



**THE HIGH COURT**  
**AN ARD-CHÚIRT**  
**JUDICIAL REVIEW**

[2024] IEHC 465

Record No. 2024/438JR

**BETWEEN**

**EAMONN BUTTERLY**

**APPLICANT**

**- AND -**

**MYRA CULLINANE, CORONER FOR THE DUBLIN DISTRICT**

**RESPONDENT**

**-AND-**

**THE FAMILIES OF THE 47 DECEASED REPRESENTED BEFORE THE  
STARDUST INQUEST BY PHOENIX LAW, PATRICIA KENNEDY (MOTHER  
OF MARIE KENNEDY), THE COMMISSIONER OF AN GARDA SÍOCHÁNA  
AND DUBLIN CITY COUNCIL**

**NOTICE PARTIES**

**Judgment delivered on 24 July 2024 by Mr. Justice Tony O'Connor**

**Background**

1. Immediately after this Court delivered its *Ex-Tempore* judgment on 28 March 2024 (the typed version of which is attached as an appendix to this judgment) counsel for the

families of the 47 deceased (“**the families**”) applied for their costs against the applicant in respect of their representation at the hearing of the application for leave. The Court decided that it was preferable for the parties to deliver and exchange written submissions before the Court would hear oral submissions. The Court has had the benefit of the written legal submissions dated 24 April 2024 for the families and 2 May 2024 for the applicant.

2. At the hearing on 15 May 2024, counsel for the families summarised their position as follows:

- (1) The families had a clear interest in the application;
- (2) The families had not sought time to prepare for the application having been alerted of the adjournment of the inquests to allow for the application for leave to be heard;
- (3) There had been no objection to the families having representation on 27 March 2024 for the application to grant leave;
- (4) The Court could have exercised its discretion whether requested or not to allow for the families and others to be heard at the application for leave;
- (5) The approach taken on 27 March 2024 minimised the level of costs incurred at the hearing of the application for leave and was in ease of all the parties.  
Counsel clarified that the claim for fees is limited to the fees of one senior counsel, one junior counsel and the solicitor relating to the hearing in this Court.
- (6) There is no binding case law for this particular application for costs. The application for leave was opened and the parties acquiesced in having it heard as an *inter partes* type application.

3. Counsel for the applicant:

- (1) Submitted that Order 84(20) of the Rules of the Superior Courts (“**RSC**”) provides for the application to proceed on an *ex parte* basis. Although it was evident that the Court was prepared to hear counsel for the applicant, the Coroner and the families, the application still “did not constitute an application on notice”.
- (2) Disagreed that the approach adopted was in ease of the applicant. If the application had been adjourned to allow for the respondent and the notice parties to be placed on notice, the applicant could have sworn an affidavit to dispute the submission made on 27 March 2024 for the families that there was a risk of discharging the jury if leave was granted.
- (3) Drew the Court’s attention to various excerpts from the transcript of the hearing before the Coroner which supported the applicant’s contention that the jury could conclude without proper jurisdiction that a series of failures amounted to unlawful killing.
- (4) Repeated the written submission “that the applicant was in somewhat of a catch 22. The within application was objected to as being premature but if he had not moved when he did, and had instead waited until a verdict was returned, he would undoubtedly have met the objection, at any subsequent application for leave, that he ought to have moved before the jury returned a verdict, as at this point any successful application for judicial review would set the entire process at nought”.
- (5) Submitted that the legal representatives for the families by reason of their terms of engagement and support offered by the State are entitled to be paid for their appearance at the hearing of the *ex parte* application. In addition, the work for

the legal representatives of the families had largely been undertaken by virtue of their appearances and submissions during the relevant parts of the inquests.

**Statutory provisions**

4. Section 168(1) of the Legal Services Regulation Act 2015 provides that -
- “...a court may, on application by a party to civil proceedings, at any stage in, and from time to time during, those proceedings—
- (a) order that a party to the proceedings pay the costs of or incidental to the proceedings of one or more other parties to the proceedings, or
- ...”
5. Order 84(20)(7) of the RSC provides that:
- “If the Court grants leave, it may impose such terms as to costs as it thinks fit and may require an undertaking as to damages.”

