

THE HIGH COURT

[2022] IEHC 273
RECORD NO. 2021/9JR

BETWEEN

EMMA KELLY

APPLICANT

AND

THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Ms. Justice Niamh Hyland delivered on 12 May 2022

Background

1. This is a contested application for leave to seek judicial review in respect of a decision made by the Attorney General on 16 October 2020 declining to exercise his powers under s.24 of the Coroners Act 1962 ("the 1962 Act") to order a fresh inquest. The applicant is the sister of John Kelly who died tragically by drowning on 16 October 2008 at Britain Quay, Dublin 2. Following John's death, an inquest was commenced on 27 May 2009 and was adjourned to 24 September 2009. The conclusion of the inquest was that John died by misadventure. No challenge was brought to that finding.
2. Following that inquest John's family made representations about the Garda response on the night of John's death and in respect of the investigation. As Ms. Kelly identifies in her grounding affidavit sworn 7 January 2021 in these proceedings, the response and investigation was the focus of "intense criticism and lobbying by my family and me".
3. An inquiry was established under S.I. No. 198/2017, Garda Síochána Act 2005 (Section 42) (Special Inquiry relating to the Garda Síochána) (No. 3) Order 2017. On 15 May 2017 Mr. Justice Herbert was appointed to conduct an inquiry under s.42 of the 2005 Act and to inquire into:
 - (i) Responses made on the night of the death of Mr. John Kelly at Britain Quay, Dublin 2 on 17 October 2008 by the Garda Síochána, and
 - (ii) The conduct and adequacy of the Garda Síochána investigation conducted thereafter.
4. The report of the inquiry was released on 4 December 2018. That report was critical of the Garda investigation, and concluded *inter alia* that the response made on the night of the death of the deceased by An Garda Síochána was "confused, inappropriate and inadequate". On the other hand, the conduct and adequacy of the investigation conducted thereafter by An Garda Síochána was "thorough and sufficient". Judicial review proceedings were brought by the applicant to challenge the findings of that inquiry but they were ultimately abandoned by her.

Request for new inquest

5. In 2019, some 11 years after the death of John Kelly, Ms. Kelly sought a new inquest. There is a provision in the 1962 Act for the Attorney General to direct a coroner to hold an inquest. Section 24(1) provides as follows:

"Where the Attorney General has reason to believe that a person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner (whether or not he is the coroner who would ordinarily hold the inquest) to hold an inquest in relation to the death of that person, and that coroner shall proceed to hold an inquest in accordance with the provisions of this Act (and as if, not being the coroner who would ordinarily hold the inquest, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry, held any inquest in relation to or done any other act in connection with the death."

6. That makes it clear that even where an inquest has already been held, the Attorney General may direct a coroner to hold an inquest where the Attorney has reason to believe that a person has died in circumstances which in his opinion make the holding of an inquest advisable.
7. The wording of the section suggests a very significant discretion is given to the Attorney in making a decision on whether to direct an inquest. This is confirmed by the decision of Keane C.J. in *Farrell v AG* [1998] 1 IR 203 which concerned a challenge by way of judicial review to the decision of the Attorney General to direct the holding of a second inquest. Keane C.J. confirmed that the standard of review to be applied to decisions made by the Attorney General under s.24(1) was the test identified in *O'Keeffe v. An Bord Pleanála* [1993] 1 IR 39 i.e. that where it is alleged a decision-making authority has acted irrationally, the applicant must establish that the authority in question had before it no relevant material which would support its decision. It may be that the scope of the test has altered somewhat in subsequent years, in particular given the expansion of the test of proportionality, but that is not a matter I need to decide in this application for leave.
8. On 1 October 2019, solicitors for Ms. Kelly wrote to the Attorney General identifying why a second inquest was, according to her, necessary. They argued that there was an obligation under Article 2 of the European Convention on Human Rights ("the ECHR") to have an effective and independent investigation into alleged failings by State agents that impacted upon the right to life. They further argued that the s.42 inquiry carried out by Mr. Justice Herbert could have been the mechanism by which the State's duty was discharged but because it did not have the particular characteristics required by Article 2, that duty had not been discharged. They noted that the usual way for a State to discharge its Article 2 duties was to establish an inquest with those characteristics. They further argued that the original inquest did not have the correct characteristics either and identified a number of alleged flaws with same. At paragraph 3, subparagraph 6 of the letter it is identified that the findings of Mr. Justice Herbert in the s.42 inquiry showed that the response from the Gardaí was "incompetent and overall a failure". The letter closed by requesting the establishment of a new Article 2 ECHR compliant inquest into the death of Mr. John Kelly pursuant to s.24 of the 1962 Act.
9. The Attorney General sought the observations of the former Dublin District Coroner, Dr. Farrell, who conducted the 2009 inquest and once those had been received, replied by

