Army Deaths Seminar

CONTROVERSIAL DEATH INQUIRIES & PUBLIC FUNDING

1. Introduction

1.1. When I was asked by Nick Blake to contribute an opinion to his Review it struck me that I was perhaps a peculiar choice of 'expert': I had never represented an army family nor been involved in any of the legal processes that are peculiar to the forces. However, as I became familiar with the relevant concerns - expressed by the Deepcut families and others - the close relationship between those concerns and those that have been expressed by our clients, over many years, emerged. The solicitors at Bhatt Murphy have represented families who have lost loved ones in custody for over 15 years. We began our work in a very different climate – one in which there was no pre-inquest disclosure and no public funding for our clients' representation – a climate that remains familiar to army families and their representatives. That is not to say that all nor even many of the battles have been won in respect of custodial death inquiries – unfortunately the reality remains that there are enormous obstacles placed in the path of bereaved families. But it is true that the concerns are broadly the same: to achieve a reliable truth; to ensure that failings (both individual and systemic) are identified; and to ensure that lessons are learned.

1.2. The experience of losing a loved one in the forces whether in combat or not is an exceptional one which places formidable stresses upon family members. Not all such deaths require a full investigation – if the circumstances are clear and there is no question of default (or direct involvement) on the part of the state. Lawyers might say "Article 2 is not engaged". I will spend a little time, in a moment, explaining what in my view Article 2 means in this context and I will then go on to discuss the circumstances under which public funding is available.

1.3. Regrettably the present system for investigating controversial deaths can all too often exacerbate the pressure upon the bereaved. The availability of public funding can alleviate those pressures but as I emphasised in my opinion for the Blake Review, it is my submission that the provision of public funding is not merely a voluntary matter; an opportunity for the state to extend kindness and consideration to army families but rather a legal duty which obliges the state in circumstances where Article 2 is engaged.

1.4. Deaths in army barracks occur behind closed doors. In most instances, the only evidence available as to precisely what happened will come from those whose conduct may be called into question. Families will therefore have understandable concerns about the opportunities for public officials to abuse the trust placed in them, not only in the sequence of events leading to the incident itself but in the management of the incident and the investigation of it. It is therefore a reasonable starting point for all those concerned in these matters to anticipate at least a degree of mistrust on the part of the bereaved family. A rigorous investigation will do much to regain that trust but all such efforts will be lost if that investigation is not open, transparent and accountable. From my understanding of army death inquiries there is much work to be done to improve the openness, transparency and accountability but some steps in the right direction are now being tentatively made. However, important steps such as permitting a family to attend a board of inquiry are meaningless without extending the relevant funding.

1.5. As lawyers, our viewpoint is inevitably informed by the feelings and views of the people whom we represent. Our overriding impression is that too often families are excluded from the investigative process and feel alienated and dissatisfied by it. I am conscious that the role of the law has traditionally been to seek compensation for individuals. Perhaps it is for this reason that opinions have been communicated that this is the reason why bereaved families engage in the coronial process:

> Some lawyers treat coroners as though they were their opponents in litigation, instead of judicial officers conducting a statutory inquiry. Such lawyers may regard the inquest as a potential opportunity to obtain legal aid for other proceedings so take care accordingly. *Practice Notes for Coroners 1998 (reprinted 2002)*

1.6. In reality it is our overriding experience that bereaved families have little, if any, interest in compensation that might be achieved – and then only on behalf of the deceased's surviving children - but are in fact more concerned with the objective of preventing future fatalities and that the possibility of their contribution to that objective affords them some meaning and purpose for an otherwise alienating process. The pursuit of transparency and accountability are thus of overriding importance. I can assure you that lawyers have no incentive and some considerable disincentive in seeking legal aid "for other proceedings".

2. The Human Rights Act (HRA)

2.1. From 2 October 2000, the HRA made the key Articles of the European Convention directly enforceable in domestic law and placed a requirement on all public authorities to act in compliance with the Convention.