**Case law**

6. In *O'Connor v. Nenagh Urban District Council (and Dunnes Stores Limited Notice Party)* [2002] IESC 42, Denham J. for the Supreme Court affirmed the exercise of the discretion exercised by Geoghegan J. when directing the applicant to discharge the costs of the notice party (Dunnes Stores). There, the notice party had participated in the full hearing of the judicial review. At para. 9 of Denham J.’s judgment, the reasoning of Geoghegan J. was set out. Particularly relevant for this Court was the rejection by Geoghegan J. of the submission that the notice party could have just relied upon the submissions of the respondent. Ultimately the Supreme Court iterated the effect of Order 99(1)(1) of the RSC which provided:

“The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.”

That provision now appears as O.99 (2) (1) of the RSC.

7. In *Treasury Holdings v. NAMA and Ors* [2012] 1 IR 782 Finlay Geoghegan J. awarded 50% of the applicant's costs against the first and second respondents and a notice party arising from their objections. In that judgment the learned judge also determined the issue of costs associated with ancillary interlocutory injunction applications.

8. This Court summarises the effect of those judgments on what the Court must now consider as:-

- (1) Costs associated with a leave application for a notice party may be awarded against an applicant;
- (2) An applicant may recover costs for bringing the application for leave (even though the application is mandatory) following the outcome of the substantive judicial review proceedings.

9. The facts now presenting are acknowledged to be novel and prompts the Court to pose two initial questions:-

- (a) Is it necessary to consider the families as parties to these proceedings in circumstances where these proceedings have not progressed beyond the leave stage?
- (b) Does Order 99(2)(1) of the RSC allow this Court to exercise its discretion to award the costs of the families against the applicant?

### **Discussion**

10. The applicant sought an injunction staying the conclusion of the inquests pending the determination of the judicial review proceedings if leave had been granted. The submission that the right of the families to vindicate the rights of the 47 deceased pursuant to Article 40.3 of the Constitution, Article 2 of the European Convention on Human Rights and s.18(A) of the Coroners Act 1962 has merit. The effect of an injunction would have extended the long life of the inquests.

**11.** No application for leave to judicially review the verdicts has been made since those verdicts were delivered on Thursday 18 April 2024. The circumstances which moved the applicant to apply for leave have not caused the applicant to seek leave following the delivery of the verdicts. Counsel for the applicant submitted on 16 July 2024 that there is no merit for the applicant in pursuing a judicial review once the verdicts were delivered.

**12.** This Court makes no ruling about the catch 22 scenario advanced in submissions for the applicant as described earlier because no issue in that regard now arises. The reality is that the families were going to be affected seriously by the granting of leave sought by the applicant. The Court balanced the rights asserted in March 2024 and nothing further will be added by the Court at this stage.

**Notice of application**

**13.** The build up to the application for leave commencing with the first impugned ruling of the Coroner on 1 March 2024 up to 26 March 2024 alerted the respondent and the notice parties to the likelihood that the applicant would seek leave before the upcoming break for the Easter long weekend beginning on 29 March 2024. Senior counsel for the families informed the Court without contradiction, that the Coroner late on 26 March 2024 had postponed the resumption of the Inquests to allow the application for leave to proceed. It was in that way that the families had learned of the *ex parte* leave application and instructed counsel to attend the only vacation court sitting on 27 March 2024.

**14.** Although the families were not notified pursuant to a direction of the Court, the way in which the application was opened and the appearances were given by counsel for the Coroner and the families without objection, allowed the Court to hear the application at an Easter vacation sitting, as though it was an application on notice to the Coroner and the families.

**15.** The submission for the applicant that a direction of the Court would have afforded an opportunity for the applicant to prepare for the resistance of the families does not withstand scrutiny. Whether the jury at the inquests could have withstood the long delay arising from the granting of leave was not the determining factor.

