Northern Ireland Law Commission

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CORONERS AND INQUEST LAW

INN OF COURT SEMINAR

30th September 2011

THE HUMAN RIGHTS ACT 1998: THE JUDICIAL ROLE AND THE IMPACT OF ARTICLE 2 ECHR ON INQUESTS

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I ARTICLE 2 ECHR

[1] Article 2 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") is one of the foremost rights protected by this instrument of international law. By dint of the Human Rights Act 1998 ("*HRA 1998*") it now forms part of the domestic laws of the United Kingdom. Under the deceptively simple banner "Right to Life", Article 2 ECHR states:

> "*1.* ***Everyone's right to life shall be protected by law****. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law*.
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
>
> *(a) in defence of any person from unlawful violence;*
> *(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection*".

These intricate and inter-related provisions invariably repay careful reading. The opening sentence, which I have highlighted, is the particular focus of this discourse.

[2] Article 2 has been repeatedly described as basic, fundamental and supreme. In the language of the European Court, Article 2 "*… enshrines one of the basic values of the democratic societies making up the Council of Europe*".[1] Comparable pronouncements are found in the texts of the UN Human Rights Committee and the Inter-American Commission on Human Rights. Long before the advent of HRA 1998, the common law had recognised a person's right to life as "*the most fundamental of all rights*".[2] In the specific context of Article 2, the European Court has emphasized the well established principle that given the object and purpose of the Convention as an instrument for the protection of individual persons, it must be interpreted and applied in a manner which renders its safeguards practical and effective.[3] In equally uncompromising language, the European Court has stated that the circumstances in which the deprivation of life may be justified [per Article 2/2] must be strictly construed, given the fundamental nature of the right in play and the consideration that no derogation from Article 2 is permissible in peace time.[4]

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[1] ***McCann –v- United Kingdom*** [1995] 21 EHRR 97, paragraph 147.
[2] ***Bugdaycay –v- Secretary of State for the Home Environment*** [1987] AC 514, at p. 531, per Lord Bridge.
[3] ***McCann,*** paragraph 146.
[4] See Article 15(2), permitting derogation in respect of deaths resulting from lawful acts of war. Notably, in ***Ocalan –v- Turkey*** [2005] 41 EHRR 45, the European Court held that the arbitrary deprivation of life pursuant to capital punishment laws *or* the deprivation of life pursuant to the execution of a sentence of a court which is not independent and impartial in the Article 6 ECHR sense would contravene Article 2: see paragraph 166.

[3] In the jurisprudence of the European Court of Human Rights, Article 2 has been repeatedly and consistently interpreted as imposing on Council of Europe Member States:

(a) A substantive obligation not to take life without justification; and

(b) An associated obligation to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life.[5]

Article 2 has a further dimension, frequently described as *procedural* or *adjectival* in nature, which has featured prominently since the commencement of the 1998 Act. This further aspect of Article 2 derives from the substantive obligation to protect the right to life (in the opening sentence of Article 2) and the general duty imposed on the state by Article 1 to "*… to secure to everyone within* [its] *jurisdiction the rights and freedoms defined in* [the] *Convention*". From these sources the European Court has derived an implied obligation on the part of the state that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. In one of the cases emanating from Northern Ireland, the Court defined this obligation in the following terms:

> "*The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention …*
>
> *It may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events …*
>
> *The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible.* ***This is not an obligation of result, but of means …***
>
> *A requirement of promptness and reasonable expedition is implicit in this context …*
>
> *There must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.*"[6]

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[5] See, for example, ***Keenan –v- United Kingdom*** [2001] 33 EHRR 38, paragraphs 88-89, a case concerning the suicide of a mentally ill prisoner.

[6] ***Jordan –v- United Kingdom*** [2003] 37 EHRR 2, paragraphs 105-109, emphasis added.

In the jurisprudence of the House of Lords, one finds the following pithy formulation:

> "*The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons from his death may save the lives of others*".[7]

[7] ***R (Amen) –v- Secretary of State for the Home Department*** [2003] UKHL 51 and [2004] AC …, paragraph [].