2.2. Many aspects of the relationship between the state and young soldiers invoke the protection of the Act. Four of the Articles of the Convention are of particular relevance to that relationship - Article 2 which protects the right to life, Article 3 which prohibits inhuman or degrading treatment or punishment - which may be relevant to the treatment of the deceased prior to death, and for relatives and family members, Article 8 which protects the right to a private and family life. Article 13 is also relevant even though it has not been incorporated into our law through the HRA. This Article guarantees the right to an effective remedy in respect of breaches of Convention rights. It has not been incorporated as the HRA itself is deemed to provide that remedy[1]. However,

[1] The HRA provides 3 types of remedy: under s.7 proceedings may be brought for a declaration and/or damages should a public authority act in a manner that is not complaint with the

the Article is important as the right to an effective remedy encompasses aspects of the investigation into a death and the inquest. Today I will focus exclusively upon the most important of these rights – the right to life.

2.3. The right to life is often said to be the most fundamental of all human rights, the basic precondition of the enjoyment of other rights: (Bugdaycay v SSHD [1987] AC 514 at 531; State v Makwanye [1995] LRC 269 at 309-312, 313). This is a theme that has emerged not only from the jurisprudence of the European Court of Human Rights but the British common law over many decades. It is recognised in jurisdictions around the world.

2.4. The importance of the Article 2 right to life in terms of the Convention itself is reflected in the fact that states which are signatories to the Convention are not permitted to derogate from its provisions during peacetime (Article 15). Although a derogation has been entered into by Britain in consequence of the Iraq war (to permit detention without trial) it has not endeavoured to derogate from the right to life. In practical terms for those required to uphold the rights preserved by Article 2, the duties are onerous and the amount of discretion left to individual decision makers will be interpreted very narrowly McCann v UK paragraph 181 (the same principle applies to Article 3).

2.5. It has long been established that Article 2 is relevant when state officials take the lives of citizens and where state officials have failed to take preventative measures in the face of a real and imminent risk to life but there is – or appeared to be - some controversy surrounding the proposition advanced by

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Convention Rights [this is known as the 'statutory tort' created by the Act]; under s.2 for a declaration that primary legislation is incompatible with a Convention Right [known as a "declaration of incompatability" this will usually – but not invariably lead to parliamentary intervention]; under s.3 to enable the courts to read existing legislation in such a way that it becomes compatible with Convention Rights [the interpretative power];

me in my opinion for the Deepcut Review that Article 2 was engaged in respect of the Deepcut deaths.

2.6. That controversy appears to have been laid to rest by a very recent decision of the European Court of Human Rights (ECtHR) in Salgın v. Turkey (no. 46748/99[2]) as to whether Article 2 is engaged in the type of circumstances that affect the Deepcut and Beyond families. I say "appears" because this judgment is currently available in French only. It was given on 20 February 2007. Although the court found that there had been no substantive violation of Article 2 in respect of the death itself, there was a finding of a violation of the investigative obligation under Article 2.

- Mr Salgın was the father of İsa Salgın, who died aged 25, while performing military service.
- On 22 November 1997 Isa was found dead in front of his guard post. A criminal investigation was immediately opened, then an administrative investigation. As part of the investigations, witness statements were taken from other soldiers, who said that İsa had been noted for his irritable and even aggressive behaviour but had calmed down after the birth of his son. During a manoeuvre on 10 November, he had panicked, thinking that he had seen terrorists, and had emptied his magazine into the air. At about 5 pm on the day of his death, the other guards on duty heard a shot and saw a tracer bullet heading into the air. On searching for the source of the shot, they found İsa, on his knees, his chest facing towards the ground and resting on his rifle.
- The autopsy found a bullet entry wound, measuring 4 x 3 cm, above the left nipple and surrounded by a burn mark, and three bullet exit wounds in the dorsal region. According to the forensic doctors, these had been