**16.** Carney J. in *DPP v. Special Criminal Court* [1999] 1 IR 60 at p.69 -70 as originally cited by counsel for the applicant to demonstrate that this Court could grant leave , supports the position of the families:-

“It is unique in my experience that relief of this nature is being sought during the currency of a trial which remains at hearing. It cannot be strongly enough emphasised that an expedition to the Judicial Review Court is not to be regarded as an option where an adverse ruling is encountered in the course of a criminal trial. I am undertaking this application for judicial review during the currency of the trial because a need has presented itself to urgently balance the hierarchy of constitutional rights including, in particular, the right to life. In the overwhelming majority of cases it would be appropriate that any question of judicial review be left over until after the conclusion of the trial. In the instant case, such an approach would have led the Director of Public Prosecutions to abort the trial and the people of Ireland would have been deprived of their right to have a particularly heinous crime prosecuted to a verdict of either conviction or acquittal.”

**17.** O’Flaherty J. in the Supreme Court in *DPP v. Special Criminal Court* [1999] 1 IR 60 at p.89 stated:-

“I would endorse everything that Carney J. said about the undesirability of people repairing to the High Court for judicial review in relation to criminal trials at any stage (and certainly not during their currency) but, in the exceptional circumstances of this case, and having regard to the importance that there should be a definitive

ruling on this matter of informer privilege, it was right that Carney J. should have entertained the application at first instance and for us to hear it on appeal.”

**18.** While *DPP v. Special Criminal Court* may be authority for the proposition that an application can be made for leave during criminal proceedings (and by analogy in coronial inquests), the thrust of those judgments is that applying for judicial review during the currency of a trial (and by analogy an inquest) prompts the Court to “urgently balance the hierarchy of constitutional rights”.

**19.** Notwithstanding that this Court accepted during the course of these proceedings that an application for leave could be made, there was no authority available to this Court to support such a late interruption of the long running inquests.

**20.** Without the assistance of counsel for the families including the citing of persuasive authorities from the United Kingdom (albeit for a different coronial system) the Court would have struggled to deliver its reasoned judgment overnight and minimise the delay to the conduct of the inquests.

**21.** This leads the Court to conclude that:

- (a) The families were parties before the Court for the leave application. Order 125 of the RSC provides that “ “party” includes every person served with notice of or attending any proceeding although not on the record”.
- (b) It had always been open to the applicant to object to the submissions made on behalf of the families. The applicant and the Court acquiesced to the making of submissions by Counsel for the families.
- (c) The Court is entitled to exercise its discretion pursuant to Order 99(2)(1) of the RSC.



**Entitlement to recover elsewhere.**

**22.** Regulation 2(b) of the Civil Legal Aid Regulations 2021 (S I No. 248/2021) given under official seal of the Minister for Justice on 18 May 2021 provides as follows:

“The [Legal Aid Board] may provide legal aid to an applicant without reference to his or her financial resources if the legal aid to be provided to the applicant relates to an inquest to be held pursuant to a direction issued to the Dublin District Coroner on 19<sup>th</sup> day of December 2019 into a death which occurred –

(a) at the premises known as “Stardust” situate at Kilmore Road, Artane, Dublin 5 on the 14<sup>th</sup> February 1981, or

(b) after that date as a result of injuries sustained at that premises on that date.”

**23.** Counsel for the applicant submits that counsel and solicitors for the families are entitled to recover fees in respect of their appearance at the inquests and proceedings relating to those inquests pursuant to those regulations. In addition, it was submitted that there will be duplication of research and work for the inquests and the application for leave.

**24.** Although the families may be entitled to apply for legal aid and may have their costs at the inquests discharged pursuant to those regulations or by the State in some other way, it is not axiomatic that they will be entitled to recover all of the fees charged by counsel and the solicitors appearing before this Court on 27 March 2024 and for the delivery of the ex tempore judgement on 28 March 2024.

**25.** The Court is not determining the fees. That is a matter for the High Court Costs Adjudicator. Order 99 of the RSC provides for the powers of the Adjudicator and the procedures to be followed for submitting and challenging fees. This Court is merely tasked with exercising its discretion to award costs.

