Coronial bias: a predisposition is not a predetermination

written by Imogen Hildred | 4 March 2022

***In the matter of Downey* [2021] NIQB 108**

There is much to be learned from this recusal application, that was founded on the Coroner having allegedly expressed a decided view regarding an important legal point before he had received the written submissions he had invited on the issue.

Despite a High Court judge initially having '*significant concerns*' about the events, the judge eventually accepted the Coroner's explanation that his having stated an, apparently, concluded view on the applicability of Art 2 in correspondence with the Legal Services Agency, was merely a '*poor choice of words*', and that he had not actually predetermined the matter. As such, the application that the Coroner should recuse himself from further involvement in the inquest failed.

The judgment is worthwhile reading, with much opportunity for vicarious learning for Coroners in the fascinating twists and turns of not making an Art 2 decision. For the inquest lawyer Northern Ireland's newest High Court judge provides an extremely detailed and helpful guide to the key legal principles in play if making an application for recusal on the grounds of bias allegedly shown by predetermination of an issue.

The background

When Michelle Downey died, having taken her own life, her mother initially did not want an inquest and was content for the death to be registered.[1] However, she subsequently, changed her view and requested the Attorney General for Northern Ireland ('AG') to reconsider the decision.[2] The AG duly directed that an inquest be held: his[3] reasoning included that Michelle had been a vulnerable person for whom the state had a 'heightened responsibility' and that the investigation by the NHS Trust into her death was insufficient to discharge the obligations which he believed arose under Article 2 ECHR.

Mrs Downey thereafter expected an Article 2 compliant inquest, where the actions and inactions of the relevant NHS staff and the police could be subject to further scrutiny. However, the Coroner was not initially persuaded that any Art 2 procedural obligations arose.

The issue rumbled on for months, with some oral argument heard at two PIRs, culminating in the Coroner, in February 2020, offering to revisit his preliminary view that Art 2 obligations were not engaged 'on receipt of written submissions from the next of kin'.

The Attorney General's contribution

The next of kin were in the process of applying for exceptional public funding which was understood to be dependent upon whether the inquest was to be Article 2 compliant. It seems Mrs Downey did not yet have the funding to pay counsel to settle written legal submissions on her behalf.

In the meantime, in June 2020, the Attorney General provided the court with his own written submissions on the scope of the inquest and the applicability of Article 2. Those submissions concluded that questions regarding Michelle's interaction with agencies of the state 'ought to be raised and, so far as possible, answered in an inquest capable of discharging the procedural rights

under Article 2.'

The Coroner wrote back to the Attorney General asserting that the office of the AG no longer had any role in the case and so should not be directing and/or making legal submissions to the Coroner in inquest proceedings unless directly invited to do so by the Coroner as a properly interested person or otherwise.[4]

The apparent predetermination

The Article 2 issue had still not been decided when, in August 2020, as part of the assessment of the family's public funding application, the LSA asked the Coroner for his view.

The coroner replied stating that this was a one-day case that was not complex and that '*this is not an Article 2 ECHR inquest*' but involved relatively straight forward factual issues. As such, wrote the Coroner, the family would be able effectively to participate without legal representation. He also informed the LSA that he had '*instructed coroner's counsel who will be able to assist the next of kin*', and so, '*legal representation for the family will not be necessary to assist me*.'

Pausing there – the basis for instructing Counsel to the Inquest must be very different in Northern Ireland from the position in England and Wales. It would be wholly remarkable in this jurisdiction for CTI to be instructed in a one-day, non-complex, non-jury, non-Art2 case, particularly where the Coroner has explicitly expressed the view that it is unnecessary for the bereaved to have any public funding for their own representation. On this side of the Irish Sea public funds being expended to instruct counsel to assist the Coroner is overwhelmingly only justifiable in complex and substantial cases with: multiple interested persons with legal representation; large numbers of witnesses; disputed and complex expert evidence or factual issues; voluminous or complex documentations; adversarial subtext; novel points of law; national security concerns or other sensitive material; special measures for vulnerable witnesses; long duration of the inquest or mass fatalities.[5]

Funding decision and recusal application

In any event, public funding was eventually granted to the family in October 2020 and, a few weeks after this, a letter requesting the Coroner recuse himself was sent, citing his position as expressed in response to the LSA as evidence of actual or apparent bias on his part.

The Coroner heard oral submissions on recusal in February 2021, when he refused to recuse himself and agreed to provide written reasons for his decision. Two months later the Coroner still had not provided any written reasons and so a JR letter before action was issued. The written reasons arrived a week later, but did not head off the JR.

The decision

Mr Justice Rooney emphasised that this was '*not a straightforward decision*' – judicial code perhaps for "***this was a pretty close run thing***"? But sensibly determined that a single comment in the letter to the LSA was not sufficient to demonstrate actual or apparent bias where it had been abundantly clear in all other dealings with the case that the Coroner had only come to a preliminary view.