II THE HUMAN RIGHTS ACT 1998

[4] The launch date for HRA 1998, 2nd October 2000, now seems a distant occurrence. While most judges and practitioners were aware that something was stirring, few dared to predict the impact which this seminal statute has unquestionably had. One infamous prediction was that it would provide a field day for crackpots. Others expressed themselves in more cautious and solemn terms. In one of the early decisions, the English Court of Appeal cautioned that HRA 1998 should not be deployed to escort the court "*down blind alleys*".[8] Within a mere three months of the commencement date, an intervention by one senior English judge sparked a debate about whether Convention rights have any similarity to "*iatrogenic disease*".[9] In a later decision, the same judge categorised HRA 1998 as one of the "*constitutional statutes*", ranking it alongside Magna Carta, the Bill of Rights 1689, the Act of Union, the European Communities Act 1972 and the major constitutional devolution statutes of 1998 (The Scotland Act and others).[10]

[5] The legal community was awash with predictions that some of the newly incorporated ECHR rights would have a major influence on our legal system – in particular Article 5 (Liberty), Article 6 (Fair Trial), Article 8 (Private and Family Life) and Article 10 (Freedom of Expression). There were confident expectations that these particular rights would dominate subsequent jurisprudence and exert a real and concrete influence on the lives of citizens. I apprehend that few would have predicted, however, that during the decade to follow major questions relating to *the procedural dimension of Article 2* would occupy both the European Court and the highest United Kingdom courts. That this has occurred illustrates the profound influence which ECHR rights, suitably buttressed by the admirable machinery of HRA 1998, have had in a newly evolving legal culture. Lord Woolf has suggested that the statute has profound constitutional significance, since underpinning it is the concept that in a democratic society, both governmental action and powers granted by Parliament are limited, the rationale being that "*… the recognition of the need to adhere to the rule of law by protecting human rights is essential to the proper functioning of democracy*".[11]

[6] HRA 1998 has been variously described as revolutionary, constitutional, historic and dynamic. All of these adjectives seem apt. It is widely regarded as one of the most important measures of law reform in the history of the legal system. Arguably its greatest impact is that it does not belong to some isolated, hermetically sealed compartment of the law: rather, it applies to **all laws,** both legislation and the common law, past and future,, in a dominant, pervasive and reforming manner. Since its introduction, this statute has become the barometer for testing the validity of all pre-existing and subsequently made laws, whether legislation or rules and principles of the

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[8] ***Daniels –v- Walker*** [2000] 1 WLR 1382, pp. 1386-1387.

[9] Per Sir John Laws: ***R –v- Spear*** [2001] QB 804 paragraph [54].

[10] Thorburn –v- Sunderland City Council [2003] 2 WLR 247 where, in the unpromising context of what his Lordship described as the "*dry enough subject*" of weights and measures legislation, one finds a pronouncement of some profundity:

"[62] …In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental…And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were "ordinary" statutes and "constitutional" statutes. The two categories must be distinguished on a principled basis. In my opinion a constitutional statute is one which (a) conditions the legal relationship between citizen and State in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights."

[11] "Human Rights. Have the public benefited?" [2003] 121 Proceedings of the British Academy 301-303.

common law. Even where it does not apply directly it can be influential. This very concise outline serves to convey the unmistakable impact which HRA 1998 has had on our legal system during its relatively brief lifespan of ten years.

[7] HRA 1998 can, of course, be analysed in various ways. One simple analysis is that it has two fundamental components viz. it enshrines the substantive Convention rights which are now recognised and protected by domestic law **and** it establishes a regime for their protection and vindication. The central spine of this regime, or machinery, is found in Sections 2 – 8 inclusive. Within this machinery, the courts occupy a dominant position. They feature in one of the earliest provisions of the statute, **Section 2**, which requires any court or tribunal "*… determining a question which has arisen in connection with a Convention right …*" to take into account any relevant decision, declaration or opinion of the three Strasbourg organs – the European Court of Human Rights, the Commission and (frequently overlooked) the Committee of Ministers, *insofar as relevant.* From this point of departure, the overarching role – and responsibility - of the courts assumes progressive prominence : in **Section 3** (the requirement to construe all primary and subordinate legislation in a manner compatible with the convention rights, *so far as it is possible to do so*); **Section 4** (declarations of incompatibility); **Section 5** (intervention of the Crown in certain court proceedings); and, next, **Section 6**, which is really the fulcrum of the entire statutory regime:

> "*(1)* ***It is unlawful for a public authority to act in a way which is incompatible with a Convention right …***
>
> *(3) In this Section 'public authority' includes –*
>
> > *(a) a court or tribunal, and*
> >
> > *(b) any person certain of whose functions are functions of a public nature,*
>
> *but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament*".

