Neutral Citation No: [2018] NIQB 109	*Ref:* **McC10780**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered ex tempore:* **13/11/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY ANN COULTER FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

ONE OF THE CORONERS FOR NORTHERN IRELAND

_____

McCLOSKEY J

[1] Ann Coulter ("the Applicant") challenges a ruling of the assigned coroner relating to the application of Article 2 ECHR in the inquest concerning the death of her son Christopher. The reasons for the acceleration which this case has enjoyed in this court will become quickly apparent.

[2] At the outset, I draw attention to the very sad background of this case. This young teenager was aged only 15 when this tragic fatality occurred. One cannot but be struck by the date of Christopher's death. It was 18 December 1994 - fully 24 years ago. The family received an inquest outcome of "asphyxia due to epileptic seizure" in August 1995. The central issue for the family has at all times revolved around the undisputed fact that some two weeks prior to his death Christopher, who was in perfect health, received a measles/rubella vaccine at school, as part of a national immunisation programme. The family vehemently believe that this is what killed their son.

[3] The family has been battling against the 1995 inquest verdict for over 20 years. An important watershed was reached when the Attorney General made an order under Section 14 of the Coroners Act requiring a new inquest to be held. Once again one is inevitably struck by the date: the order was made on 7 February 2012 and almost seven years later there has still been no fresh inquest.

[4] Now the family finds itself in a judicial forum which ought in principle to be one of last resort – a reflection, doubtless, of their desperation. Their judicial review

challenge has two limbs. The first is directed to the Coroner's ruling that an Article 2 ECHR/"Middleton" type inquest is not considered appropriate, albeit the Coroner has stated that this will be subject to review as the inquest progresses.

[5] The second matter relates to funded legal representation. The family do not qualify for public funding and are unable to afford legal representation. Their only hope is that the Legal Services Commission ("LSC") can be persuaded to grant them so-called "*exceptional funding*" in accordance with the guidance promulgated by the Lord Chancellor. The latter instrument lists, inexhaustively, a series of factors to be taken into account. One of these is the views of the Coroner, where available. In the impugned ruling the Coroner expressed no views on this issue and, indeed, went further, protesting that it was not her function to do so.

[6] The Applicant's case is that the Coroner erred in law in each of the foregoing matters.

[7] I return briefly to the narrative. Following the order of the Attorney General dated 7 February 2012 the Coroner, some 14 months later, by letter dated 17 April 2013 provided a provisional inquest date hearing of 17 June 2013. Here I find another disturbing fact, namely that almost 5½ years have elapsed since the Coroner's proposed inquest hearing of 17 June 2013 came and went. I note further that there was another hearing date of 19 November 2013 and I take cognisance that the next of kin precipitated the adjournment of that for sundry reasons, one of which was one of the issues that is before this court, being their inability to secure exceptional funding from the Lord Chancellor. I note that there have been various communications with the LSC.

[8] I record that there was then another lengthy delay, of 14 months duration, between February 2015 and April 2016, marked by outright inertia. The funding issue continued to percolate, particularly in 2017. The first preliminary hearing in the Coroner's court was listed for 27 October 2017, just a couple of months shy of six years after the Attorney General had ordered a fresh inquest.

[9] The point about that kind of delay is that while I can see that there has been activity during the past 12 months, dating from the first preliminary hearing, that activity began many years after it should properly have begun. That is the problem with earlier delays. The court is aware the Coroner's Service, in common with every public authority, has a limited budget and finite resources. But where one has an enormous delay of the dimensions noted already an appeal to limited resources and finite budget begins to lose whatever strength or merit it might otherwise have had.

[10] At this stage of the saga, it has, thankfully, been possible to introduce an insertion of acceleration. As the first order of this court makes clear the papers were brought to my attention following the lodgement of the judicial review application on 14 September 2018, this court made its first Order within two days and this case has progressed on an accelerated fast track ever since. Summarising, the court is

profoundly concerned at the overall delay in this case. This matter has been hanging over the family for 24 years and that is a frankly highly disturbing figure.