Considering the issue of pre-determination as a form of bias, Rooney J took from *Lewis v Redcar and Cleveland*[6] thedistinction between a mere disposition, which is legitimate, and the predetermination which comes with a closed mind, which is illegitimate.

In the judge's view, the application of the well-known *Porter v McGill* 'fair minded observer' test in

practice was that being 'predisposed' towards a particular outcome was not objectionable unless there was positive evidence to show that there was indeed a closed mind. A prior observation or apparent favouring of a particular decision should not suffice to persuade a court to quash a decision. The judge drew on comments of Lord Hope in *Helow*[7]

'The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively'

Here, said the judge, the fair-minded observer would bear in mind that the Coroner had openly said at a number of pre-inquest review hearings that he had not decided the matter and would receive further submissions, and take this as positive evidence that he had not closed his mind. The coroner had also acknowledged his error saying that his response to the LSA had been 'poorly worded'. The coroner was a professional judge with years of relevant training and experience, the judicial oath of impartiality was of course not determinative of recusal issues, but it must, nonetheless,rank as a factor of some potency.

On the whole, the judge felt that the assumptions made by the applicant, although plainly understandable, were not to be attributed to the impartial observer and so the application was dismissed.

Comment

This case is welcome reminder that there is nothing wrong with a coroner expressing a preliminary view on a point. Indeed, in many cases it will assist Interested Persons and their advocates to do so, as participants will then know where their appropriately focussed submissions should be directed. Expressing a preliminary view is a legitimate position, provided all the relevant factors and viewpoints are still considered, they are subjected to a balancing exercise and the mind of the decision maker remains open and receptive to all arguments up until the decision is made.

Unfortunately, in this case, the position of the Coroner in the eyes of the claimant may not have been helped by the strident way in which he had taken against the Attorney General, expressing any view. At the PIRH the Coroner had stated "*I don't intend to take any account of those submissions at all, because the Attorney General has absolutely no standing to make submissions at all*". It may well be correct in law, that the AG had no formal locus but, when operating in an inquisitorial jurisdiction, declining to countenance submissions from an informed law officer with a legitimate interest in the matter does not give an appearance of remaining open-minded. Even more so perhaps when the bereaved mother was agreeing with the AG's submissions, but did not yet have the funding to make her own submissions on the same topic.

The judge himself acknowledged having initially had '*significant concerns that the respondent had predetermined the issue and should have recused himself*.' Nevertheless, many will also have sympathy with a coroner faced with such a tricky Art 2 application to decide. The facts of this death are not made clear in the judgment, beyond it being said that the Coroner had indicated that 'the deceased was not an in-patient or detained patient'. It could well be that the Coroner's preliminary view was correct in law – although the Art 2 picture is still evolving regarding deaths of mental health patients in the community, with *Morahan* coming before the Court of Appeal in June 2022 and *Maguire* also now heading to the Supreme Court.

In the meantime some wider learning might be taken from this case:

- Be very careful about how you express opinions – preliminary views are fine to hold but make

it very clear they are preliminary, whoever you are communicating with.
- If you do misspeak, just ‘fess up’ and clarify the position immediately. Put it right and apologise where appropriate. Don’t wait for someone to JR you before you acknowledge something could have been expressed in better terms.
- If a person who is informed of the facts of a case and is sufficiently experienced in the law (such as an Attorney General) provides a legal submission – even if completely uninvited – what harm is there to fully consider the submission? There is coronial discretion to consider a submission made by anyone, and in an inquisitorial jurisdiction considering a relevant and informed view, even one you disagree with, might just help you find the right route to the right decision
- In England and Wales there is no formal consultation with a coroner before a public funding application is granted. A coronial decision that Article 2 obligations do arise may be of assistance to the bereaved in an exceptional funding application, but to write to a public funding agency, be that in support of or against allocation of funding, may appear as the judiciary seeking to influence decisions to be made by the executive.
- Finally, if you say you will give written reasons for a decision then do it – failing to produce a promised decision will invariably bring on a JR, no matter how persuasive your reasons would have been if they had been produced more promptly.

Footnotes

[1] An inquest in such circumstances being discretionary in Northern Ireland under (1) of the Coroners Act (Northern Ireland) 1959.

[2] Under (1) of the Coroners Act (Northern Ireland) 1959, 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 any coroner to conduct an inquest.

[3] John Larkin QC was AG for NI until 30 June 2020, since when Brenda King has been in post.

[4] The letter was never actually sent, but it seems this was only due to an administrative oversight.

[5] See Chief Coroner’s Guidance No 40 here

[6] [2009] 1 WLR 83

[7] *Helow v Secretary of State for the Home Department* [2008] UKHL 62