[My emphasis].

[8] By **Section 7**, the mechanism for the affected citizen to establish that a public authority has acted, or proposes to act, contrary to Section 6(1) is twofold:

(a) The citizen may bring proceedings against the authority under the Act in the appropriate court or tribunal; or

(b) He or she may rely on the Convention right concerned *in any legal proceedings*.

But the citizen's right to have recourse to either of these mechanisms arises "*… only if he is (or would be) a victim of the unlawful act*". . If proceedings are brought, **Section 8** becomes operative, as this regulates the topic of **judicial remedies**:

> "*In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and equitable*".

In subsections (2) and (3), Parliament has imposed certain limitations on the power of the High Court to select an award of damages as the appropriate remedy: in short, where some other remedy (e.g. a declaration or a quashing order) is considered by the court to be adequate, damages will not be awarded.

III THE ROLE OF THE JUDICIARY AND THE SEPARATION OF POWERS

[9] In highlighting the centrality of the role occupied by the High Court in the HRA 1998 machinery, one recalls that for many centuries it has been the function and duty of independent judges to adjudicate on disputes between citizens and disputes between citizens and the state. Historically, although appointed by the King, for this purpose, judges became increasingly independent. With the passage of time, judges progressively displayed the courage and integrity required to resist the whims of despotic monarchs and to develop the common law in a way which can now be seen compatible with the fundamental rights of citizens. Some of these rights were initially enshrined in Magna Carta [e.g. the rights of access to a court and to speedy adjudication]. Today, some of the leading HRA 1998 commentators and practitioners proudly boast about the clearly demonstrable links between the statute (on the one hand) and the common law dating from Magna Carta (on the other). The independence of judges was underwritten by Parliament in an important piece of legislation, the Act of Settlement 1700. Pursuant to this statute, judges held tenure of appointment for as long as they were of good behaviour and could be removed from office only pursuant to a resolution of both Houses of Parliament. I digress to observe that in the whole of English history, *no High Court judge has been removed from office***.** To return to the present context**,** it is worth recalling the long title of the Act of Settlement:

> "*An Act for the further limitation of the Crown* ***and better securing the rights and liberties of the subject***".

[My emphasis]

[10] The separation of powers means that there is an executive which governs society; an elected Parliament which legislates for society; and an independent judiciary which adjudicates upon disputes between citizens and public authorities. The adjudication of these disputes lies at the heart of HRA 1998 and it seems truly appropriate that this crucial function has been entrusted to the judiciary. This is readily recognised as a measure which strengthens and nurtures the rule of law in society. The function, and responsibility, of independent judges in the framework of the rule of law is encapsulated in what Lord Bingham said in 1996, appropriately in a human rights case :

> "[The court] *has the constitutional role and duty of ensuring that the rights of citizens are not abused by the unlawful exercise of executive power. While the court must properly defer to the expertise of responsible decision makers, it must not shrink from its fundamental duty to do right to all manner of people*".[12]

These are profound words indeed. They are also echoed in the following formulation:

> ""*The right to carry a dispute with the Government before the ordinary courts, manned by judges of the highest*

[12] The Queen –v- Ministry of Defence, ex parte Smith [1996] QB 517, p. 556 (per Sir Thomas Bingham MR).

