CO/3656/2014

Neutral Citation Number: [2015] EWHC 1658 (Admin)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M3 3FX

Thursday, 26 March 2015

B e f o r e:

MR JUSTICE WALKER

Between:
THE QUEEN ON THE APPLICATION OF WIGGINS
Claimant

- v -

HER MAJESTY'S ASSISTANT CORONER FOR NOTTINGHAMSHIRE
Defendant

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr J Bunting appeared on behalf of the **Claimant**
Mr M O'Brien QC appeared on behalf of the **Defendant**

J U D G M E N T
(Approved)

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1. MR JUSTICE WALKER: This is a renewed application for permission to apply for judicial review.

2. On 8 June 2013, Mr Louis Shaw, prisoner at HMP Ranby, was pronounced dead. He was then aged 23. He had been found hanging in his cell that morning. The Claimant, ("Ms Wiggins") was his mother. The Defendant is an Assistant Coroner, Mr Ivan Cartwright, who conducted an inquest into Mr Shaw's death from 6 to 8 May 2014.

3. On 7 February 2014, Stephensons Solicitors LLP ("Stephensons") Ms Wiggins' solicitors, wrote to the coroner's office. Their letter said that they were in the process of making an application for exceptional funding from the Legal Aid Agency. That application would enable them to provide Ms Wiggins with representation at the inquest into Mr Shaw's death, which had been listed for 6 to 8 May 2014.

4. Stephensons sought confirmation that the inquest would be an "Article 2 inquiry". By this they meant that it would be an inquiry in compliance with the United Kingdom's obligation under Article 2 of the European Convention on Human Rights as explained by the House of Lords in R (Middleton) v West Somerset Coroner [2004] UKHL 10,[2004] 2 AC 182.

5. In response, an e-mail was sent by the coroner's office on 13 March 2014 confirming that Article 2 was engaged and there would be a jury inquest to examine how and in what circumstances Mr Shaw's death had occurred.

6. A further e-mail dated 27 March 2014 informed Stephensons that there would be a pre-inquest review on 15 April 2014. The e-mail gave a list of witnesses to be called along with a list of witnesses whose evidence was to be read.

7. On 11 April, Stephensons wrote to the office warning that delays in obtaining an exceptional funding certificate from the Legal Aid Agency may have the result that Ms Wiggins would need to request an adjournment of the inquest. On 28 April 2014, Stephensons wrote an urgent letter to the coroner's office requesting an adjournment because the application for exceptional funding was still outstanding. That request was refused by letter dated 30 April 2014. The inquest accordingly went ahead on 6 to 8 May 2014.

8. In a claim form seeking permission to apply for judicial review lodged on 5 August 2014, Ms Wiggins identified three grounds for seeking judicial review.

9. Ground 1 comprised two alternatives. What I shall call "ground 1A" was that an adjournment should have been granted in order to enable Ms Wiggins to play an effective role in the investigation. What I shall call "ground 1B" was that the Defendant failed in his duty to ensure that Ms Wiggins played an effective role at the inquest.

10. Ground 2 was that the Defendant considered evidence only in relation to the immediate cause of death and did not appear to have considered wider systemic issues that arguably caused or contributed to Mr Shaw's death. This was said to be an unlawful

failure to investigate fully, fairly and fearlessly into the circumstances of Mr Shaw's death.

11. Ground 3 was that the Defendant directed the jury that they could not record criticism of anyone where "it is not actually causative of death" and that any shortcomings in this case did not cause or contribute to death. This is asserted to have been an unlawfully narrow approach to causation in an Article 2 inquest. Ground 3 relied upon the Court of Appeal decision in Sarjantson v Chief Constable of Humberside [2013] EWCA Civ 1252, [2014] QB 411 in this regard.

12. On 2 September 2014, the Defendant filed an acknowledgment of service accompanied by summary grounds of resistance. The Governor of HM Prison Ranby was named in the claim form as an interested party. The court was advised by the Treasury Solicitor that the Governor did not propose to play any part at the permission stage.