[11] I now come to another issue to which I am going to refer to only in a tangential way, since otherwise it would result predictably in some kind of obstruction or delay in these proceedings which the court will not permit to happen. There is an issue concerning whether the coroner is the appropriate respondent in judicial review cases. The principle is found in *Re Darley's Application* [1997] NI 384 and it was considered most fully by the Court of Appeal in *Re Jordan's Applications* [2016] NI 107. I refer particularly to paragraphs 16-18 of the judgment.

[12] I am not raising the Darley principle as an issue of substance in the present case because of the compelling need for expedition. To convert this into an issue of substance would defeat the object of the expeditious track on which this case has been advanced from day one. It is, however, something which coroners must bear in mind in every single judicial review in which they are involved. If this case had been proceeding at a more leisurely stage in this court one would have raised this at an earlier phase probably at some kind of preliminary or interim case management hearing and the outcome of that might well have been that the so called *legitimus contradictor* or respondent would be the Public Health Agency with the coroner an interested party but more of a spectator, an interested one of course, than anything else.

[13] I now turn to the Applicant's reconfigured challenge via the amended Order 53 Statement. This has two targets, each noted in [4] above. I take into account that these proceedings were not issued until 25 June 2018. I am alert that, as one might expect, on behalf of the respondent coroner an issue of delay has been raised. For a host of reasons including those which I have already articulated, any resistance to this case on the basis of non-compliance with the basic time limit enshrined in Order 53 Rule 4 of the Rules of the Court of Judicature, thereby requiring the Applicant to appeal to the exercise of the court's discretion is unlikely to find much sympathy with the court. That the basic time limit has elapsed is, of course, undeniable. However, the court's discretion to extend time is one of some breadth and I do so readily. It would be a poor reflection of our legal system if this long suffering family were to be denied access to justice on the basis of non-compliance with a technical (though important) procedural requirement. They have demonstrated sufficient justification for this dispensation. Time is extended accordingly.

[14] The Applicant is first of all challenging the coroner's ruling that Article 2 of the Human Rights Convention is not engaged in the inquest proceedings. The ruling notes at paragraph 20 that the distinction between a Jamieson and a Middleton inquest may not be of great substance on issues of scope and practice and, (paraphrasing) it will rather be more directly relevant to the nature of the verdict and the findings.

[15] At paragraph 22 of the ruling the coroner states:

> *"Accordingly, I do not accept at this stage that Article 2 is specifically engaged in this inquest."*

I draw attention to three important words in that sentence and that is 'at this stage'. At paragraph 23 the coroner continues:

> *"Given that the substance of difference between the Middleton and Jamieson inquest is the extent of the verdict then I intend to keep an open mind and if any evidence is heard which suggests engagement of the Article 2 positive duty then it is possible to extend the conclusion of the verdict to incorporate by what means and in what circumstances the deceased met his death."*

[16] The importance of the way in which the coroner has expressed herself in paragraphs 22 and 23 of the impugned preliminary decision is that the ruling is not expressed in final, inflexible and once and for all terms. This is the clear import of these paragraphs. This in turn raises the question of the propriety of the intervention of the High Court at this stage, triggering reference once again to *Re Jordan* [2016] NI 107, together with and *Re McLuckie* [2011] NICA 34 at [26] and *Re C and others* [2012] NICA 47 at [8]. There are other material references, the most recent being *Re Hughes' Application* [2018] NIQB 30 at [25] to [26].

[17] The significance of this issue may be framed in the following way. There exists a live possibility that the coroner will revisit the Article 2 ruling in the course of the inquest, whether on her own initiative or upon application. There is an equally live possibility, therefore, that the inquest will make findings which are compatible with the Article 2 procedural obligation. The question for this court – a supervisory tribunal of last resort - is whether it should intervene in these circumstances having regard to, *inter alia*, the entrenched principle that judicial review is a remedy of last resort and the associated, or offshoot, principle which discourages inappropriate satellite judicial review challenges in the course of inquest proceedings. I have concluded that the appropriate course is to stay this aspect of the Applicant's challenge.