letter of 16 October 2020. That letter is of considerable importance in the context of this leave application since it is the decision that is sought to be quashed. The letter states that there was nothing that would vitiate the inquest of 2009 or disturb its findings as to how the death occurred. Further it was not accepted that the inquest of 2009 fell short in terms of the listed criteria, being; (i) independence (ii) permitting of effective family involvement (iii) permitting of public scrutiny (iv) promptness and (v) effectiveness. In each case the letter explains why the applicant has not identified how those criteria were breached. Thus, for the purposes of the response, the Attorney General appears to have evaluated the original inquest by reference to the Article 2 criteria identified by the applicant. In my view, this makes the case more likely to be focused on whether the applicant can identify material that suggests the Attorney acted unlawfully in coming to those conclusions, rather than being concerned with the question of whether the Convention and/or the Constitution require what the applicant describes as “an investigation into an investigation” or the characteristics of any such investigation. In any case, these are not matters for the leave stage, but for the substantive hearing.

10. The letter concludes that in view of the compliance with the identified criteria and given that no material is identified going behind the views of Dr. Farrell, the Attorney General is of the opinion that it is not appropriate for him to direct the holding of a fresh inquest into the case.

Judicial review proceedings

11. On 7 January 2021 the applicant sought leave to seek judicial review. An Order was made by Meenan J. on 11 January 2021 directing that the application be made on notice. The respondent appeared at the leave hearing and filed written submissions, as did the applicant. Naturally, because leave has not yet been granted no Statement of Opposition or replying affidavit have been filed by the respondent.
12. In summary, the applicant seeks to challenge the decision to refuse to direct a new inquest on the following bases:
 - the first inquest was void due to its failure to comply with the requirements of Article 2 of the ECHR.
 - the inquiry into the investigation by the Gardaí was itself flawed.
 - there is a constitutional right to an investigation into an investigation as a corollary of the right to life and that the refusal to direct a new inquest breaches that constitutional right.
 - the applicant is entitled to an inquest complaint with the requirements of Article 2 of the ECHR and the refusal to direct a new inquest breaches that entitlement.
13. Notably an Order of *mandamus* is sought that the Attorney General exercise his powers pursuant to s.24 and order the holding of a fresh inquest touching upon the circumstances of the death of John Kelly.

14. Further, a declaration is sought that Article 2 of the Convention is engaged by the fresh inquest and the fresh inquest is required to have a scope and operation compliant with the respondent's obligations and the applicant's rights pursuant to Article 2 ECHR and the Constitution and that the 1962 Act must be read accordingly.
15. This is of course a leave application and there is no dispute about the applicable standard that must be met. As identified in the case of *G v DPP* [1994] 1 IR 374, and repeated many times since then, leave should be granted, *inter alia*, if (a) the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought by way of judicial review and (b) on those facts an arguable case in law can be made that the applicant is entitled to the relief which he seeks. In this case, the leave application is being contested by the respondents, but it is well established that this does not alter the threshold that must be met by the applicant. Therefore, I must assess whether the applicant has met the threshold for leave on the basis that the applicant will be able to establish the facts averred to by her.