13. On 7 September 2014, Ms Wiggins filed an outline response to the Defendant's summary grounds of resistance. An e-mail dated 15 September 2014 on behalf of the Defendant objected to this course. That e-mail observed that CPR 54 does not provide a Claimant with a right to submit any such pleading. It complained also that the outline response sought to add or develop new arguments and to re-argue certain points. A request was made that the outline response should not be considered by the judge when deciding whether or not to grant permission.

14. In my view, the approach urged in the email of 15 September 2014 would not have been in the interests of justice. I am not for a moment encouraging claimants to lodge unnecessary responses, nor can a claimant assume that there will be an opportunity to lodge a response. However, where a response has been lodged, it may assist the court to know what, if any, answer there is to the points made in the Defendant's summary grounds of resistance.

15. It could well be that an answer might, in order to be effective, necessitate a request for permission to amend the grounds of claim. Even so, it may assist the court to know what is proposed. If new points emerge as a result, then it will often be better that they emerge at the paper stage rather than on an application to renew. If the new points do not give rise to an arguable case, then the judge can explain this when giving reasons for a decision refusing permission. If the judge concludes that they do or might give rise to an arguable case, then the judge can consider how to proceed in a manner which will be consistent with the requirements of the overriding objective.

16. In the present case, permission to apply for judicial review was refused on papers by His Honour Judge Pelling QC in an order dated 15 September 2014 and sealed by the court on 22 September 2014. It is not clear whether the judge considered the outline response. Notice of renewal was duly served on behalf of Ms Wiggins on 25 September 2014. The notice was accompanied by four short grounds for renewal.

17. On 18 March 2015, a skeleton argument on behalf of the Defendant was filed. In support of the renewal application, a skeleton argument was filed on 23 March 2015. Also filed on 23 March 2015 was a witness statement of Miss Gemma Vine, a solicitor

of Lester Morrill Solicitors in Leeds. She explained that her firm specialised in representing bereaved families at inquests.

18. At the oral hearing before me today, Mr Jude Bunting has represented Ms Wiggins and Mr Mike O'Brien QC has represented the Defendant. Mr O'Brien has helpfully provided a supplementary skeleton dated 25 March 2015.

19. On ground 1, His Honour Judge Pelling said this:

> Ground 1: Whether or not to grant an adjournment is an exercise of discretion which is entirely fact sensitive. It is capable of challenge only on the basis that the challenged refusal was irrational in the public law sense. There is no arguable basis for contending that the decision in this case to refuse an adjournment satisfies that test even at the level of arguability. The letter of 30 April 2014 contains an entirely balanced and reasoned decision. Amongst the factors that plainly provide support for that decision include the lateness of the application for funding, the lateness of the application for an adjournment, the effect of an adjournment on the date by which the inquest would then be completed and the impact on the witnesses and potential jurors who were to be called of a last minute adjournment. The Coroner was plainly entitled to refuse an adjournment for the reasons that he gave. There is no arguable basis for contending that the refusal of an adjournment was a decision that no reasonable Coroner could have arrived at.

As to this, renewal ground 4.2 stated:

> 4.2. His Honour Judge Pelling QC applied the wrong test to ground one. The test is not whether the decision to refuse to adjourn the inquest was irrational, but rather whether the Defendant acted fairly and/or in compliance with Article 2 of the Convention in refusing to adjourn the inquest. That is a question for the Court to assess for itself, not to approach on the basis of a rationality test.

20. The Defendant's skeleton argument dealt with this at paragraphs 11 to 17. Paragraph 11 contained a broad assertion that a decision by a coroner to refuse an adjournment is only challengeable on the basis that it was irrational in public law. The whole of paragraphs 12 to 17 proceeded on the footing that this assertion is correct. No reference was made to renewal ground 4.2. It also ignored what I have referred to earlier in this judgment as ground 1B.

21. Mr Bunting's skeleton argument added that the jurisprudence on Article 2 made it clear that there was a duty to ensure the effective involvement of the next of kin in the inquest and that compliance with that duty was a question for the court to determine for itself. In this regard, Mr Bunting relied on R (Humberstone) v Legal Services Commission [2011] 1 WLR 1460, R (Khan) v Secretary of State for Health [2004] 1 WLR 971 and R (Letts) v Lord Chancellor [2015] EWHC 402 (Admin).