[2] Under Article 43 of the European Convention on Human Rights, within three months from the date of a Chamber judgment, any party to the case may, in exceptional cases, request that the case be referred to the 17-member Grand Chamber of the Court. In that event, a panel of five judges considers whether the case raises a serious question affecting the interpretation or application of the Convention or its protocols, or a serious issue of general importance, in which case the Grand Chamber will deliver a final judgment. If no such question or issue arises, the panel will reject the request, at which point the judgment becomes final. Otherwise Chamber judgments become final on the expiry of the three-month period or earlier if the parties declare that they do not intend to make a request to refer.

caused by a burst of close-range shots; the three bullets had followed an oblique path and destroyed the upper section of the heart, the main veins, the lower left section of the lungs and one vertebra.

- On 26 May 1998 the military prosecutor concluded that İsa had committed suicide and that it was not necessary to bring proceedings in this connection. Isa's father appealed unsuccessfully against this decision.
- The applicant alleged that his son had not committed suicide but had been killed by a corporal or a soldier. He relied, in particular, on Articles 2 (right to life), 13 (right to an effective remedy) and 14 (prohibition of discrimination).
- Having regard to the evidence before it, the Court considered that any allegation that İsa had been the victim of a homicide would be purely speculative. Seeing no reason to contest the finding established by the Turkish authorities, to the effect that the applicant's son had committed suicide, the Court concluded unanimously that there had not been a violation of Article 2 with regard to the death itself. Furthermore, like the Turkish authorities, the Court accepted that a form of *unpredictable* psychological depression had caused İsa to commit suicide, since, during his lifetime, he had apparently *displayed no behaviour traits suggesting a real and immediate likelihood that he would end his life* (emphasis added). No blame could therefore be attached to Turkey for failing to meet its obligation to protect the applicant's son from himself.
- In addition, however, the Court was of the opinion that the exact circumstances of İsa's death had not been duly assessed and determined. *It also noted that the applicant had in effect been excluded from the investigation* (emphasis added). In those circumstances, the Court considered that the investigation carried out in this case, taken as a whole, had not been "effective". It therefore concluded unanimously that there had been a procedural violation of Article 2.
- By way of just satisfaction, the Court awarded the applicant EUR 12,500 for non-pecuniary damage, of which EUR 10,000 was to be assigned to

the deceased's heirs, and EUR 3,057 for costs and expenses, minus the EUR 630 already received from the Council of Europe by way of legal aid.

3. Positive Obligations

3.1. As is demonstrated by that judgment, one of the key aspects of Article 2 is that public authorities are placed under a positive obligations to enforce Convention rights and this includes the responsibility to hold an effective investigation where Article 2 is engaged. This contrasts quite strongly with domestic jurisprudence which had, for many years, proceeded from the premise that the State was simply required to refrain from activities which infringed the rights of individuals. The concept of the State having a pro-active role is commonly summed up in the phrase 'positive obligations' and has crucial importance in the debate concerning the legal requirements of the state in respect of army deaths.

3.2. The positive obligations as they arise in respect of army deaths are a matter of emerging law but the seminal case in domestic law concerning custodial death investigations, R v SSHD ex parte Amin, [2003] UKHL 51, establishes minimum standards in respect of the state's duty to investigate deaths in custody. With the likely assistance of the *Salgin* judgment and analogy in any event, those minimum standards can be relied upon in respect of army deaths.

3.3. The 5 *Amin* points:

- The 'requirements' for an effective investigation set by Jordan v UK, (2003) 37 EHRR 52, at paras. 105-9, and Edwards v UK, (2002) 35 EHRR 19, at paras. 69-73, are 'minimum standards which must be met, whichever form the investigation takes";
- the 'requirements' for 'public scrutiny' and 'next of kin participation' are separate such requirements;
- the 'requirements' apply with at least equal force to a 'state neglect' or omission case, as to a state 'lethal hands' case, applying Edwards v UK;

- the trigger to the duty arises from the mere fact of the custody death, and does not depend upon an appearance or allegation of state fault: this means that the bereaved do not have to demonstrate in advance on the facts the utility of an inquiry[3]; and
- 'domestic standards' of investigation, established for many centuries, carry the same requirements of independence, public scrutiny and family participation.

