

CARC3301

## IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

## QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY THE NORTHERN IRELAND  
HUMAN RIGHTS COMMISSION FOR JUDICIAL REVIEWCARSWELL LCJ

## Introduction

In this application the Northern Ireland Human Rights Commission (the Commission) seeks judicial review of a decision by HM Coroner for Greater Belfast Mr John L Leckey made when he was sitting, by virtue of a direction from the Lord Chancellor, as HM Coroner for the district of Fermanagh and Tyrone for the purpose of holding an inquest into the deaths of victims of the bomb explosion in Omagh on 15 August 1998. The coroner decided on 27 September 2000 in the course of that inquest that although he would have been very ready to receive submissions from the Commission on certain points relating to human rights, he was unable to do so, since it did not in his opinion have power to make such submissions to him.

## The Commission's Application to the Coroner

The inquest hearing was due to commence on 6 September 2000 in Omagh. The coroner decided to hold a preliminary hearing on 30 August 2000 to deal with applications and procedural matters. On 16 August he wrote to the Commission stating that there might be a human rights dimension in respect of pre-inquest disclosure of depositions, maps and photographs, which had been requested by solicitors acting for the families of two of the victims of the bomb. His purpose in

writing was to inquire if the Commission would wish to make a formal submission as to the position that he should adopt. The coroner's approach throughout this matter has been that he would find assistance from the Commission welcome in resolving the human rights issues which might arise.

The Commission sent instructions to Ms Quinlivan of counsel, who prepared an elaborate skeleton argument on the issue of disclosure. The preliminary hearing appears in the event to have been put off until 6 September, on which date representatives of the next of kin appeared before the coroner to argue in favour of pre-inquest disclosure. Ms Quinlivan, instructed on behalf of the Commission, was also present on that day, but the coroner decided after hearing from the other representatives to allow disclosure, and so did not call upon her to address him on the issue.

At an early stage in the inquest counsel for the next of kin of one of the bomb victims attempted to address questions to the police about the effectiveness of their response to the bomb warning given shortly before the explosion took place. Objection was taken to this line of questioning by counsel for the Chief Constable of the RUC. The coroner decided to hear submissions on the issue and arranged to hear them on a specific day, inviting the legal representatives to furnish him with skeleton arguments in advance. The Commission wrote to the coroner on 12 September stating that it had formed the view that "there may be human rights principles arising in respect of these matters on which it would be appropriate for the Commission to make submissions to the Inquest".

The Commission furnished to the coroner a skeleton argument, supporting the broadening of the scope of the inquest, by reference in particular to provisions of the European Convention on Human Rights. When he had read this the coroner decided that he required to hear argument concerning the Commission's power to make submissions and address arguments to courts and tribunals. It is right to say that the Commission had on several occasions been heard on human rights issues in the High Court, and in *Re White's Application* (2000, unreported) I had received a written submission from it, while declining to permit counsel to address me at the oral hearing of an application for judicial review. The coroner took the view that I had ruled in this decision that the Commission did not have power to concern itself in legal proceedings as *amicus curiae* or intervener. I did not, however, decide that point in *Re White's Application*, for I had assumed in that case, without addressing the issue, that the Commission did have such power. Be that as it may, the coroner did decide, correctly in my view, that it was an issue which required decision, and requested that counsel for the Commission should deal with it at the hearing arranged for 27 September.

On 27 September the coroner heard detailed submissions from counsel instructed on behalf of the Commission. He held that the Commission did not have power under the provisions in the Northern Ireland Act 1998 by which it was founded to intervene in judicial proceedings. He accordingly did not go on to rule on the issue whether the Commission should be permitted to take part in the inquest, or on what basis or by what means, although he expressed in

correspondence his gratitude for the assistance which he had received from the written submission which had earlier been sent to him by the Commission.

The coroner was informed that the Commission wished to test the matter by means of an application to the High Court for judicial review, but rather than hold up the inquest any further he decided to proceed with the hearing. The inquest was duly completed while this application was pending. Counsel asked me to hear argument and express a conclusion on the issues comprised in the application, notwithstanding that no substantive relief could now be given if I were to hold that the coroner was in error in his ruling. In view of the importance of settling the issue of the extent of the Commission's powers I agreed to take this course, applying the principle to which I referred in *Re McConnell's Application* [2000] NIJB 116 at 120:

"It is not the function of the courts to give advisory opinions to public bodies, but if it appeared that the same situation was likely to recur frequently they might be prepared to make a declaration, to give guidance which would prevent the body from acting unlawfully and avoid the need for further litigation in the future."