22. In any event, Mr Bunting went on to answer points which were made on the merits of the decision to adjourn by Mr O'Brien. In that regard, reference was made to the witness statement of Miss Vine. Mr O'Brien's supplementary skeleton argument, like his original skeleton argument, did not expressly address the legal submissions that had been made on behalf of Ms Wiggins in this regard. The supplementary skeleton noted what it described as an argument that Article 2 can include a right to legal aid. It was said that this was an interesting argument, but that the present case was not where it should be canvassed.

23. In this regard, the supplementary skeleton argument went on to make an assertion that coroners can and often do ask questions for the family and that the coroner retains control of the scope of the evidence whether a person is represented or not.

24. At the hearing this morning, I drew the parties' attention to the decision of the Court of Appeal in R v Takeover Panel ex parte Guinness PLC [1990] 1 QB 146. That case appears to me to have relevance to ground 1. It is not, of course, concerned with inquests or with Article 2. It does, however, establish that whether or not a refusal of an adjournment complies with the common law obligation of procedural propriety is a matter for the court to determine and it is not sufficient for a Defendant simply to show that the decision was not irrational.

25. In oral argument today, Mr O'Brien began by repeating the stress he had placed earlier upon the coroner's ability to retain control over which witnesses would be called and what questions the coroner asked of them.

26. He noted that by 9 May, the merits of the matter had not been considered by the Legal Aid Agency, which had thus far been concentrating on means. He submitted that the coroner had acted with reference to his own knowledge that legal aid may not be granted. The decision was one that he submitted was taken with a great deal of clear consideration. If the inquest were re-listed, it would be more than a year after the death. That contrasted with the duty of the coroner to complete the inquest within 6 months unless it was not reasonably practicable to do so.

27. Mr O'Brien acknowledged that the decision in Guinness established that in the end, the question of procedural propriety was one for the court, although the court will have regard to the decision maker's reasons for considering that the procedure in question was fair. It was submitted that the procedure adopted by the coroner was indeed both fair and just.

28. Turning to ground 1B, in his oral submissions Mr O'Brien again repeated that the scope of questioning was determined by the coroner. This complaint, submitted Mr O'Brien, was really a dispute with the Legal Aid Agency. Mr O'Brien accepted that the Claimant, Ms Wiggins, who attended the hearing, did not in fact ask any questions.

29. In these circumstances, it seems to me that it is only today that the Defendant has sought to grapple with the true legal principles that arise. I conclude that arguable matters arise both as to ground 1A and as to what I have called ground 1B. It is

appropriate that they are heard at a full judicial review and I will give permission in that regard.

30. On ground 2, His Honour Judge Pelling stated:

> Ground 2: Is not arguable because evidence was given concerning the systemic failings on which the Claimant relies that was proportionate in the circumstances. There is no evidence that the systemic failings of which complaint was (rightly) made were probably causative of the death of the Deceased or that his death could have been prevented or even foreseen had they not occurred. The question whether a Coroner has exercised his or her discretion wrongly by failing to call particular witnesses depends on in the first instance on whether it can be said that the Coroner has overlooked a particular issue. IF the answer to that is that he or she has not then the decision whether or not to call particular witnesses can be challenged only on rationality grounds. The decision of the Coroner in this case to limit the witnesses to those who in fact were called was one that he [was] entitled to take. The obligation is not to call every witness but sufficient witnesses to enable a proper enquiry to take place. Here, the Coroner called sufficient witnesses to establish the existence of systemic failings. Indeed there does not appear to have been a dispute as to their existence. There was no evidence available to the Coroner that suggested any of these failings were or were probably directly causative of the death of the deceased. The duty of the Coroner was to confine the Inquest to an Inquiry as to the matters that were directly causative of the death of the deceased. The two officers that the Claimant identifies as witnesses who should have been called were not available to give evidence….

As to this, Ms Wiggins' renewal ground 4.3 stated:

> 4.3. His Honour Judge Pelling QC erred in considering ground two in isolation. The Court's conclusions in respect of ground two depend on (a) the Court being satisfied that the evidence was properly adduced and explored at the inquest (ground one), and (b) the Court being satisfied that the correct test for causation was applied (ground three).