**Brief for inquests**

26. Counsel for the families indicated to the Court that they were aware of the possibility that an application for leave would be sought given how the impugned rulings had been challenged at the inquests. The informed submissions made by counsel for the families to this Court on 27 March 2024 distilled and focussed on what had transpired at the applications prior to the rulings of the Coroner relating to the impugned rulings. That does not mean that counsel and the solicitor who appeared on 27 March 2024 did the same work for the Inquests and the hearing before this Court. The High Court Costs Adjudicator may consider any relevance of the briefing and work previously undertaken. It was clarified that other counsel in addition to the counsel who appeared before this Court represented the families at the Inquests. The work for the impugned rulings was not necessarily the same as the work required to resist the application for leave on 27 March 2024. The Court declines to examine that area of contention because that is more properly for the Costs Adjudicator.

27. The Court also notes the position of the families stated in a copy email reply dated 8 June 2024 from the solicitors for the families to the applicant's solicitor (as presented in a booklet handed into the Court on behalf of the applicant on 16 July 2024), that the free legal aid scheme "... only applies to the inquest proceedings."

28. A letter dated 12 July 2024 from the solicitors for the families to the applicant's solicitor included in that same booklet handed into Court, stated without contradiction: "In the costs hearing on 15 May 2024, Mr Paul O'Higgins SC explained to the Court that he was not making the submission that the families were going to be paid in any event for resisting the failed application in the High Court by virtue of an inquest hearing being listed on the same day. We trust that this position has not changed because it should be clear to you that the Stardust Fire Inquests were separate proceedings to the application

brought by your client in the High Court in March 2024. Any costs incurred from the Stardust Fire Inquests are separate to costs incurred from the application brought by your client in the High Court in March 2024.”

### **Stance of the Coroner**

29. Counsel for the Coroner at the application for leave did not address the vindication of the rights of the families described earlier and did not cite authorities. It was Counsel for the families who made the substantive submissions. The Coroner who has not sought an order for costs, through her Counsel provided clarity on facts which the Court needed. The Coroner confirmed that she was about to commence delivery of her final instructions to the jury when she was asked to delay same for the purpose of the application for leave. The reasoning of Geoghegan J in *O'Connor v. Nenagh Urban District Council* described at para. 6 above, resonates when one considers the hierarchy of rights and the submissions made by counsel for the families.

### **Decision**

30. No matter what way this Court looks at the arguments advanced on behalf of the applicant, there was merit in the families engaging solicitors and counsel to represent their interests at the hearing of the leave application. Fairness and justice compel this Court to exercise its discretion to direct the applicant to discharge the costs incurred by the families limited to the appearance of one senior counsel, one junior counsel and a solicitor for the families at the hearing of the application on 27 March 2024 and the taking of judgment on 28 March 2024. Such costs are directed to be adjudicated in default of agreement.

### **Costs of this application**

31. Research, written submissions and advocacy were required for the application which is the subject of this judgment. Costs usually follow the event. Should the applicant wish to contend for an order other than an order directing him to pay the costs of the families

relating to the written and oral submissions leading to this judgment, the Court will hear representatives for the applicant and for the families at 10.30am on 31 July 2024 in relation to that aspect and other order which may be sought to conclude these proceedings.

Counsel for the applicant: Paul O'Higgins SC and Joe Holt BL instructed by O'Scanaill and Company.

Counsel of the families: Sean Guerin SC and Conan Fegan BL instructed by Phoenix Law.

Counsel for the Coroner: Mark Tottenham BL instructed by Conor Minogue Solicitor.