[18] I elaborate on the foregoing in the following way. This course gives the Applicant protection, it closes no door, it prejudices no party and is clearly harmonious with the overriding objective. It would, in the event that the coroner maintains her ruling that Article 2 is not engaged, leave the Applicant at liberty to reconfigure the challenge, if necessary, and to return to this court at a later stage. It is appropriate to observe in passing that the staying of the first limb of the Applicant's challenge obviates the requirement to apply to this court for permission to reconfigure this aspect of the Order 53 Statement because by the well-established practice of this court permission to amend is not required up to the stage of determining whether leave to apply for judicial review should be granted. That is

one scenario. The second identifiable scenario is that the coroner who, predictably, will be urged to give full effect to what is stated unequivocally in paragraphs 22 and 23 of the interim decision is persuaded that a broader Article 2 ECHR outcome of the *Middleton* variety is the appropriate course as a matter of law, in which event the stayed judicial review challenge to the extant ruling would become academic and would not have to proceed.

[19] This brings me to the second aspect of the Applicant's challenge. Quoting from paragraph 3.2 of the amended Order 53 Statement:

> "*The applicant further challenges the coroner's decision in that ruling that it is not the function of the coroner to comment upon the provision of legal aid for the purposes of representation at an inquest.*"

In paragraph 24 the coroner says the following:

> "*While I fully agree with counsel for the next of kin that it is important that the family are able to engage within the coronial process it is not the function of the coroner to comment upon the provision of legal aid for the purposes of representation at an inquest.*"

The coroner then elaborates briefly by reference to engagement of coroner's counsel and the steps being taken by the coroner for the attendance of what are described as numerous medical experts to attend the inquest and to give evidence. This prompts the coroner to say the following:

> "*I consider that all necessary questions will be asked and that the statutory questions will be properly addressed.*"

[20] The Lord Chancellor has promulgated guidance dated 15 December 2005 entitled "Lord Chancellor's Guidance on exceptional legal aid funding under Article 10A of the Legal Aid Advice and Assistance (Northern Ireland) Order 1981". This guidance is directed to the LSC. In paragraph 28 it addresses the topic of inquests in the following terms:

> "*For most inquests where the Article 2 obligation arises the coroner will be able to carry out an effective investigation without the need for funded representation of the deceased's family. Only exceptional cases require the public funding of representation in order to meet the ECHR Article 2 obligation. In considering whether funded representation may be necessary to comply with this obligation all the circumstances of the case must be taken into account including:*

…

(iv) The views of the coroner where given are material but not determinative."

[21] There is no reference in the Coroner's ruling to the Lord Chancellor's guidance. It seems to this court tolerably clear that the coroner – as a minimum arguably so - did not take the guidance into account. Any argument to the contrary will be very difficult indeed to sustain. It is at least arguable that the coroner was obliged as a matter of law to take the guidance into account. It is no answer to say that paragraph 28 is confined to cases where the inquest definitively entails an Article 2 obligation and thus to contend that the guidance had no relevance whatsoever in light of the coroner's Article 2 ECHR decision. The reason for that quite simply is that the coroner has not closed the door on the inquest as a matter of law having to be an Article 2 compliant inquisition. Furthermore, this is an instrument of guidance and it therefore falls to be construed by the court, in accordance with well-established principle, in a flexible and not narrow or rigid manner.

[22] The challenge enshrined in paragraph 3.2 of the Order 53 Statement is a conventional, indeed, classic judicial review challenge. I would summarise it in the following way. The coroner was obliged to at least have regard to the Lord Chancellor's guidance that was the preliminary elementary public law obligation which was engaged. For the reasons which I have given there are compelling indications that the coroner did not do so. Furthermore, it is strongly arguable that the Coroner's statement in [24] of the impugned decision – reproduced in [19] above – is erroneous in law, misrepresenting as it does the clear intent and import of the Lord Chancellor's Guidance. The court does not hesitate to grant leave to apply for judicial review against this aspect of the coroner's decision.