3.4. The House of Lords also made two findings of fact with regard to the case itself:

- the case's history of extensive non-public investigations[4] fell well short of those minimum domestic and ECHR standards;
- there are many unanswered questions which require a fresh inquiry. In the absence of an inquest, this must be in public, with representation for the family, provision of the relevant material and the right to cross-examine.

3.5. So what are the Jordan and Edwards criteria – these are the ECtHR's pronouncement with regard to the essential elements of an Article 2 complaint investigation, as follows:

- That there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of

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[3] The detail of the full judgment in *Sagin* will be of importance here.

[4] There was (1) an immediate apology and acceptance of failure in the duty of care by the Director General of the Prison Service; (2) an independent police inquiry, into both the murder itself and any wider criminal liability; (3) the report was served upon the family while the legal proceedings were pending; (4) the criminal trial of the murderer, where the issue was 'diminished responsibility', (5) the CPS conclusion on the advice of counsel, that there was insufficient evidence to prosecute any wider criminal liability; (6) an internal Prison Service inquiry, by a serving Governor, Mr Butt: with offers of meetings and consultation: both parts of the report were promptly served upon the family, but neither were published; (7) a CRE report into the race aspects of the incident: with no relevant public hearing, and without any real family participation: the Report was published 3 working days before the House of Lords hearing and (8) for detailed reasons set out in the Coroner's affidavit, she had exercised her discretion under S. 16(3) of the Coroners Act, 1988, not to resume the inquest, after the criminal trial.

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 initiative, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.

- For an investigation into alleged unlawful killing by State agents to be effective, 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. This means not only a lack of hierarchical or institutional connection but also a practical independence (this means not relying too readily on the account provided by those whose conduct is under investigation).

- 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. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

- 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.

- For the same reasons, 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. The degree of public scrutiny required may well vary from case to case. *In all cases,* however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. (Emphasis added)

3.6. The legal principles enunciated by the House of Lords in Amin bringing Jordan and Edwards into the domestic jurisprudence apply equally to an inquest as they do to the public inquiry that was ordered in Amin. In principle, an independent police investigation and an inquest are capable together of fulfilling the 'Jordan' requirements, and the state's investigative obligations (see McCann v UK (1995) 21 EHRR 97) without the need for a public inquiry. However, the ECtHR has since in Jordan v UK expressed deeper concern about effective disclosure of relevant material to the family. Further reservations were entered for the family at the Amin hearing about current procedures, including: inconsistency with regard to disclosure, funding; and the restrictions on verdicts. The House of Lords decision reflects significant appreciation of these limitations on inquests. Lord Bingham referred to the Home Office Review recommendations, indicating that they would avoid such problems and adds: "… no doubt that report is receiving urgent official attention." Unless and until substantially reformed, there is strong judicial recognition of the need for more effective investigation than can currently be provided by inquests. The State therefore has a powerful incentive to accelerate the programme for inquest reform. Meanwhile, such efforts that can

be made to facilitate family participation can only serve to increase the possibility of the inquest meeting the positive obligations under Article 2.

3.7. The aspirations of the bereaved family in *Amin* family - to make sense out of their grief by contributing to the future protection of others – will have strong resonances for many here today. In this case, the most senior Law Lord, Lord Bingham recognised this as one of the main purposes of the investigation, and "thereby humanely connected the needs of the bereaved with the duties of the state[5]".

