Probably suicide, but undoubtedly unlawful killing (at least for now)

written by Meelis Magland | 14 May 2019

***R (Maughan) v Senior Coroner for Oxfordshire, the Chief Coroner as intervenor (and INQUEST as an interested party)* [2019] EWCA Civ 809**

After the seismic shift that followed *Maughan* in the Divisional Court it was remarkable that no one seemed to be predicting any aftershocks when the Court of Appeal considered the case. After all, what had always seemed so obvious one way, was now just so obvious the other way once you stopped and thought about it. Indeed, why on earth did any of us ever think that something that has not been a crime for more than half a century should require proof to a criminal standard within a civil inquisitorial jurisdiction?

All the sensible money was on the Court of Appeal upholding the first instance decision. They have not disappointed. Dismissing the appeal the CoA have now concluded that:

- the civil standard of proof is to be applied to factual findings and determinations in inquests generally, including to findings of suicide (whether expressed in narrative or short-form conclusions);
- the criminal standard of proof (exceptionally) applies to the unlawful killing conclusion.

This was an appeal from the Divisional Court which, in July 2018, had decided (off its own bat) that the standard of proof to be applied to all cases of suicide, both for short-form and narrative conclusions, was the civil standard (see our earlier blog here).

The bereaved brother appealed that decision, arguing that the criminal standard should have applied. Unusually, the Chief Coroner applied to intervene in order to advance detailed arguments representing the pros and cons of the respective positions as well as to set out the position on unlawful killing. INQUEST also made written submissions strongly advocating that, in principle, the standard of proof at an inquest should be the same for unlawful killing and suicide: and that there is no proper justification for a higher standard of proof for issues of unlawful killing raised at inquests

The writing was already on the wall in November 2018 when the Northern Irish High Court (in *Steponaviciene's Application*[1] – see our earlier blog here) had reprised and supported the arguments in favour of the civil standard. In *Steponaviciene'* nine first instance cases that the Divisional Court had not been referred to in *Maughan* had been reviewed. But now the Court of Appeal could also deal with the sticky question of an apparently contrary appellate level decision in *R v Wolverhampton Coroner, ex parte McCurbin*[3] .

In a detailed and well-reasoned judgment the Court noted it was –

> *"elementary, but nevertheless essential to emphasise that inquests are not to be regarded as litigation."*

Having found little support for the appellant in first instance decisions (which for the most part had assumed, without argument on the point, that the criminal standard of proof applied in cases of

suicide) the CoA went on to consider the groundwork already established by the House of Lords in the family law setting of cases concerning allegations of sexual abuse. That law was clear:

> *"there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not"[2]*

The CoA identified five reasons why the appropriate standard of proof to be applied throughout in cases of suicide should also be the civil standard:

(i) the essence of an inquest is that it is primarily inquisitorial, and not concerned to make findings of guilt or liability;

(ii) since 1961 suicide had ceased to be a crime;

(iii) the civil courts nowadays generally apply in civil proceedings the ordinary civil standard even where the proposed subject of proof may constitute a crime or suicide;

(iv) the importance in Article 2 cases of a proper investigation into the circumstances of death under s.5(2) of the 2009 Act and the answer to the question "how?", strongly favours the imposition of the lower standard of proof;

(v) the application of the civil standard to a conclusion of suicide expressed in a narrative conclusion would cohere with the standard applicable to other potential aspects of the narrative conclusion.

Authority did not compel a different result: *McCurbin* (in which the CoA had stated that in cases of suicide, the applicable standard of proof at an inquest was the criminal standard) did of course bind this court. But *McCurbin* only bound this court for what it *actually* decided, and *McCurbin,* was a case on unlawful killing.

As the CoA recognised, the Divisional Court at first instance had "adopted a bold approach in departing from what had been regarded as settled law and practice for over 35 years". Particularly bold when this was a departure from the previously understood position that none of the parties appearing before the Divisional Court were actually arguing for. Nevertheless, it was held to be right in the ultimate conclusion. And it is hard to see that the Supreme Court will now disagree.

However the real future interest is in what might now be determined about the coronial standard of proof for unlawful killing. The CoA have said that there are "powerful arguments" for subjecting that conclusion to the civil standard of proof, but that the issue was foreclosed to them by *McCurbin*. No surprise then that permission was readily given to appeal further to the Supreme Court, where although appeal on the suicide point might seem rather hopeless, the unlawful killing issue could still hit the Coronial Richter scale.

In the meantime the Court has urged the Government to address the matter by further Coroners Rules and invited the Chief Coroner to revise his Guidance No. 17 on Short Form and Narrative Conclusions and the Bench book. The Chief has already notified all Coroners that revised documents will be circulated in due course.

Footnotes

[1] [2018] NIQB

[2] *re H (Minors)* [1996] AC 563; *re B (Children*) [2008] UKHL 35, [2009] 1 AC 11.

[3] [1990] 1 WLR 719