The present case in my judgment satisfies the conditions propounded by Lord Slynn in *R v Home Secretary, ex parte Salem* [1999] 1 AC 456 at 457, when he suggested that the court might make a declaration when –

"a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

### The Coroner's Powers

It is well established that a coroner has as part of his inherent jurisdiction the power to control the proceedings in his court: *Re Jordan's Application* [1995] NI 308

at 314; *R v Lincoln Coroner, ex parte Hay* (1999), *The Times*, 3 March. In the exercise of this power he is entitled to allow a person or body to intervene in the proceedings or to ask for the assistance of an *amicus curiae*. There is a clear distinction between the function of an intervener and that of an *amicus curiae*. The former seeks to take a positive role in the proceedings, to support one party in seeking a conclusion in his favour or to uphold a particular proposition, and may be permitted at the discretion of the court to take part for such a purpose. A clear example of this function is the participation of Amnesty International in the Pinochet litigation: see in particular *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No 2) [1999] 1 All ER 577. An *amicus curiae*, on the other hand, is requested by the tribunal to give assistance, either by offering assistance in the resolution of legal problems in which he has special expertise or by presenting the arguments in favour of one side which would otherwise not be represented: see *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 1 All ER 543 at 560, per Lord Salmon. In either case he is not a partisan, but is there to assist the court to reach the proper conclusion. Third parties have from time to time been permitted to intervene in various forms of judicial proceedings, mainly in higher courts involving issues of public law, and it is not in doubt that the courts, including coroners, have power in their discretion to permit intervention where they think it appropriate.

Under Rule 7(1) of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 a properly interested party is entitled to take part in the proceedings and examine witnesses at the inquest. The coroner expressed the view in his letter of 11 September 2000 that the status of the Commission "equates to that

of a properly interested person". The coroner in using the phrase "equates to" did not purport to hold that a body such as the Commission could be regarded as being within Rule 7 as an interested party. It was submitted at the hearing before me on behalf of the Commission that it would so qualify, but I have considerable doubts about the correctness of the claim. Rule 7 reads as follows:

"7.-(1) Without prejudice to any enactment with regard to the examination of witnesses at an inquest, any person who in the opinion of the coroner is a properly interested person shall be entitled to examine any witness at an inquest either in person or by counsel or solicitor, provided that the coroner shall disallow any question which in his opinion is not relevant or is otherwise not a proper question.

(2) If the death of the deceased may have been caused by an injury received in the course of his employment or by an industrial disease, any person appointed by a trade union to which the deceased at the time of his death belonged shall be deemed to be a properly interested person for the purpose of this Rule."

The categories of persons who are generally regarded as constituting interested persons are set out in Leckey & Greer, *Coroners' Law and Practice in Northern Ireland*, para 7-33 as follows:

- (1) the next of kin of the deceased;
- (2) the executor(s) of the deceased's will or persons appointed as the deceased's personal representative;
- (3) solicitors acting for the next of kin;
- (4) insurers with a relevant interest;
- (5) anyone who may, in some way, be responsible for the death;

- (6) others at some special risk or appearing to the coroner to have a proper interest."

It is stated at para 7-34 that the list is not intended to be exhaustive, and in other cases coroners in Northern Ireland will tend to look for guidance to England and Wales. They should do so with a degree of caution, for rule 20 of the Coroners Rules 1984 is framed in quite different terms, and in some respects is definitely wider. For example, a person appointed by a trade union is specifically given the right to examine witnesses by rule 20(2)(e) of the English rules, whereas under Rule 7(2) of the 1963 Rules such a person is deemed to be a properly interested person, from which it must be implied that he would not otherwise qualify. The meaning of the phrase "properly interested person" in rule 20 of the 1984 rules was discussed by the Divisional Court in *R v HM Coroner for the Southern District of Greater London, ex parte Driscoll* (1993) 159 JP 45. Kennedy LJ did not attempt to lay down a comprehensive definition of the term, but indicated that in a suitable case it might extend beyond persons who stood to gain or lose in some way as a result of the death.