> *independence, is an important element in the Anglo-American concept of the rule of law*".[13]

[11] Few would deny that the independence of the judiciary is a value of supreme importance throughout the developed world. Equally undeniable is the marriage of the rule of law and judicial independence: neither partner can survive without the other. At a recent conference, one of the most senior English judges offered the following formulation of judicial independence:

> "*In a democratic country all power, however exercised in the community, must be founded on the rule of law. Therefore each and every exercise of political power must be accountable not only to the electorate at the ballot box, when elections take place, but also and at all times to the rule of law. Independent professions protect it. Independent press and media protect it.* ***Ultimately, however, it is the judges who are guardians of the rule of law. That is their prime responsibility. They have a particular responsibility to protect the constitutional rights of each citizen as well as the integrity of the constitution by which those rights exist. The judge therefore cannot be out for popularity. He – or she – cannot please everyone. He should never try to please anyone. That includes the judge himself. He should never use his office to confirm his predilections or to allow his prejudices to gain some kind of spurious judicial respectability***".[14]

As a pre-requisite to appointment, every judge must pronounce an oath (or affirmation) whereby he undertakes –

> "*… that I will do right to all manner of people without fear or favour, affection or ill will according to the laws and usages of this realm".*

This is another facet of the rule of law. While judges administer the law, they are also primarily *accountable to* the law. Thus, properly understood, judicial independence is not some kind of privilege enjoyed by judges. Those who assert the contrary are mistaken. Judicial independence is a bedrock of our system of government in a democratic society and a safeguard of the freedoms and rights of the citizen under the rule of law. This requires judges to be independent of the legislative and executive arms of government.

[12] The unwritten British constitution is firmly based on the separation of powers i.e. the separate of judicial power from executive and legislative powers. The courts are the interface between the citizen and government. While many such disputes are now determined by specialised tribunals, these are subject to the control of the superior courts. Thus every citizen in dispute with the government has a constitutional right to bring such dispute before a court, where it will be determined by judges of the highest independence. This is the cornerstone of the HRA 1998 regime. The protection and

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[13] "Administrative Law" (Wade and Forsyth, 10th Edition, p. 19).

[14] The words of the Rt. Hon. Lord Judge, Lord Chief Justice of England and Wales: 16th Commonwealth Law Conference, Hong Kong, 9th April 2009 – my emphasis.

promotion of Convention rights would be barren indeed in the absence of mechanisms for judicial adjudication.

IV THE DECISION IN RE McCAUGHEY

[13] Against this background, I turn to examine the procedural dimension of Article 2 .Northern Ireland cases have made a notable contribution to the Article 2 jurisprudence which has evolved under HRA 1998 . The names of the cases are now familiar:

- ***In Re McKerr***.[15]
- ***Re Jordan and McCaughey***.[16]
- ***Re McCaughey***.[17]

These cases, in very brief compass, raised questions concerning the ambit of inquests and permissible verdicts in the wake of HRA 1998 . All of them were considered by the House of Lords or The Supreme Court, in tandem with certain landmark English cases, including ***Regina (Middleton) –v- West Somerset Coroner***[18], the ***Amin*** case[19] and ***Regina (Hurst) –v- London Northern District Coroner***.[20]

[14] It is appropriate to highlight the broader context in which the relevant jurisprudential developments have taken place. In Northern Ireland, a discrete category of so-called "legacy" inquests has gradually materialised. There are approximately thirty of these. In broad summary, they relate to deaths attaching to which there is significant controversy by reason of the alleged involvement of the security forces. Some of these deaths occurred many years ago. The ensuing activities of the coroner in these cases has frequently generated much general interest and publicity. It is uncontentious to observe that there has been much delay in convening the inquest hearings in these cases. Some of the deaths have generated a proliferation of legal challenges, by applications for judicial review to the High Court, while the problem of limited coronial manpower and resources has also featured. The list is ever increasing having regard to the exercise by the Attorney General of his power under Section 14 of the Coroners Act (NI) 1959 to order that an inquest be conducted in certain circumstances.

[15] The recent decision of the Supreme Court in ***Re McCaughey*** [21] represents another development in the law in this sphere. This decision relates to one of the so-called "legacy" inquests, having its origins in the death of Mr. McCaughey on **9th October 1990**. The deceased was shot and killed by on duty soldiers. *The inquest is still to take place:* this proved to be a key consideration in their Lordships' reasoning. The issue to be determined was whether, under the aegis of HRA 1998, the coroner is under an obligation to conduct an "Article 2" inquest. By virtue of the decision in ***Re McKerr***[22], a dichotomy had developed. This was described in one case in the following terms:

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[15] [2004] 1 WLR 807 and [2004] UKHL 12.
[16] [2007] 2 AC 189.
[17] [2011] UKSC 20.
[18] [2004] 2 AC 182.
[19] Paragraph [2], *supra*.
[20] [2007] 2 AC 189.
[21] [2001] UKSC20.
[22] Paragraph [] *supa*.