[23] Paragraph 28(d) of the Lord Chancellor's Guidance is a reflection of the truism that no person or agency has a better insight into the issue arising in the investigation of a death in the context of inquest proceedings than the appointed coroner. The coroner's position is unique. In advance of the public sittings, the coroner becomes immersed in the minutiae, the nuances and the subtleties of all of the issues which have emerged and continue to emerge in the important exercise of inquest hearing preparation. That is the reason why the views of the coroner on whether exceptional funding should be provided are of particular importance. Of course the guidance is absolutely correct in law to state that these views are material but not determinative. This court would however expect the views of the coroner on this issue to be treated with considerable respect by the LSC in such cases where they are available.

[24] I would add the following. There is nothing casual about what this court has stated in [9] of its initial order:

> "*This court observes that the nature, importance and complexity of the applicant's challenge combine to indicate that public funding may be appropriate*."

While what I have just said about the coroner in the inquest context applies fully to the unique position of this court in the judicial review context, there is a further dimension. The materials assembled in these proceedings include certain medical reports. A perusal of these yields the unmistakable conclusion that the medical issues in the inquest proceedings are both complex and of obvious public importance.

[25] It is appropriate at this juncture to draw attention inexhaustively to certain further considerations. The first is that the reasoning of the Attorney General in directing a new inquest into the tragic death of Christopher Coulter is, at heart, "*I consider it to be of enormous public importance that the possible role of the MR vaccine in the death of an apparently healthy boy be fully explored*". Second, the Coroners Rules confer on Mrs Coulter and her family certain rights in the inquest forum. Inquests are a unique species of legal process. They differ markedly from the criminal trial process and they differ markedly from the civil trial process. It has been said repeatedly in statements of the highest authority that they are a hybrid process which is primarily inquisitorial albeit entailing certain – in my view no more than slender - adversarial strands. Rule 7 entitles someone in Mrs Coulter's position not only to attend but also to question the witnesses. The coroner is, of course (per Rule 8 and other provisions), the driving force in the selection of the witnesses to attend, the mode of receipt of evidence - ie whether it be in written form or in oral form or a combination of both - and in the initial examination of all witnesses. However, the crucial feature from this court's perspective is that an acutely and intensely interested party such as Mrs Coulter has **a right** to question the witnesses. I emphasise the word "right": it is not a matter of discretion on the part of the presiding coroner.

[26] This prompts reflection once again on the issue of medical complexity. There are very few inquests in the real world where an interested party can effectively participate without legal representation. The court takes judicial notice of this and makes that observation based on its long experience of inquests in Northern Ireland. Inquests, like many forms of legal process, have become increasingly sophisticated and progressively formal. It is no coincidence that it has become the practice of successive coroners in Northern Ireland during the past two decades to appoint their own counsel. Indeed the court is aware of one ongoing inquest in which the Coroner has a team of three, constituted by senior counsel and two junior counsel. In the present case the Coroner has appointed an experienced junior counsel. Furthermore, the other interested parties are represented by solicitor and counsel. To this I add that coroners, by statute, are qualified lawyers who must have a minimum period of experience as practising lawyers before they become eligible for appointment to the position of coroner. Thus in the inquest underlying these proceedings an able and experienced lawyer presides, aided and guided and directed, where necessary, by another able and experienced lawyer.

[27] The rhetorical question which the foregoing reflections prompt is unmistakable: where does that leave someone such as Mrs Coulter who may find herself in this inquest forum on her own, without any form of legal representation whatsoever? Whither the principle of equality of arms, in its broad sense? Or the related principle of equal access to justice? The imbalance seems glaring. The view that those who would hold that the rights and interests of Mrs Coulter do not require legal representation in this inquest are somnambulists in an unreal world is more than respectable.

Conclusion

[28] The court orders:

(i) Leave to apply for judicial review of that aspect of the impugned decision of the Coroner concerning the approach to the Lord Chancellor's Guidance is granted.

(ii) The Applicant's separate challenge to the Coroner's provisional decision relating to Article 2 ECHR is stayed.

(iii) The parties' representatives will have a period of two weeks to absorb the content and impact of this ruling and, if necessary, to prepare an agreed timetable for the completion of these proceedings. This will not, of course, be necessary if a sensible forward course, driven by the values of the overriding objective, can be formulated consensually.

(iv) Costs are reserved.

(v) I grant liberty to apply.