**APPENDIX**

**APPENDIX TO JUDGMENT DELIVERED ON 24 JULY 2024**

**PUBLICATION RESTRICTED TO THE PARTIES UNTIL AFTER DELIVERY OF VERDICT BY  
JURY AT INQUEST.**



**AN ARD-CHÚIRT**

**THE HIGH COURT**

**H. GR. 2024 0000438**

**[Record No. 2024/438 JR]**

**BETWEEN**

**EAMONN BUTTERLY**

**APPLICANT**

**AND**

**MYRA CULLINANE, CORONER FOR THE DUBLIN DISTRICT**

**RESPONDENT**

**AND**

**THE FAMILIES OF THE 47 DECEASED REPRESENTED BEFORE THE  
STARDUST INQUEST BY PHOENIX LAW, PATRICIA KENNEDY (MOTHER  
OF MARIE KENNEDY), THE COMMISSIONER OF AN GARDA SÍOCHÁNA**

**AND DUBLIN CITY COUNCIL**

**NOTICE PARTIES**

**EX TEMPORE JUDGMENT delivered on Thursday 28 March 2024 in Court 1, Four Courts by Mr. Justice Tony O'Connor at 10.30am.**

1. Before the Court is an application seeking reliefs by way of judicial review for effectively an order directing the respondent Coroner, (“**the Coroner**”), to instruct a jury that “a verdict of unlawful killing is not an available verdict”. Counsel for the families of 47 deceased who died at the Stardust Nightclub on 14 February 1981 were present in Court throughout the hearing of the application which was opened at yesterday morning’s vacation sitting from about 12.00pm to 1.00pm, and then from 4.00pm to 8.00pm in Court 3, Four Courts. Those details shall be specified more accurately in the Order if the digital audio recording of the hearing is required. Counsel for the Coroner attended in Court and later in the day remotely. Given that it is now 10.30am, and in view of the stated intention of the Coroner to conclude her instructions to the jury, the Court confirms that it refuses the reliefs sought. The Court will now proceed to give its reasons, but the Court thinks that it is best to give that detail now. I anticipate that this judgment will run for about 20/30 minutes. The Court will explain its refusal following the principles which apply to applications for leave.
2. Under the heading “necessary ingredients which an applicant must satisfy”, Finlay C.J. in *G. v. Director of Public Prosecutions* [1994] 1 IR 374, at pp. 377 to 378, stated that :-

“An applicant must satisfy the court in a prima facie manner by the facts set out in his affidavit and submissions made in support of his application of the following matters:

- (a) That he has a sufficient interest in the matter to which the application relates...

[Here, the applicant has so satisfied the Court.]

- (b) That the facts averred in the affidavit would be sufficient, if proved, to support a stateable ground for the form of relief sought...

[Here, counsel for the applicant has described a *prima facie* argument, but is it sufficient for the relief sought? The Court will address that issue in its discussion about the availability of other reliefs and the conduct leading up to this application.]

- (c) ...[the] arguable case [entitles] the applicant... to the relief [sought].

[Again, the Court will explain its reasoning in the context of the extent of entitlement.]

- (d) That the application has been made promptly...

[The Court notes that Finlay C.J. stated that “*promptness*”, where all other conditions are fulfilled, should be left to the hearing of the argument. Promptness comes into this Court’s consideration following the conclusion that other conditions have not been fulfilled.]

- (e) That the only effective remedy, on the facts established... would be an order by way of judicial review or... that... judicial review... on... the facts... [is] a more appropriate method of procedure.

[This is a principal ground for the Court’s refusal as will be outlined.]”

### **Applications on notice**

3. The Court does not apply a more stringent onus of proof on the applicant just because the application was made on notice (albeit limited) to the Coroner and to the families of the 47 deceased (by virtue of the delayed recommencement of the Inquests as a result of this application). The Court acknowledges that without the submissions made on behalf of the families of the 47 deceased, it may not have been alerted to some of the points discussed in this judgment.

