Art 2 inquest required where a 'credible suggestion' of a breach of substantive rights

written by Bridget Dolan QC | 23 October 2020

***R (Skelton) v Senior Coroner for West Sussex and the Chief Constable of Sussex Police & Robert Trigg (interested parties)* [2020] EWHC 2813 (Admin)**

Determining whether Art 2 procedural obligations are engaged at an inquest can be one of the most challenging legal questions in the coronial jurisdiction. The issue for a coroner is not whether breaches of a substantive Art 2 duty have been made out, but whether such breaches are "arguable".

The Divisional Court have made it clear that, when considering arguability, coroners should apply the test in *Maguire*[1], asking themselves whether there is a 'credible suggestion' that a breach of substantive Art 2 rights may be established after the further and fuller investigation of all the evidence which will be available at a *Middleton* inquest.

Further, should a coroner's decision be challenged with unqualified human rights in play, the Divisional Court's role is not to assess the quality of the decision on pure public law grounds but to apply heightened scrutiny, effectively asking itself the same question that the coroner has considered. Hence in practical terms there can only be one right answer and a rationality challenge collapses into a merits review.

The background

Susan Nicholson, was murdered in 2011 by her then partner, Robert Trigg. Her death was investigated by Sussex Police who initially considered it to be non-suspicious. An inquest verdict of accidental death was returned. Some five years earlier another of Trigg's partners, Caroline Devlin, had also died at their shared home. Ms Devlin's death had been thought to be from natural causes.

Following a lengthy campaign by Ms Nicholson's parents a re-investigation commenced in 2016 that ultimately led to Trigg's conviction for the murder of both women in 2017. In light of the conviction, the Senior Coroner obtained a High Court order under Coroners Act 1988 quashing both the original inquests. When the Coroner indicated she would list a short hearing in Ms Nicholson's case in order to record the cause of death as unlawful killing the Claimants argued that was insufficient. Police shortcomings in investigating Ms Devlin's death in 2006 and failure to protect Ms Nicholson when aware of domestic violence against her in 2011 meant that the procedural obligations under Art 2 ECHR were engaged. An Art 2 compliant *Middleton* inquest was required.

The Coroner declined that application holding that:

- The purported failure to conduct an effective investigation into the death of Ms Devlin was not arguably sufficiently serious to meet the Art 2 threshold. The Coroner noted that at the time there were no signs of any disturbance, no injuries apparent on the body of the deceased, and no concerns were raised by the FME or at the post-mortem examination. Notes from the criminal trial suggested it was only after Ms Nicholson's death that similarities between the two deaths could be appreciated, and more information had become available regarding Trigg's history of violence towards former partners, such that the circumstances of Ms

Devlin's death became questionable.
- It was not arguable that the police, who had been called out to domestic violence incidents between the couple shortly before Ms Nicholson's death, had failed to take reasonable steps to protect her from a real and immediate risk to her life posed by Trigg. The Coroner considered that evidence of previous non-fatal violence against former partners, and against Ms Nicholson herself, did not establish that the police knew or ought to have known of a present and continuing risk to Ms Nicholson's life.

When Ms Nicholson's parents brought Judicial Review (JR) challenging the ruling the challenge was opposed by the Chief Constable of Sussex Police and by Trigg. The Senior Coroner adopted a neutral stance[2].

The Law

The Court noted there was little difference between the parties as to the nature, content and scope of the obligations imposed on the state by Art 2 ECHR. These were to (i) protect an individual whose life is at risk from the criminal acts of another person and (ii) investigate crimes involving loss of life. The Senior Coroner had accurately set out the governing law in her decision, save that she had expressed the threshold for operational failures to investigate as being "very serious". The Court found the better yardstick was simply "serious".