> ***"[15]*** *In summary, the decisions in* ***Re Jamieson*** *and* ***Re MOD*** *have now been affirmed by the House of Lords. The central theme of those earlier decisions is that the statutory word "how" is to be interpreted as "by what means" rather than "in what broad circumstances". They are now to be considered in conjunction with paragraphs [38] – [41] of the Opinion of Lord Bingham in* ***Re Jordan and McCaughey****. For convenience, I shall describe the* ***Jamieson/MOD*** *kind of inquest as a "type 1" inquest.*
>
> ***[16]*** *The second genre of inquest ("type 2") is of the species arising out of the decision of the House of Lords in* ***Regina (Middleton) –v- West Somerset Coroner*** *[2004] 2 AC 182. In short, the* ***Middleton*** *doctrine governs inquests into deaths postdating 2nd October 2000, where Article 2 of the Convention is engaged. This dichotomy arises on account of the non-retrospective effect of HRA 1998, as explained in* ***In Re McKerr*** *[2004] 1 WLR 807 and in* ***Re Jordan and McCaughey*** *and* ***R (Hurst) v London Northern District Coroner*** *[2007] 2 AC 189 (which were heard at the same time). The decision in* ***Middleton****, when it is applicable, effects an adjustment to the interpretation of the word "how". The effect of this adjustment is to extend the meaning from* ***by what means*** *to* ***by what means and in what circumstances****."* [23]

The principle known as the "***Jamieson/MOD***" principle required coroners and juries to confine themselves to determining by what means the death in question occurred, to be contrasted with undertaking a review of the broader or surrounding circumstances. In contrast now, in Article 2 cases, the coronial inquiry is wider and should ordinarily culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the proceedings. A more discursive verdict is required in such cases.

[16] Stated succinctly, the importance of the decision in ***Re McCaughey*** is that it departed from ***Re McKerr***. By a majority, the Supreme Court held that, under the aegis of HRA 1998, Article 2 ECHR governs this inquest. The immediate impetus for departing from ***McKerr*** was a decision of the Grand Chamber of the European Court of Human Rights in ***Silih –v- Slovenia***.[24] In thus deciding, the Supreme Court drew on the "*living instrument*" principle, the "*mirror*" principle and the holding in ***Silih*** that the procedural obligation enshrined in Article 2 ECHR is freestanding, or detachable. The "*mirror*" principle was given particular weight by their Lordships. Stated succinctly, this principle is to the effect that the ambit of HRA 1998 should mirror that of the Convention. The court further discerned the presumed intention of Parliament to have been that HRA 1998 should give effect to the obligation in international law declared in ***Silih***. In retrospect, Section 2(1) of HRA 1998, which obliges domestic courts to take into account the relevant jurisprudence of the European Court (and Commission), had the potential to lend some weight to the reasoning and conclusion of the Supreme Court. However, interestingly, Section 2(1) does not feature in the opinions of their

[23] ***Re Siberry's Application*** [2008] NIQB 147.
[24] [2009] 49 EHRR 996.

Lordships, although some observers might argue that it is the elephant in the text of their opinions. In the event, it was comfortably eclipsed by the "*mirror*" principle. I pose the question: would the late Lord Bingham have subscribed to the majority view? This seems at least debatable. Writing extra-judicially, in the context of the ***McKerr*** and ***Hurst*** decisions, Lord Bingham expressed the following view in 2009:

> "*Until relatively recently the class of case falling within the Article 2 requirement, already small, has been further reduced by the rule laid down in* ***Re McKerr*** *and reiterated in* ***Hurst****… that Article 2 of the Convention does not apply to deaths occurring before the Human Rights Act came into Force on 2nd October 2000. These, being decisions on the temporal effect of a UK statute, are unaffected by any Strasbourg ruling on the temporal effect of the Convention*".[25]

This view might be considered orthodox by many. However, by its decision in ***Re McCaughey***, the Supreme Court has concluded otherwise.