31. Mr O'Brien's skeleton argument dealt with ground 2 in paragraphs 18 to 24. Mr O'Brien relied upon Goods v HM Coroner for Bedford and Luton [2004] EWHC 2931 as showing that the nature of an Article 2 inquiry depends on the context. In the more recent case of R (on the application of Lepage) v HM Assistant Deputy Coroner for Inner South London [2012] EWHC 1485 (Admin), the Divisional Court, Mr O'Brien submitted, had held that the coroner could exercise discretion about calling particular witnesses provided that this discretion was exercised reasonably in order to enable the jury to reach a proper decision on the cause of death.

32. In response, Mr Bunting's skeleton argument at paragraphs 22 and 23 identified grounds for serious concerns that there were inadequate systems in place at HMP Ranby to protect life, and that obviously relevant witnesses were not called without adequate inquiry as to whether they were able to give evidence. It added that the

failures in the present case were properly described as striking, the jury having not been presented with evidence of undeniable importance as to the timing of the death, where Mr Shaw was in the cell when he died and whether his death could have been prevented.

33. In oral argument today, Mr O'Brien took me to passages in the judgment in Lepage which undoubtedly to my mind made good his proposition that the coroner can exercise discretion about calling particular witnesses provided that this discretion is exercised reasonably in order to enable the jury to reach a proper decision on the cause of death. That proposition is not, as it seems to me, of itself in dispute. The question is what is required by Article 2 in those circumstances and what was required by reference to the particular position in this particular case?

34. I am not by any means encouraging Claimants to take issue with detailed assessments arrived at by a coroner in circumstances where there is no striking failure of the kind asserted in the present case. It does seem, however, to me that the failures which are asserted in this present case appear to be sufficiently striking to warrant the grant of permission to apply for judicial review on ground 2.

35. On ground 3, His Honour Judge Pelling stated:

> Ground 3: Is unarguable because the duty of a Coroner when directing a jury is to direct the jury in any narrative verdict to address only matters which probably had a causative connection to the death being investigated. The direction by the Coroner that the jury should consider what he described as shortcomings or failings and then decide "…whether there is any link between any failing and Mr Shaw's death" was in my judgment in conformity with the case law applicable in this area and the contrary is not realistically arguable.

As to this, Ms Wiggins' ground for renewal 4.4 stated:

> *4.4. His Honour Judge Pelling QC has provided no adequate reasoning for rejecting the Claimant's submissions that the case of* Sarjantson *required guidance on the correct approach to causation in the Article 2 context.*

36. Mr O'Brien's skeleton argument dealt with ground 3 at paragraphs 25 to 28. Mr O'Brien relied upon the decision of the House of Lords in R (L) v Secretary of State for Justice [2008] UKHL 68, [2009] 1 AC 588 for a proposition that it is the duty of the coroner in considering a narrative finding to address only those matters which probably had a causative connection to the death being investigated.

37. Mr O'Brien also relied upon what was said in the decision of the Court of Appeal in R (Lewis) v Mid and North Shropshire Coroner [2009] EWCA Civ 1403, [2010] 1 WLR 1836 as justifying a proposition that the inquest process can be visualised as a funnel: wide at its opening, but narrowing as this evidence passes down it so as to exclude non-causative factors from the eventual verdict.

38. However, it appears to me from the report that the proposition Mr O'Brien relies upon was a proposition advanced in argument on behalf of the coroner in that case. Mr O'Brien accepts that that was so and he accepts that it was not a proposition which was adopted by the court. He submits, however, that the proposition accurately summarised the case law. He added that the coroner in this case took a proper view.

39. As to the case of Sarjantson, Mr O'Brien contended that it was not inconsistent with what had been said about causation in Lewis and in other cases. The references relied upon from Sarjantson were passages where the court was considering liability. Those passages were not applicable to the questions which arise for a coroner, submitted Mr O'Brien. Accordingly, Sarjantson, he submitted, did not involve a conflict with established law concerning verdicts at inquests.

40. In his skeleton argument, Mr Bunting acknowledged that the propositions he contended for appeared to be inconsistent with earlier Court of Appeal authority. He submitted, however, that the earlier authority had not involved consideration of arguments arising from what had been said in Sarjantson.

