. It is anticipated that the Lord Chief Justice will appoint a High Court Judge as presiding judge for the new coroners' service. At the time of writing four part-time coroners' districts have been amalgamated with the Greater Belfast district.

³ See: Recommendation 123 of the *Review of the Criminal Justice System in Northern Ireland* (March 2000); "*Death Certification and Investigation in England, Wales and Northern Ireland – The Report of a Fundamental Review 2003*" (Cm 5831) and *Death Certification and the Investigation of Deaths by Coroners*" – Third Report of the Shipman Inquiry, 2003 (Cm 5854).

⁴ This is no longer the position as Rule 9 of the Coroners (Practice and Procedure) Rules (NI) 1963 has been amended by SR 2002 No 37. All witnesses are now compellable but a witness may refuse to answer a question tending to incriminate himself or his spouse.

⁵ See *Jervis on Coroners*, 12th ed, para 13-16.

lawful or unlawful killing – were not available in Northern Ireland⁶. Second, bereaved families' expectations of what an inquest could and should deliver changed radically, and an increasing number of families are now legally represented at inquests⁷. Third, the enactment of the Human Rights Act 1998 which came into force on 2nd October 2000. The effect of this legislation was complemented and enhanced by the establishment of the Northern Ireland Human Rights Commission which came into existence on 1st March 1999⁸. It was tasked to "...keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the promotion of human rights"⁹.

Whilst each was significant in itself, without doubt the key reason was the Human Rights Act. The coronial landscape was forever changed. Within a few years of it coming into force it became noticeable to me how the human rights' "language" was being used routinely by bereaved families whether in court or in correspondence. I was impressed by the grasp so many non-lawyers had acquired of the important human rights concepts and of their impact on the investigation of deaths through the medium of a coroner's inquest¹⁰.

Article 2 of the European Convention on Human Rights provides:

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Section 6(1) of the Human Rights Act provides that "*it is unlawful for a public authority to act in a way which is incompatible with a Convention right*". ("Public authority" includes any court or tribunal, which would include coroners' courts.¹¹) Section 2 provides that a court or tribunal determining a question which has arisen in connection with a Convention right must take into account the European jurisprudence. Section 3 provides that domestic primary and subordinate legislation "*must be read and given effect in a way which is compatible with the Convention rights*"¹²

The obligations imposed by section 6 as well as sections 2 and 3 are most important. The obligation to take account of the European jurisprudence

⁶ The terms of a *Finding* at an inquest in Northern Ireland could not stray beyond the parameters of a brief, neutral, factual statement. See *R v HM Coroner for North Humberside and Scunthorpe ex p Jamieson* [1994] 3 WLR 82.

⁷ Often despite the fact that legal aid was not available for such representation. Now exceptional funding for inquests is available under Article 12(8) of the Access to Justice (NI) Order 2003.

⁸ It was created as a result of the Good Friday Agreement of 1998. See the Northern Ireland Act 1998 (Ss 68-71 and Sch 7).

⁹ 1998 Act s 69(1). As to the right of the Commission to *intervene* in an inquest see *In re Northern Ireland Human Rights Commission* [2002] UKHL 25.

¹⁰ Much of the credit for this must be attributed to the pro-active educative role of the Northern Ireland Human Rights Commission under the chairmanship of Professor Brice Dickson.

¹¹ S 6(3)(a).

¹² As to whether a coroner is required to take account of the United Kingdom's international obligations see *Metropolitan Police Commissioner v Hurst* [2005] EWCA 890, CA.

means much more than a mere acknowledgement. In his speech in *R v Secretary of State for the Home Department, ex parte Amin*¹³. Lord Bingham stated:

“Even though there may be room for flexibility in the procedures by different Member States, the European Court of Human Rights has insisted on a minimum threshold. In my opinion, even if the United Kingdom courts are only to take account of the Strasbourg Court decisions and are not strictly bound by them (section 2 of the Human Rights Act 1998), where the Court has laid down principles and, as here a minimum threshold requirement, United Kingdom courts should follow what the Court has said. If they do not do so without good reason the dissatisfied litigant has a right to go to Strasbourg where existing jurisprudence is likely to be followed.”

*R (Middleton) v West Somerset Coroner*¹⁴ was of particular importance in developing and clarifying the role of coroners' inquests in the new human rights era. It removed any previous uncertainty or ambiguity (and there certainly had been some— at least amongst coroners). In his speech Lord Bingham stated:

“The European Court has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life...”

“The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated.”¹⁵

Lord Bingham went on to answer the question he had posed – what form is the “*effective public investigation*” to take? His answer was in unequivocal terms¹⁶.

“In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligations under article 2.”¹⁷

¹³[2003] UKHL 51 at para 44.

¹⁴ [2004] 2 WLR 800.

¹⁵ See paras 2 and 3.

¹⁶ Para 47.

¹⁷ Normally an inquest is not held following a full criminal trial where the relevant facts have been fully explored.

The use of the phrase “unless otherwise notified” is of particular significance as it implies that it is unnecessary for the coroner to seek the permission of the state before holding an Article 2 compliant inquest. The inquest *must* be held on that basis *unless* the state gives a specific direction to the contrary¹⁸. To put it a different and, in perhaps, a more provocative way, the coroner is required to be proactive whilst the state may be reactive.

The coming into force of the Human Rights Act 1998¹⁹ coupled with the developing jurisprudence of the European Court, which had been consistently critical of the law and practice governing coroners’ inquests in Northern Ireland²⁰, inevitably necessitated a re-interpretation of the meaning of “how” as it is used in Rule 15 of the 1963 Coroners’ Rules²¹. In *Middleton* Lord Bingham stated²²:

“It is correct that the scheme enacted by and under the authority of Parliament should be respected save to the extent that a change of interpretation (authorised by section 3 of the Human Rights Act 1998) is required to honour the international obligations of the United Kingdom expressed in the Convention.