3.8. Before concluding this dash through the relevant law, consideration also needs to be given to the requirement to take operational measures to protect life. In the case of Osman the European Court were concerned with a situation where threats had been made to the life a child by a former teacher of his and these threats had been reported to the police. No action was taken and the teacher eventually murdered the child's father and injured the child. At the time of these events, the family were precluded from taking any action against the police on the grounds that they had immunity from civil action. The UK Government had argued that Article 2 was only violated where the failure to perceive risk to life and to take preventative measures was tantamount to gross negligence or wilful disregard of that duty. This very narrow test was rejected by the ECtHR and they expressed the duty as being far broader and imposing greater obligations on the authorities.

> [The state authorities are required] to do all that could be reasonably expected of them to avoid a *real and immediate risk to life* of which they have, or ought to have knowledge. This is a question which can only be answered in light of all the circumstances of any particular case. (paragraph 116 - see also Kaya v Turkey @ para 86).

3.9. It may seem that this only has relevance to deaths arising from the use of force - be it private individuals or state officials - but it is clear that the ambit of this duty extends not only to the risk of harm from others but also to the risk of self

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[5] Patrick O'Connor, QC

harm. Moreover, this is the test by which a substantive violation of the protective obligation might be established. It is now clear that the investigative obligation 'kicks in' in response to some other and lower standard. This is a matter of common sense: without the investigation how does one establish whether or not a violation has occurred.

4. Making the Difference

4.1. What can independent advice and assistance achieve

- Provision of reliable information concerning the process to the family.
- Management of the family's expectations from the process.
- Facilitation of the family's effective contribution to the inquiry including provision of information from the family.
- Analysis of documentation and the law from the family's perspective.
- Greater balance and objectivity to the process.

4.2. A good example is given by reference to procedure concerning post mortems.

- INQUEST surveyed its client group and found that only 1 in 10 were informed when and where the post-mortem was going to take place and of their right to have a representative present. Information communicated at this stage may not be readily understood or absorbed. The leaflet, "The Work of the Coroner/What happens after sudden death" should be given **before** the post mortem but frequently is not. Independent advice can obviously assist at this stage.
- An effective post mortem will often require information concerning a deceased's past. Building the family's confidence and involvement will improve the quality of information available to the pathologist. In contrast the post mortem will often take place before the family are aware of the arrangements. Certainly, without an opportunity to engage an independent pathologist to attend the first post mortem.
- The engagement of lawyers at an early stage means that the post mortem findings can be communicated to the family sensitively and from

a source that they can trust. 2nd opinions can then be sought if necessary (although this is very much a second best option to their own pathologist being present on 1st post mortem) but this is only a possibility if funding is available for these purposes.

- Leading pathologists have advised that in all controversial death cases (i) the ideal is for an independent pathologist to attend the first post-mortem or (ii) if this is not possible, to seek the first pathologist's report and to ensure it is reviewed by an independent pathologist with a view to making a decision as to whether a second post mortem is necessary **before** the body is released.

4.3. Similarly with regard to disclosure.

- The discretion to disclose rests with the agency whose conduct may be called into question but those agencies are amendable to judicial review. Lawyers are needed to challenge restrictive decision making.
- Documents provided to the Coroner are often not provided to the bereaved family.
- Private communications between the Coroner and for example, the state is permitted.
- Crucial documentation frequently emerges in the course of evidence and requires consideration.
- The existence of documents is denied and pressure must be brought to bear in this respect.

5. Exceptional Funding for inquests: when is it available

5.1. Public funding (formerly 'legal aid') for representation before an inquest is specifically excluded from the public funding regime by Schedule 2 of the Access to Justice Act 1999. However, funding may be provided by way of a grant of exceptional funding under section 6(8) (b) of the Act. In respect of custodial death inquests, the Lord Chancellor has devolved responsibility for decision making to the Legal Services Commission (LSC) and in reality, most custodial death inquests do now have the benefit of public funding ["the

custody death exception"]. In all other cases, the LSC offers recommendations to the Lord Chancellor with whom the decision with regard to a grant of exceptional funding rests. The Lord Chancellor has issued guidance to indicate the types of case he is likely to consider favourably under this power. The relevant guidance was issued on 1 November 2001. Before approving an application the Lord Chancellor would expect the LSC to be satisfied that either there is a significant wider public interest[6] in the applicant being legally represented at the inquest[7] or funded representation for the family of the deceased is likely to be necessary to enable the coroner to carry out an effective investigation into the death, as required by Article 2 of the ECHR (emphasis added).