41. The overall submission from Mr O'Brien remained that all that the Claimant appeared to be doing in this regard was seeking the opportunity to argue against established law.

42. In my view, the question whether the reasoning in Sarjantson has an impact upon what has been said in earlier cases is a question which may well merit full argument should the case be taken to the Court of Appeal. I think it desirable Ms Wiggins should have permission in this regard so that on her behalf, should counsel consider it appropriate, it can be submitted that the decision in Sarjantson gives rise to grounds for asserting that the position is not as clear cut as may have been thought earlier.

43. Whether that submission is one which should be advanced at first instance or should be reserved for an application for permission to appeal to the Court of Appeal, should that the be necessary, is not a matter upon which I express any view.

44. In those circumstances, I will grant permission on all three grounds.

45. MR BUNTING: I am very grateful. Your Lordship has given a detailed judgment that I have struggled to keep up with as your Lordship has gone through. Those instructing me have asked if it might be possible for a transcript to be made available of the helpful judgment that your Lordship has given.

46. MR JUSTICE WALKER: The parties can order a transcript --

47. MR BUNTING: I am very grateful.

48. MR JUSTICE WALKER: -- but the Administrative Court will advise about the procedures in relation a transcript.

49. MR BUNTING: I am obliged. In respect of the hearing itself, I understand that those instructing me have been in discussions with the Administrative Court office in respect of whether this case should be listed before a Divisional Court. It is not something

which I express any view on, but I thought it proper to raise it in front of your Lordship this afternoon.

50. MR JUSTICE WALKER: Well, what I had in mind was to ask counsel to seek to agree directions.

51. MR BUNTING: Yes.

52. MR JUSTICE WALKER: There is a potentially complicating factor which is whether the Governor will want to be involved in the detailed grounds stage.

53. MR BUNTING: Yes.

54. MR JUSTICE WALKER: I would hope that whatever timetable you are able to agree upon, it may be that the timetable in the Rules will work out perfectly well. I would hope so, but if there is going to be any adjustment to that timetable, then that needs to be sorted out promptly.

55. MR BUNTING: Yes.

56. MR JUSTICE WALKER: Insofar as the position of the Defendant is concerned, I hope it can be sorted out today --

57. MR BUNTING: Yes.

58. MR JUSTICE WALKER: -- but if there is to be any request for an adjustment to the timetable on behalf of the Governor, that will need to be dealt with promptly.

59. I think it is desirable that I should make an order, and the order that I would ask you to draft should include this, that I direct that the transcript of what I have said today should be expedited.

60. MR BUNTING: If I could just take a moment to seek some instructions, my Lord. **(Pause)**

61. I am very grateful. I have no further submissions.

62. MR JUSTICE WALKER: Will you both be here for a little bit of time this afternoon?

63. MR BUNTING: We can be if that assists your Lordship.

64. MR O'BRIEN: I do have another appointment later this afternoon, but if it would be about 2 o'clock --

65. MR JUSTICE WALKER: Right. Well, if you are available, I am sorry it may break into your lunch break.

66. MR O'BRIEN: Yes. It is not my lunch break that is the problem.

67. MR JUSTICE WALKER: If you are able to talk to each other about an agreed order --

68. MR O'BRIEN: Right.

69. MR JUSTICE WALKER: -- then that would be useful. I will understand if you cannot get it sorted out this afternoon, but please can you make sure to get it sorted out on Monday --

70. MR O'BRIEN: Very well.

71. MR BUNTING: Yes.

72. MR JUSTICE WALKER: -- and e-mail it through to the court?

73. MR BUNTING: I am obliged. I do not know if your Lordship's assistants are able to give us contact details for the court. I am assured those instructing me already have them, actually.

74. MR JUSTICE WALKER: Yes. You will have contact details for the Administrative Court. It is the Administrative Court Office, Manchester.

75. MR BUNTING: Yes. I am very grateful.

76. MR JUSTICE WALKER: Yes.

77. MR BUNTING: Thank you.

78. MR JUSTICE WALKER: Anything else that I can deal with now?

79. MR BUNTING: No. I am obliged.

80. MR JUSTICE WALKER: Thank you. I will hold on to the papers for the purpose of preparing and checking the transcript when it arrives.