Decision on leave

16. The heart of the applicant's case is that she is entitled to an investigation into the Garda investigation compatible with Article 2 of the ECHR. She argues that both the inquest and the inquiry were not compatible with what is required to vindicate the ECHR right to what she describes as "an investigation into an investigation" and asks that the Attorney General be directed to order such an inquiry. As noted above, the Attorney appears to have accepted for the purpose of his response that there was an entitlement to an inquiry in the form identified by the applicants i.e. an ECHR compatible inquiry. His position was that the inquest met those requirements, and that the subsequent inquiry did not suffer from the flaws identified by the applicant. The applicant disagrees with that position and seeks to judicially review his conclusion that none of those principles had been breached.
17. Given that I am to take the applicant's arguments at their height, it seems to me that she has put enough material before the Court that, if accepted, forms the basis for a stateable case that the inquest and inquiry did not meet the necessary threshold. There is undoubtedly material in the respondent's written submissions and oral argument that might suggest that there are significant difficulties ahead for the applicant in establishing those facts. However, that will become clearer when the respondent puts in a replying affidavit engaging with those factual issues.
18. In relation to the question of the applicable threshold, and the requirements of the Constitution and/or ECHR, the respondent has made compelling arguments that the applicant's approach is not supported by the case law, including the cases of *Fox v The Minister for Justice* [2021] 2 ILRM 225 and *Re Dalton* [2020] NICA 26. A court might ultimately decide it does not need to decide this issue given the approach of the Attorney General in his decision refusing a further inquiry, as identified above. However, if a court does decide to pronounce on those issues, it seems more appropriate that the interpretation of the relevant approaches in the jurisprudence, both domestic and Convention, be done at a substantive hearing and not at the leave stage.

19. In the circumstances it seems to me that the applicant should be given leave in respect of all reliefs identified and all grounds in the Statement of Grounds, save for the relief at paragraph 3.2 of the Statement of Grounds. That seeks the following relief:

"An order of mandamus that the First Respondent exercise his powers pursuant to Section 24 of the 1962 Act and order the holding of a fresh inquest touching upon the circumstances of the death of John Kelly (deceased)."

20. It is well established that an order by a court directing the executive to take specific steps in relation to the exercise of the executive's functions is generally inconsistent with the distribution of powers between the legislative, executive and judicial arms of government mandated by the Constitution (see *T.D. v Minister for Education, Ireland and the Attorney General* [2001] 4 IR 259). Because of the necessity for the Court to avoid trespassing upon the executive functions of the State, it would not be appropriate for me to provide an Order of mandamus directing the Attorney General to carry out an inquest. It is the role of the Attorney General to decide whether to direct an inquest under s.24 and considerable discretion is given to him or her in this regard. That function cannot be usurped by the Courts. The role of the Courts is limited to scrutinising the legality of any decision pursuant to s.24 and to ensuring that it is taken within permissible parameters. Where it is not, the decision will be quashed and sent back to the Attorney to reconsider the matter. However, in that situation, the Court is not permitted to step into the shoes of the Attorney and make a decision under s.24. That is exclusively a matter for the Attorney General. However, that is in substance what the applicant is seeking by the relief sought at paragraph 3.2. Because the relief sought by the applicant is in my view not a relief that a court would be entitled to grant, even assuming the facts identified by the applicant could be established, I decline to grant leave in relation to the relief at paragraph 3.2.
21. I have some reservations also about the form of declaration sought at paragraph 3.3 of the Statement of Grounds. The applicant seeks to have the 1962 Act, in her words, "read down" (which I take to mean interpreted), in the light of the applicant's alleged right pursuant to Article 2 ECHR, the Constitution and common law. The European Convention on Human Rights Act 2003 makes it clear at s.5 that, although a declaration of incompatibility can be made to the effect that a statutory provision is incompatible with the State's obligations under the Convention, a declaration of incompatibility shall not affect the validity, continuing operation or enforcement of the statutory provision in question. The respondents argue that the applicant cannot succeed in obtaining this declaration given the provisions of the 2003 Act and that the Court is being asked to fashion a new inquiry and require the respondent to order that such an inquiry takes place – a relief that cannot be granted.
22. However, given the wording of s. 2 of the 2003 Act, which requires a court interpreting a statutory provision to do so as far as possible in a manner compatible with the State's obligations under the Convention provisions, it seems to me that the relief identified at paragraph 3.3 of the Statement of Grounds, insofar as it refers to obligations under

Article 2 of the ECHR, should not necessarily be interpreted at this leave stage as requesting the Court to take a step not permitted by the 2003 Act. Accordingly, I will grant leave in respect of the relief at paragraph 3.3.

Conclusion

23. On the basis that the applicant has met the admittedly very low threshold of an arguable case, I will grant leave in respect of all the reliefs sought save for the relief identified at paragraph 3.2.

24. In relation to costs, given this is a leave application I propose to reserve them to the trial judge. If either side wishes to argue for a different Order, they should do so within 7 days of receipt of this Order by providing submissions of no more than 1,500 words to the Registrar. In the absence of the receipt of submissions from either side, an Order reserving the costs of the leave application will be made.