5.2. The Lord Chancellor and the LSC's guidance in this regard have been amended to take account of the decision of the Court of Appeal in R (Khan) v Secretary of State for Health [2003] EWCA Civ 1129 which considered the particular circumstances in which the Article 2 investigative obligation requires funding to be provided for the deceased's family to be legally represented at the inquest or at an equivalent investigation. Accordingly, in determining whether there should be a grant of exceptional funding, consideration will be given to the following:

- The nature and seriousness of any allegations which are likely to be raised at the inquest, in particular any allegations against public authorities or other agencies of the state.
- Particular regard will be given to any of the following circumstances:
  - closely related multiple and avoidable deaths from the same cause within the same institution;
  - criminal conduct;

[6] "Wider public interest" means the potential of the proceedings to produce real benefits for individuals other than the client (other than benefits to the public at large which normally flow from proceedings of the type in question).

[7] This means that an applicant must be able to demonstrate that representation is necessary to obtain any benefits that may arise, not just, that the inquest itself may provide benefits.

- attempts to conceal information or otherwise interfere with an investigation into the circumstances surrounding the death;
- Whether other forms of investigation have taken place, or are likely to take place, and whether the family have or will be involved in such investigations;
- Whether the family may be able to participate effectively in the inquest without funded legal representation. This generally depends on the nature of the issues raised and the particular circumstances of the family; and
- Any views concerning the necessity of representation expressed by the coroner, although these are not determinative.

5.3. In general, applicants must also satisfy the financial eligibility limits for Legal Representation as set out in regulations and which in effect mean that the applicant must have very modest means. However, with effect from 1 December 2003 the Lord Chancellor acquired discretion to waive financial eligibility limits relating to representation at an inquest where the LSC requests him to do so (Regulation 5C of the CLS (Financial) Regulations 2000 as amended). The Lord Chancellor will consider such a waiver in relation to inquests that satisfy the guidance if, in all the circumstances, it would not be reasonable to expect the family to bear the full costs of representation at the inquest. Whether this is reasonable will depend in particular on the history of the case and the nature of the allegations to be raised, the applicant's assessed disposable income and capital, other financial resources of the family, and the estimated costs of providing representation. Where it is appropriate for a contribution to be payable this will be based upon the applicant's disposable income and disposable capital in the usual way ignoring upper eligibility limits.

5.4. The Lord Chancellor also has discretion to waive the upper financial eligibility limits with regard to provision of legal advice and assistance towards the preparations for an inquest including disbursements such as experts' fees

(Regulation 38(8A) and (9) of the CLS (Financial) Regulations 2000 as further amended on 25 July 2005).

5.5. Accordingly exceptional funding is available to cover preparation for the inquest (whether under Legal Help or Legal Representation if the applicant is financially eligible or exceptional funding if the applicant's means place him/her outside the upper eligibility limits for Legal Help/Representation) and advocacy at the hearing itself. Public funding is thus available in respect of:

- Preparation, advice and assistance.
- Disbursements, for example, obtaining a second post mortem.
- Counsel or solicitor's fees for acting as advocate at the hearing.
- The costs of any other legal representative attending the hearing.
- The cost of instructing counsel for the hearing.
- The cost of any conference at or immediately before the hearing.
- Costs in relation to any preliminary hearing at which advocacy is required.

5.6. In my opinion, I expressed the view that the circumstances of the Deepcut cases would appear to have the type of exceptional characteristics that would justify the grant of exceptional funding and waiver of the financial eligibility limits[8].

[8] The Review's remarks that such discretions should be exercised wherever possible to give effect to Convention rights (see Chapter 2 Paragraph 2.41) are noted in this context.