**Judgment of Meenan J.**

4. In *Eamonn Butterly v. The Coroner & ors* (Unreported judgment delivered on 2 November 2022 [2022] IEHC 598), Meenan J. set out the factual background to the inquest which is the subject of these proceedings. The parties and those interested in this judgment are referred to that judgment, (“**judgment no. 1**”) for the facts up to the delivery of same together with the statutory provisions which apply equally to this application. Mr. Paul O’Higgins, Senior Counsel for the applicant, submitted that s. 30 of the Coroners Act 1962, which precludes the jury from considering questions of civil or criminal liability, is separate and additional to s.31 which precludes the identification of someone being liable. The essence of the argument advanced in this Court before addressing entitlement to relief is to be found in the interpretation of para. 42 of judgment no. 1. Mr. O’Higgins submitted that s. 18A does not allow a jury to consider or find criminal liability when reaching a verdict where the evidence adduced at the inquest specifically links named individuals to the possible verdict of “unlawful killing”. Mr. O’Higgins submitted that Meenan J., by referring to the Dublin and Monaghan bombings inquest, drew a distinction between an unlawful killing from a bomb which is not attributed to any individual or individuals and an unlawful killing which may be linked to those identified in evidence and submissions in the inquest, which is the subject of this application. Mr. O’Higgins quoted from para. 49 of judgment no. 1, and particularly :-

“However, it is clear that evidence will be given at the forthcoming inquests concerning the design and condition of the Stardust building, prior inspections and maintenance and the management of the Stardust. Should such evidence actually be given, a verdict of “unlawful killing” could be problematic given the limited circumstances in which such a verdict can be brought in. It may be that the more



detailed the evidence is on the circumstances of the fire the less permissible will be a verdict of unlawful killing.”

### **The impugned rulings**

5. Paragraphs 19 to 24 of the affidavit sworn by the applicant’s solicitor and filed on 27 March 2024 describes the 120 days of hearings, the breaks and how the Coroner heard oral submissions as to the available verdicts before giving a written ruling on 1 March 2024, (“**the first impugned ruling**”). At para. 27 of that affidavit, the central area of contention is identified and that is the statement by the Coroner at para. 68 of the first impugned ruling which reads :-

“Identifiability must mean more than simple association. There must be a clear line between the actions and omissions of party A or parties A and B in the death of C... Those accounts are not uniform and in fact a number of reasons are linked to actions or omissions which may have contributed to the deaths of the deceased.”

6. It is important to note that this Court is not tasked to adjudicate on the correctness of that ruling. The applicant merely needs to establish that there is a *prima facie* argument that the Coroner is incorrect and is about to commit such a serious error as to cause the jury to act without statutory authority in their deliberations and in delivering their verdict. It is further worth noting also, at this stage, that the Coroner declined the request made by counsel for the applicant last Friday, 22 March 2024 (Day 119) to seek directions from the High Court pursuant to s. 62 of the Coroner’s Act on the issue about whether a verdict of unlawful killing could be left to the jury.

### **Discussion**

7. While this Court acknowledges the plausible basis for the argument that a verdict of unlawful killing should not be available where there is a limited number of connected people

associated with such a verdict according to the evidence adduced, the Court appreciates the specific reference by Mr. Guerin, Senior Counsel for families of the 47 deceased, to paras. 75 to 78 of the first impugned ruling. I read those paragraphs on a number of occasions last night, and I am satisfied that the Coroner is acutely conscious of the line which cannot be crossed by the jury in relation to the applicant or his father. Paragraph 78 summarises her view :-

“That the verdict of unlawful killing can be safely left to the jury so long as they are very clearly directed on findings they are permitted to make and that they are appropriately cautioned that they cannot identify any individual or individuals nor are they permitted in the making of their findings or returning of their verdict to expressly or impliedly attribute liability to any identified or identifiable person.”

8. The Coroner is in a good position to assess whether the applicant or his father can only be identified or is identifiable by a verdict of unlawful killing. During submissions, the Court was informed that some 21 individuals (of which 18 were identified) had been mentioned at the inquest and may be associated with a verdict of unlawful killing. This fits in with what Mr. Guerin described in submissions as a model statement of the law which is faithful to Meenan J.’s caution in judgment no. 1.