[25] " How, When and Where ?" An address, in absentia, to the Northern Ireland Medico-Legal Society.

V THE PRINCIPLE OF INQUISITION

[17] One particular reflection seems apposite. None of these undoubtedly important decisions of the House of Lords and Supreme Court has purported to depart from or modify one of the cornerstone principles of inquest law: ***inquests are inquisitorial in nature***. They are not a species of adversarial litigation. There is no *lis inter-parties*. It would appear that nothing in the European or domestic jurisprudence requires a different approach. While emotionally and/or politically charged contexts are not uncommon, this consideration should not be overlooked. In this context, one recalls that the European Court has consistently declined to be prescriptive about the form of investigation required to comply with the procedural dimension of Article 2. The court has repeatedly said:

> "*What form of investigation will achieve those purposes may vary in different circumstances …*
>
> *It is not for this court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents …*
>
> *Nor can it be said that there should be one unified procedure providing for all requirements.*"[26]

In particular, there is nothing in the jurisprudence of the European Court to suggest that a coroner in the United Kingdom must now conduct a full blown adversarial hearing in order to comply with Article 2. The appropriate route to an Article 2 compliant terminus lies within the discretion of the presiding coroner. There are no absolute or rigid rules or requirements to be observed.

[18] Notably, in the pre-HRA 1998 ***Jamieson*** decision,[27] there is a clearly discernible emphasis on the discretion invested in the presiding coroner:

> "*It is the duty of the coroner as the public official responsible for the conduct of inquests, whether he is sitting with a jury or without, to ensure that the relevant facts are fully, fairly and fearlessly investigated …*
>
> *He must ensure that the relevant facts are exposed to public scrutiny …*
>
> *He fails in his duty if his investigation is superficial, slipshod or perfunctory.* ***But the responsibility is his. He must set the bounds of the inquiry. He must rule on the procedure to be followed. His decisions, like those of any other judicial officer, must be respected unless and until they are varied or over-ruled.***"[28]

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[26] ***Jordan,*** paragraphs 105 and 143.
[27] [1995] QB1.
[28] ***Jamieson,*** p. 26, emphasis added.

There is nothing in the post-HRA 1998 jurisprudence or the Strasbourg case law suggesting that this approach no longer prevails. In particular, it has always lain within the discretion of the presiding coroner to conduct an inquiry which, viewed retrospectively, ranges outwith the boundaries of the legally permissible verdict/outcome. Furthermore, bearing in mind the inquisitorial setting of the inquest and the factor of ever diminishing public resources, the coroner is entitled to expect the maximum degree of co-operation and assistance possible from responsible legal representatives. By analogy, the overriding objective, embedded and entrenched in both the County Court and the High Court, must surely have a role to play in this forum. The over-riding objective, now familiar to most practitioners, lays emphasis on a series of principles and values, including in particular the following:

- Equality of arms.
- Saving expense.
- Proportionality.
- Expedition.
- Distribution of the court's limited resources amongst all cases.[29]

In short, the over-riding objective is in the vanguard of the battle against excessive delay, excessive cost and undue complexity. There is no apparent reason why its principles, values and objectives should not apply fully to proceedings in the Coroners Court.

[29] See Order 1, Rule 1A of the Rules of the Court of Judicature.

VI JUDICIAL REVIEW: SATELLITE LITIGATION AND DISHARMONY WITH ARTICLE 2 ECHR?

[19] I would offer one final reflection, stimulated by the observations of the Northern Ireland Court of Appeal in a recent decision. In the case in question, almost four years have elapsed since the exercise of the Attorney General's power under Section 14 of the Coroners Act (NI) 1959 to order the conduct of an inquest into a death which occurred approximately forty years ago, in circumstances where an inquest hearing, culminating in an "open" verdict, was completed seven months after the death, in December 1972. The impetus for an unsuccessful application for judicial review in the High Court and an ensuing unsuccessful appeal to the Court of Appeal was a decision of the coroner refusing to make an order under Section 4(2) of the Contempt of Court Act 1981, which provides for postponement of media reporting of inquest proceedings.[30] In dismissing the appeal, the Court of Appeal said the following:

