Taking the Fiat to the end of the road: s.13 applications & challenging the Attorney General

written by Bridget Dolan QC | 7 June 2018

***R (Lyttle) v (1) Attorney General (2) HM Senior Coroner for Preston* [2018] EWHC,**

In a useful reminder of the constitutional position of the Attorney General, this Administrative Court decision has made it clear that should the Attorney General refuse to give a *fiat* this will be the end of the road for any Claimant hoping to make an application under of the Coroners Act 1988 for a fresh inquest.

Unlike Judicial Review proceedings, where permission to proceed with a claim is sought from the High Court, applicants hoping for an order for a fresh inquest under Coroners Act 1988 must first seek permission to proceed (a *fiat*) from the Attorney General. As with the High Court Judicial Review permission stage, the purpose of the fiat is to weed out unmeritorious or frivolous claims. But unlike the High Court – where refusal of permission on the papers may be followed by an oral permission hearing – the Attorney General's decision, which is always made on the papers, will be final.

The Attorney General is answerable to Parliament, not to the Administrative Court in this respect, hence challenging the *fiat* decision in the High Court is not only futile but, as in the present case, the applicant also risks having costs awarded against them when the Attorney General inevitably succeeds.

Facts

The Claimant's mother had died in hospital as a consequence of metastasised carcinoma. She had received palliative care. At her inquest the Claimant asserted that his mother had been unlawfully killed by an overdose of morphine; the Senior Coroner returned a conclusion of 'natural causes'. There was a wealth of medical evidence that morphine doses given to the deceased were at the low end of the range that can be prescribed in palliative care, that the morphine had been delivered by a properly functioning syringe driver, that she showed no clinical signs of morphine toxicity and that the prescribed doses accounted for the levels of morphine found at post-mortem, once proper account was taken of the potential accumulation of morphine due to deteriorating kidney and liver function in patients in the end stage of life.

Dissatisfied with the conduct and outcome of the inquest the Claimant (a litigant in person) sought a *fiat* of the Attorney General to permit him to bring a challenge in the High Court.

The Attorney General, having considered representations from the Senior Coroner and the relevant NHS Trust, declined to give his fiat. When the Claimant then sought to Judicially Review that decision Mr Justice Lane not only resoundly dismissed his application as "hopeless" but awarded costs against the Claimant stating that:

> *"The Attorney General's decision [to refuse a fiat] is not susceptible to Judicial Review. He is answerable in this regard to Parliament, not the Administrative*

Court".

Even if that were not the case, held the judge, the Attorney General's decision would only have been challengeable on traditional Judicial Review grounds of irrationality or illegality and there was "no trace" of either in the Attorney General's decision making. It was also "unarguably clear", said Lane J, that there was "no merit in the challenge" to the Senior Coroner's conduct of the inquest or his decision-making.

Furthermore, the Claimant had had opportunity to consider the detailed responses of the Senior Coroner and the NHS Trust when his fiat application had been made. That he continued to take issue with matters did not justify him making such meritless challenges to the Attorney General's decision.

Costs

Lane J was clearly intending to firmly discourage any further unmeritorious proceedings by awarding the Attorney General the entirety of his costs of resisting the permission application against the Claimant.

Whilst a Defendant is not generally entitled to recover costs of an oral permission hearing, costs of an Acknowledgment of Service and preparation of summary grounds are recoverable (but will exclude pre-permission costs), albeit that the court will expect that the Defendant will not have incurred substantial expense at this initial stage (*R (Ewing) v Deputy Prime Minister* [2006] 1WLR 1271). The normal rule however, is that two sets of respondent's costs are not awarded against an unsuccessful claimant for Judicial Review where the respondents' resistance covers the same issues (*Bolton MBC v SSE* [1995] 1 WLR 1176).