### **Second ruling**

9. Last Tuesday, 26 March 2024, the Coroner outlined the background to her second ruling which is focused upon by the applicant also for this application. After the first impugned ruling on 1 March 2024, the parties engaged in discussions relating to a draft issue paper. Then, on 7 and 8 March, submissions were made to the jury by interested parties based on the first ruling, while the applicant choose not to make submissions. After considering those addresses to the jury, the solicitor for the applicant wrote to the Coroner applying for the potential verdict of unlawful killing to be removed from the jury’s

deliberations. This was based on what had been submitted on behalf of the families of the deceased to the Jury. Mr. O'Higgins, Senior Counsel, was permitted to make oral submissions to the Coroner last Friday, 20 March, which were effectively repeated before this Court yesterday, 27 March 2024. The Coroner, from the last paragraph on p. 9 of the transcript for Day 120 to p. 15, gave a considered ruling, and I seek to summarise the effect of same :-

- (a) The new submissions were not confined to the effect of the closing address to the jury by Mr. Guerin;
- (b) The new submissions did not satisfy the Coroner about the effect of the delay in making these new submissions. In other words, nothing was said on the day, or the day after, Mr. Guerin's address. The excuse for the delay did not outweigh the effect of the delay. There was no change of circumstances warranting the delay which has arisen;
- (c) Each counsel had made it clear that the law was a matter for the Coroner and the jury was so informed;
- (d) No new matters were effectively raised by Mr. O'Higgins.

### **Conclusion about the second ruling**

**10.** This Court is not satisfied that there is an arguable ground for judicial review of the second ruling. Whatever plausible ground exists, relates to what was articulated in the first ruling of 1 March.

### **Availability of reliefs**

**11.** The identified or identifiable persons point is arguable but can that argument be addressed by the Coroner in her instructions to the jury, and in her answers to any questions which the jury may pose? After Mr. O'Higgins opened this application, and before I adjourned to the afternoon to allow for another urgent vacation day application to be heard

concerning the care of a patient, I queried whether this application for judicial review was premature. Why not wait for the Coroner to complete her instructions to the jury? The reply on behalf of the applicant to me was twofold :-

- (1) The Coroner's rulings misinterpreted or misapplied the qualification of Meenan J. in judgment no. 1. It was submitted that the evidence adduced and the submissions for the families would render the applicant identifiable at the very least;
- (2) The effect of the feared verdict could not be remedied by a future judicial review application.

12. By the conclusion of all submissions at 8.00pm last night, I was not satisfied that there was evidence that :-

- (1) The Coroner has misdirected herself with respect to the identifiable issue. She is alert to the caution given by Meenan J. She knows the extent of the evidence given and she can direct the jury, not only in relation to their consideration of the evidence, the limited verdicts which can be delivered, but also the law. There is no allegation of lack of fair procedures and it is premature to review what the applicant fears could be instructions and guidance given by the Coroner;
- (2) The applicant will be deprived of a remedy if his fears are realised. On this aspect, I shall elaborate in deference to the case law cited in support of and against the intervention by the High Court in rulings made during an inquest and particularly in the middle of a Coroner's summation.

### **The 2000/2001 judgments**

13. *Morris v. Dublin City Coroner* [2000] 3 IR 592; *North Area Health Board v. Geraghty* [2001] 3 IR 321 and *Eastern Health Board v. Farrell* [2001] 4 IR 627 were all cited by Mr.

O'Higgins as examples of a court intervening during inquests. The Supreme Court in *Morris* allowed an appeal from a High Court ruling that a Coroner during an inquest could not grant anonymity due to his limited jurisdiction. The Supreme Court in *Geraghty* dismissed an appeal from Kelly J., who had ruled that the Coroner had not acted *ultra vires*. The Supreme Court in *Farrell* affirmed Geoghegan J., who had decided an issue about the approximate medical cause of death. As far as this Court is concerned, those judgments are not authorities for the Court to intervene during the closing address by the Coroner to the jury.