> *"[26] The application for judicial review in this case and the appeal therefrom are a further example of satellite litigation in relation to inquest proceedings. Such satellite litigation has caused many delays in the inquest system. A culture has developed whereby decisions by coroners in preparation for and during the conduct of inquest proceedings are frequently and immediately challenged by way of judicial review. On occasions this can lead to protracted delays in the inquest process frustrating the purpose of an inquest. In this instance the Inquest was about to commence with witnesses assembled, some coming from overseas, and time had been set aside for the inquest to be conducted.*"

The court then adverted to the hostility to satellite litigation in the context of criminal trials:

> *" In the context of criminal proceedings the law and the practice of the court in judicial review proceedings have been to discourage satellite judicial review proceedings, leaving challenges to decision made during the course of the criminal proceedings in the main to be considered at the conclusion of the trial process. We feel compelled to question why different considerations should apply in the context of coroners' inquests. When an inquest results in a verdict that verdict may itself be challenged in an application for judicial review but that will be at a time when the court will have the benefit of appreciating the whole context of the inquest. What may appear to be of potential or theoretical importance*

[30] The sequence of events which the Court of Appeal found wholly unsatisfactory is rehearsed in paragraph [7] of the judgment. This sequence gave rise to the abandonment of an inquest on the second day of hearing, with a jury duly sworn, video link arrangements for one particular witness in position and all interested parties, including witnesses who had travelled from the USA, in attendance.

> *during preliminary hearings or inquest proceedings before the Coroner, and which often leads to satellite litigation, may turn out to be of no such importance in the overall context of the inquest. Procedural errors during the course of the inquest, if and when they occur, may not undermine the ultimate integrity of the inquest or the ultimate verdict."*[31]

In the next succeeding paragraph, the Court of Appeal described this as an "*important procedural issue*".

> **[20]** These are interesting, and indisputably important, observations. One of the questions which they raise is whether there is any legal requirement for the coroner to make a series of preliminary or interlocutory rulings in relation to a given inquest. The practice of doing so has evolved in Northern Ireland to the point where it has become relatively entrenched. But can this practice be linked to any specific legal requirement imposed by Article 2? Or by any other rule of domestic law? One might add a further reflection. In applications for judicial review to the High Court, the jurisdiction which the latter exercises is not an appellate one. It is, rather, of a supervisory character (with appropriate adjustments in Convention rights cases under the 1998 Act). The clear rationale of the principle that in judicial review applications the jurisdiction of the High Court is supervisory rather than appellate is to emphasize the limits of judicial review and, further, to reinforce the related principle that the High Court in such cases is not concerned with *the merits* of the impugned decision/determination/ruling. There is a further related principle of equal longstanding to the effect that judicial review is designed to operate as a remedy of last resort, following the exhaustion of alternative remedies. In the specific case of underlying hearings/proceedings, in whatever forum, many alternative remedies are available within the arena of the hearing itself. Where do these principles stand in the specific context of judicial review applications relating to *forthcoming inquests*? One view is that, in such cases, the High Court has *effectively* become a court of appeal. In some coronial judicial review challenges, the High Court is invited to review the *legality* or the *vires* or the Convention rights compatibility of a preliminary or interlocutory ruling by the coroner concerned. In such cases, the High Court effectively conducts an audit of legality, exercising a jurisdiction more appellate than supervisory. There is, in theory, no limit to the number of "appeals" which may be thus brought. Furthermore, in a significant percentage of cases an unsuccessful judicial review application to the High Court is followed by an appeal to the Court of Appeal.
>
> **[21]** There is one particularly striking feature of coronial judicial review challenges: in all such cases, the High Court is requested to intervene in an *anticipatory* fashion. There is no end product to consider. Rather, everything is *prospective* in nature. The litigation is very much of the satellite variety. It attracts this appellation because it is subsidiary to and detached from the main event. One might proffer the view that, broadly, there are at least two compelling reasons for hostility to satellite litigation of any kind in this sphere. The first is the intrinsic difficulty, and undesirability, of attempting to predict in any anticipatory fashion the full significance and impact of preliminary/interlocutory rulings. In such cases, the High Court is asked to intervene at a stage when only a significantly incomplete

[31] McLuckie –v- Senior Coroner for Northern Ireland [2011] NICA 34, paragraph [26].

snapshot exists. The second (linked to the first) is that such intervention occurs in a vacuum where the various hearing management and jury management powers available to the presiding coroner have not been ventilated in the actual setting of the inquest and have not been exercised. These are *principled* objections. The *prosaic* objections – delay, increased cost, frustration, fading recolletions, diminishing trust in the rule of law, amongst others – are manifold and many of them feature prominently in the Court of Appeal's judgment.