Only one change is in our opinion needed: to interpret “how” In the broader sense previously rejected, namely, as meaning not simply “by what means” but “by what means and in what circumstances”.

It is submitted that *Middleton* is now authority for the following propositions where Article 2 rights are engaged:

- “how” should be given a broader interpretation – “by what means **and** in what circumstances” rather than “*by what means*”²³;
- “*In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under article 2.*”²⁴
- the jury should be permitted to express their conclusion on the central, factual issues in the case²⁵;
- the coroner will have to consider the form of verdict that is most appropriate for that purpose: the traditional short form verdict; a narrative form of verdict in which the jury’s factual conclusions are summarised; or the jury’s answer to factual questions put by the coroner. In relation to the latter possibility, Lord Bingham stated²⁶ “*If*

¹⁸ What form the *notification* to a coroner is to take has not been clarified. Could it take the form of a written direction from a government minister?

¹⁹ On 2nd October 2000.

²⁰ See five judgments of the European Court: *Jordan* (Application no 24746/94); *Shanaghan* (Application no 37715/97); *McShane* (Application no 43290/98); *McKerr* (Application no 28883/95); and *Kelly* (Application no 30054/96).

²¹ Rule 15 of the Coroners (Practice and Procedure) Rules (NI) 1963 provides that one of the matters to be ascertained at an inquest is *how* the deceased came by his death.

²² See paras 34 and 35.

²³ This had the restrictive meaning given in fn 6.

²⁴ See para 47 of the speech of Lord Bingham in *Middleton*.

²⁵ Presumably this would apply also to a coroner holding an inquest without a jury.

²⁶ Para 36.

the coroner invites either a narrative verdict or answers to questions, he may find it helpful to direct the jury with reference to some of the matters to which a sheriff will have regard in making his determination under section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976: where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the death.”

In *Re McKerr*²⁷ the House of Lords stated that the obligation on the state to hold an investigation in respect of a violent death which complied with the requirements of Article 2, did not arise in respect of deaths occurring before the Human Rights Act 1998 came into force on 2nd October 2000. However, the Northern Ireland Court of Appeal in *Re Jordan*²⁸ stated that irrespective of whether the death occurred before or after the implementation of the Human Rights Act, “how” should be given the broader interpretation of “*by what means and in what circumstances*”²⁹

The decision of the European Court of Human Rights in *Menson*³⁰ illustrates how the jurisprudence of the European Court is evolving. It provides that Article 2 rights are engaged in cases where there is *no* alleged state involvement in the death and it extends to cases where there has been a life-threatening attack, whether or not death results. Therefore it is arguable that an inquest arising out of *any* violent death constitutes “*the means by which the state will discharge its procedural investigative obligation under article 2*”³¹. That being so, it is submitted that the *discretionary* power to hold inquests granted by section 13 of the 1959 Act may not exist in respect of inquests that must be Article 2 compliant³². Arguably, it is now mandatory that the coroner holds such inquests, unless *notified* to the contrary on behalf of the state, and, it is submitted, the unequivocal statement of Lord Bingham at paragraph 47 of *Middleton* provides authority for that proposition.

Article 2 rights may also be engaged in respect of deaths in hospital³³, prisons, nursing homes or other state institutions. Inquests in Northern Ireland have been held on that basis and without legal challenge as to the correctness of that approach.

²⁷[2004] 2 All ER 409. This decision was given on the same day as *Middleton*.

²⁸ 10th September 2004.

²⁹ The debate continues to evolve. See *Metropolitan Police Commissioner v Hurst* [2005] EWCA 890, CA. At the time of writing three petitions are before the House of Lords for leave to appeal on a series of issues arising out of *Middleton*, *McKerr* and *Hurst*.

³⁰ (App no 47916/99) (2003) ECHR. See also “Scrutinising the bill” New Law Journal 1st August 2003 p 1194.

³¹ See *Middleton* at para 47.

³² It is submitted that *Middleton* has had the implied effect of interpreting s 13 of the 1959 Act in a manner that ensures compatibility with the European Convention.

³³ See *Investigating Deaths in Hospital in Northern Ireland* by Tony McGleenan (Sept 2004), pub by Northern Ireland Human Rights Commission. The position is unclear in respect of deaths in private hospitals or as a consequence of private medical treatment. In relation to Article 2 and hospital deaths see *R (Khan) v The Secretary of State for Health* [2003] EWCA Civ 1129, CA and *R (Goodson) v Bedfordshire Coroner* [2004] EWHC 2931 (Admin) (Richards J). Arguably the latter is a retreat from the position adopted by the English Court of Appeal in the former.

It is hoped that this short article will go some way to demonstrating the radical impact human rights legislation and case law has had on coronial law after only five years. Perhaps, it is not surprising that the resultant domestic jurisprudence that has emerged within this short time-span has not always been consistent and that some measure of confusion remains. However, as I have indicated the House of Lords now has an opportunity to shed light where there is darkness. Whether doing so will settle the debate is an entirely different matter, particularly, as our domestic courts are required to take account of the evolving jurisprudence of the European Court of Human Rights. It would be a brave, perhaps foolish, lawyer who would claim that the final chapter would then have been written.

If history is the story of *everyman*, then the common law chronicles his quest for legal rights and justice. Human rights *aficionados* will argue that human rights are his hard won rights also. I am unaware of any statement in current domestic jurisprudence that argues the contrary and moreover, I am satisfied that *everyman* knows what his rights are.