In view of the conclusion which I have reached on the extent of the Commission's powers, I do not propose to make an affirmative decision on the issue whether it could be regarded as a properly interested person for the purposes of Rule 7. I must, however, express my doubts whether it could be, for it appears that properly interested persons must have some sufficient reason to examine witnesses, and it is difficult to see how the Commission's proper concerns could extend to participating in an inquest in that fashion.

## The Commission's Powers

The anterior question is whether the Commission has power either to seek to intervene in proceedings or to act as *amicus curiae* if invited to so. As a statutory body it has only the powers conferred by statute upon it, which will include such powers as may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised: cf *Attorney-General v Great Eastern Railway Co* (1880) 5 App Cas 473 at 478, per Lord Selborne LC.; Wade & Forsyth, *Administrative Law*, 7<sup>th</sup> ed, p 219. In order fairly to be regarded as incidental, those powers, if not expressly conferred, must be derived by reasonable implication from the provisions of the legislation: *Baroness Wenlock v River Dee Co* (1885) 10 App Cas 354 at 362-3, per Lord Watson; and cf Lord Macnaghten's remarks in *Amalgamated Society of Railway Servants v Osborne* [1910] AC 87 at 97.

The Human Rights Commission was constituted by section 68 of the Northern Ireland Act 1998. By section 69 the following functions were conferred upon it:

"69.-(1) The Commission shall keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights.

(2) The Commission shall, before the end of the period of two years beginning with the commencement of this section, make to the Secretary of State such recommendations as it thinks fit for improving –

- (a) its effectiveness;
- (b) the adequacy and effectiveness of the functions conferred on it by this Part; and
- (c) the adequacy and effectiveness of the provisions of this Part relating to it.

(3) The Commission shall advise the Secretary of State and the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights -

- (a) as soon as reasonably practicable after receipt of a general or specific request for advice; and
- (b) on such other occasions as the Commission thinks appropriate.

(4) The Commission shall advise the Assembly whether a Bill is compatible with human rights -

- (a) as soon as reasonably practicable after receipt of a request for advice; and
- (b) on such other occasions as the Commission thinks appropriate.

(5) The Commission may -

- (a) give assistance to individuals in accordance with section 70; and
- (b) bring proceedings involving law or practice relating to the protection of human rights.

(6) The Commission shall promote understanding and awareness of the importance of human rights in Northern Ireland; and for this purpose it may undertake, commission or provide financial or other assistance for -

- (a) research; and
- (b) educational activities.

(7) The Secretary of State shall request the Commission to provide advice of the kind referred to in paragraph 4 of the Human Rights section of the Belfast Agreement.

(8) For the purpose of exercising its functions under this section the Commission may conduct such investigations as it considers necessary or expedient.

(9) The Commission may decide to publish its advice and the outcome of its research and investigations.

(10) The Commission shall do all that it can to ensure the establishment of the committee referred to in paragraph 10 of that section of that Agreement.

(11) In this section -

- (a) a reference to the Assembly includes a reference to a committee of the Assembly;
- (b) 'human rights' includes the Convention rights."

I have given careful consideration to the powers set out in each subsection of section 69. I have sought to give them as broad and sympathetic a construction as they will reasonably bear, recognising the value of the contribution which the Commission is capable of making to the work of the courts. I have still been unable to find anything in the section which confers power on the Commission to make submissions to courts and tribunals about the content of the law relating to human rights or its application to a particular case.

Subsection (1) requires the Commission to keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights. That could not in my view empower it to appear in proceedings or make submissions to courts or tribunals. The content of subsections (2), (3) and (4) is quite specific, making recommendations to the Secretary of State and advising the Secretary of State, the Executive Committee of the Assembly and the Assembly itself about various matters. None of these confers the power sought by the Commission.

Subsection (5)(a) is not material, as it relates to the support in litigation of persons who seek its assistance. Subsection (5)(b) gives the Commission power to bring proceedings, but this seems to me quite distinct from making submissions in proceedings instituted by others. Certainly the wording of subsection (5)(b) is quite inapposite to doing so in inquest proceedings, which are inquisitorial in nature and are not brought by anyone, least of all the Commission.