[22] Moreover, it is difficult to conceive of any *other* form of legal proceedings apart from inquests in which routine and frequent recourse to a court of superior jurisdiction (viz. the High Court) is exercised *in advance of the hearing*. In our legal system, as a strong general rule, recourse to a superior or appellate court challenges *the final outcome* of the proceeding in the lower tribunal. Furthermore, recourse to the judicial review jurisdiction of the High Court is designed to be a measure of last resort. However, in the case of inquests, the High Court has become *a port of first call*, a refuge whose doors are beaten – in some cases repeatedly - long before the main event unfolds. Some would argue that, as a general rule, the question of whether there has been compliance with Article 2 ECHR or any species of illegality or procedural impropriety should be examined at the conclusion of the process, when the jury's findings have been delivered. This would facilitate, *inter alia*, evaluation of the magnitude and materiality of the suggested irregularity. The superior court would be reviewing a concrete and complete product, rather something evolving and unfinished. This approach would also dispense with challenges in the High Court in those cases where interested parties are satisfied with the substantive outcome and unconcerned with possible minor or technical breaches of any of the Article 2 procedural requirements or other irregularity. In Northern Ireland, in the particular case of *forthcoming inquests* a different legal culture has evolved, almost imperceptibly. Ironically, one of the causes *might* be over zealousness on the part of our dedicated and conscientious coroners who, operating frequently in extremely difficult circumstances, may have arguably exceeded the bounds of fairness, reasonableness and transparency in the pre-inquest phase. The decision in ***Re McLuckie*** suggests that the time may be ripe for a radical rethink on the part of the superior courts: perhaps the moment for a broader, more robust and more pragmatic approach, giving rise to no Article 2 disharmony, has arrived.

[23] Finally, it is appropriate to recall the *ipsissima verba* of the European Court:

> "*A requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.*"[32]

These sentiments apply fully to coroners and inquests. It may be said that excessive delay is prejudicial to the fulfilment of the procedural requirements of Article 2. One of

[32] ***Jordan,*** paragraph 108.

the inquests belonging to the "legacy" group actually began almost seventeen years ago before a sworn jury and continued intermittently, until its abandonment. The death in question occurred some two years before the inquest began. Around nineteen years have passed since. Some fifteen years after the death, the House of Lords observed that this inquest had been "*dogged by delay*".[33] In a later passage, Lord Bingham described this inquest as "*forthcoming, but lamentably delayed*".[34] Four years later, it has still not taken place. This simple fact must, inevitably, stimulate reflection on the part of all concerned, including the superior courts. While all are familiar with the common law epithets that justice delayed is justice denied and delay is the enemy of justice, one might legitimately suggest that delay is antithetical to the central tenets and values of Article 2 of the Convention. Ultimately, all of this resolves to two basic choices: is it better to get on with the inquest hearing to its conclusion and then to consider a possible legal challenge in the High Court? Or should the inquest hearing be indefinitely and interminably delayed to facilitate a profusion of fragmented and intermittent preliminary and interlocutory challenges? Furthermore, spiralling cost goes hand in hand with delay. The third member of the so-called "unholy trinity", undue complexity, is not far behind. One anticipates that these questions will arise with some frequency in the near future, to be determined on a case-by-case basis, in accordance with the doctrine of the rule of law. Whether the observations of the Court of Appeal in ***Re McLuckie*** provide the stimulus for the opening of a new chapter in this important sphere of the law, with increased emphasis on simplicity and expedition and progressive hostility to delay and satellite litigation, remains to be seen.

[33] [2007] 2 AC 26, paragraph [].
[34] Ibid, paragraph [41].