**14.** No court can definitively lay down the law to exclude a possible intervention by way of an application for judicial review before or during the closing address by a Coroner to a jury. However, it is proper for me to acknowledge the following which explains my concerns about granting reliefs for feared verdicts or feared guidance by a Coroner :-

- (1) Richards J. in *Khan v. HM Coroner for West Hertfordshire* [2002] EWHC 302 Admin (“**Khan**”) stated at p. 3 :-

“The inquest is due to resume on 14-15 March for the coroner to sum up and the jury to reach their verdict. By that time, four months will have elapsed since the jury heard the evidence. It is highly undesirable for there to be a long break at such a stage in the proceedings. A further disadvantage is that the court does not have the benefit of the coroner’s summing up as a means of putting into perspective the pieces of evidence relied on by the parties and of gaining a better understanding of what the coroner regarded as important or unimportant.”

4. That suggests to me that this court should entertain considerable caution about entertaining a challenge to an interlocutory ruling of

this kind. My concern is heightened by the possibility that further delay if this court's decision is appealed....”

Mr. Guerin submitted, that there is a good chance that one or more of the parties may apply to discharge the jury if there is a delay including a full judicial review hearing and potential appeals therefrom.

- (2) In the Queen's Bench Division on the application of *Cooper v. HM Coroner of Northeast Kent* [2014] EWHC 586 Admin, Mitting J., (who cited *Khan* from paras. 10 to 14), gave a number of very good reasons for not intervening in an inquest with a jury which can be guided safely by a Coroner. Rather than quoting extensively from that judgment, suffice it for me to say that interrupting and delaying a long running inquest in respect of what may be described as one plausible argument about an interpretation of an earlier judgment concerning the inquest, does not pass the risk benefit analysis for want of a better description. In other words, the risk and fear identified by the applicant is greatly outweighed by the prejudice and inexcusable delay which will be caused to all of the parties, jury members and the Coroner. It is in this context that the delay of the applicant, although within the time limits to bring an application for judicial review, becomes relevant. I have already said that the applicant's delay from 1 March is not fatal to the application, but it does become an issue when one is considering the availability of reliefs and the effect of delays caused by parties.

15. Finally, Mr. Guerin cited the judgment of Clarke J. in *Rowland v. An Post* [2017] IR 355 and particularly paras. 10 to 14 thereof. Although this concerned an interlocutory injunction application in an employment case, I agree that the reluctance of Clarke J. to interfere in an ongoing investigative process resonates. The application before this Court is

quite different and so more significant for so many parties than in *Rowland v. An Post*. Here, the argument relates to identity and is the basis of the application to grant leave in respect of the first ruling. The Coroner, as agreed by all counsel can be requisitioned, if she fails or omits to guide the jury properly. As I indicated earlier, the Court refuses the application for the orders sought.

### **Costs**

16. Mr. Guerin applied for the costs of the first named noticed parties in respect of their representation of the hearing of this application. The Court directs that the legal representatives for those notice parties agree with the legal representatives of the applicant about exchanging written outline submissions so that they can be delivered to this Court by 17 April. These submissions should be limited to 1500 words. Following that on 1 May 2024 at 10.30am I will hear the parties further in relation to the issue of costs. I also grant liberty, to any party affected by the Order made earlier concerning publication or broadcasting of any matter relating to these proceedings which would be likely to identify the defendants set forth at para. D(i) to (xii) in the draft statement of grounds until a verdict is delivered, to apply to this Court on 48 hours' notice.

### **Post Script:-**

17. Mr. O'Higgins following delivery of this judgment and making of the order brought to the attention of the Court, the judgment of the Supreme Court in *DPP v. Special Criminal Court* [1999] 1 IR 69 as a precedent for judicial review of a ruling prior to the delivery of a verdict. The Court understands that Mr. O'Higgins only wished to ensure that any future reading of this judgment would take account of the fact that this Court did not have that authority cited before making its decision to refuse leave. Mr. O'Higgins when asked by the Court to clarify the reason for referring to that judgment after this Court had made its order to refuse leave, did not seek to make some further application on behalf of the applicant.

Counsel for the applicant: Paul O'Higgins SC and Joe Holt BL instructed by O'Scanail and Company.

Counsel of the families: Sean Guerin SC and Conan Fegan BL instructed by Phoenix Law.

Counsel for the Coroner: Simon Mills SC and Mark Tottenham BL instructed by Conor Minogue Solicitor.