Mr Barry Macdonald QC submitted on behalf of the Commission that the power could be found in subsection (6), as part of the promotion of understanding and awareness of the importance of human rights. I am unable to accept this argument. The exercise of this power is a proselytising function, spreading the word about the importance of human rights, as the reference to research and educational activities confirms. The function of making oral or written submissions to a court is altogether different. The Commission in doing this would not be attempting to inform or persuade the tribunal that human rights are important, which it is assumed to know. If acting as *amicus curiae* it would be giving non-partisan advice and information concerning the content of the law relating to human rights; if permitted to intervene in the proceedings, it would be advocating a particular view of the law or seeking to persuade the court that the application of the law should lead it to a particular conclusion.

Counsel on each side relied on the decision of the House of Lords in *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, but on examination that decision seems to me to favour the respondent's case. The issue was whether the EOC had a "sufficient interest" in the matter to which the

application related to be entitled to apply for judicial review of a decision of the Secretary of State concerning sex discrimination and affecting a large section of the population. Under section 53(1) of the Sex Discrimination Act 1975 the duty was imposed upon the EOC of working towards the elimination of discrimination. It was held that taking steps towards securing the change of discriminatory provisions in the Employment Protection (Consolidation) Act 1978 might properly be regarded as working towards the elimination of discrimination and that the EOC accordingly had the necessary *locus standi*. The contrast with the terms of section 69 of the Northern Ireland Act 1998 is in my view clearly marked. The Human Rights Commission has not been given any overall function such as advancing the observance of human rights. On the contrary, its functions set out in section 69 are specific and fairly precise and do not seem to me capable by reasonable implication of extending to making submissions to the coroner at an inquest.

Mr Macdonald relied on ministerial statements reported in Hansard concerning the power of the courts to receive submissions from the Commission acting as *amicus curiae*, claiming that they showed clearly that Parliament intended that it should have power to make such submissions. I am far from sure that the rules laid down in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 apply in the present case so as to entitle me to consult Hansard, but I propose to consider the statements there reported, for they do not in my view support the proposition for which they were cited to me.

Mr Kevin McNamara MP moved an amendment to what is now section 69 at the committee stage of the Northern Ireland Bill, to the effect that "The Commission

may, with the permission of the court, submit its opinion as *amicus curiae* on the substance of the proceedings before the court ..." Mr Paul Murphy MP, the minister in charge of the Bill, stated in response:

"The commission can already assist a court as an amicus in the normal way without the need for special legislation. We recognise the force of the argument that it might be useful to make that clear in the Bill, but the wording of the amendment is not quite right. For example an amicus does not normally act in cases in which it has an interest and its role is to advise on the law rather than the substance of a case." (Hansard, 27 July 1998)

He promised to reflect further on the matter and return with an amendment if necessary.

On 18 November 1998 he did return to the subject, when he said:

"There are also some issues relating to the Human Rights Commission on which we did not introduce amendments, but on which we believe that we should take the opportunity to clarify our position. We have been asked about the role of the commission as *amicus curiae*. Courts will be free to ask the commission to provide assistance as amicus under the normal rules that apply. However, that is not a matter for the Bill, but for the court in individual cases."

It is apparent from these passages that the focus of the attention of all concerned was on whether the Commission would be permitted by the courts to make submissions, and that no consideration was given to the anterior question whether it would have statutory power to make submissions to the courts if invited or permitted. It was, I think, assumed by the Government and by other Members of Parliament interested in the question that it would have such power. Such an assumption may reflect what they all thought to be the position, and may cause one

to look carefully to see whether that is correct, but it cannot confer upon the Commission a power that has not been given to it. There is no question in this case of a ministerial statement clarifying the intention of Parliament in enacting what is on its face an ambiguous provision.

### **Conclusion**

I am accordingly impelled to the conclusion that the coroner was correct in his ruling and must decline to make the declaration sought by the Commission. The application will be dismissed.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF AN APPLICATION BY THE NORTHERN IRELAND  
HUMAN RIGHTS COMMISSION FOR JUDICIAL REVIEW

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JUDGMENT

OF

CARSWELL LCJ

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