The Court noted that although the Supreme Court in *DSD v Met Police Commissioner*[3] had used a "plethora of epithets and antonyms", the succinct formulation of Lord Neuberger of a "seriously defective" investigation best encapsulated the legal test. That test must "keep clearly in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources so that it does not impose an impossible or disproportionate burden on the authorities."

All agreed that the threshold for the procedural obligation to arise was that there had been an *arguable* breach of an Art 2 substantive obligation. The Court noted the threshold is a low one. To impose a more onerous burden would run the risk of the Coroner determining, in advance of the full evidential picture, what the outcome of any inquest might be.

Here the challenge was not so much on the law but the Coroner's application of the facts to the law. Furthermore, the Coroner's reasons had been brief, although the court noted that a Coroner's failure to provide detailed reasoning in a complicated case like this did not mean that her conclusions were necessarily wrong.

The Court's approach

Much of the judgment concerns the approach that the Court should take to judicial review where ECHR rights are in issue. The Claimants' core ground of challenge was that rather than determining the case on public law principles it was for the Court to determine the threshold question for itself.

The Divisional Court did not agree that public law principles could be completely discarded, albeit quoting from the Lord Phillips in *ZT*[4] that "there is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered." Hence, although the standard of review is one of heightened scrutiny, in practical terms a rationality challenge collapses into a merits review. That is because "the answer to the question…is the same whether the route to it is through *Wednesbury* or an examination of the merits. If the court considers that the arguability threshold is not reached, the Coroner's decision would stand irrespective of whether public law errors were committed on the road to that conclusion. If, on the

other hand, the court considered that the arguability threshold is reached, the court will necessarily conclude that the Coroner's view was irrational." Or to paraphrase –

> ***"So long as the Coroner reaches the correct conclusion about Art 2 it doesn't matter if there are public law errors on the way, but if the conclusion is wrong it can not be sustained on any basis."***

The Decision

The Court considered that the Coroner's brief reasons did not assist it and therefore approached the issue afresh, keeping in mind that the Claimants were entitled to say that their case should be taken at its highest. The question is not whether breaches of duty are made out, but whether it can credibly be suggested at this stage that they might be, after a further and fuller investigation of all the evidence which would be available at a *Middleton* inquest.

Regarding the alleged investigatory failures the Court noted that it was beyond argument" that in the case of a death the state's duty was to investigate effectively whether there had been a culpable homicide. It could credibly be suggested that, at the time of Ms Devlin's death, there was sufficient material available to categorise Ms Devlin's death as suspicious. That would have mandated a fuller and more careful investigation and would arguably have led to a homicide enquiry. The failures, if made out, were arguably, sufficiently serious to meet the threshold of Art 2 breaches.

In respect of the operational duty owed to Ms Nicholson, the Coroner had found that evidence of previous non-fatal violence against her and Trigg's former partners did not *necessarily* establish an Art 2 risk at the relevant time. However, the Court noted that the issue was whether there was at least credible evidence to show that it *might* have done. The 'real and immediate risk' must be to life, not merely a risk of serious harm. The Court determined, contrary to the Coroner's ruling, that it could credibly be suggested that there was evidence that Trigg had previously made threats to the lives of four former partners, had perpetrated significant physical violence towards Ms Nicholson and that the situation was escalating. It was at least arguable that the police knew or ought to have known this, and therefore ought to have taken measures to protect her.

It followed therefore that the Claimants' case must succeed.

Footnotes

[1] R (Maguire) v HM Senior Coroner for Blackpool & Fylde [2020] EWCA Civ 738. See our earlier blog here

[2] Within the JR proceedings Trigg also issued an application notice seeking to challenge an earlier ruling by the Coroner that the fresh inquest was bound to reach a conclusion which was consistent with the conviction, namely unlawful killing. For further discussion of that issue see our accompanying blog here

[3] [2019] AC 196

[4] ZT (Kosovo) v Home Secretary [2009] 1 WLR 348

Bridget Dolan QC of Serjeants’ Inn Chambers represented the Senior Coroner