**The Birmingham bombing inquest ruling-what relevance to Northern Ireland inquests?**

On 26th January the English High court gave its judgment on a judicial review brought by representatives of the people killed and the many others injured by bombs in Birmingham on 21st November 1974.

The relevant portions are as follows:

1. *Submissions as to the scope of the Inquests were made between 23 February and 29 June 2017. On 3 July 2017 the Coroner ruled, amongst other things, that investigation into the identity of the suspected perpetrators (‘the Perpetrator Issue’) would not be dealt with as part of the inquiry.*
2. *Having set out the procedural background and the law, the Coroner identified the four issues on scope before him:* 
   1. *(1)  Forewarning: whether West Midlands Police (‘WMP’) or other state agency had prior knowledge that a bomb attack would take place in Birmingham on or around 21 November 1974, and whether further steps could or should have been taken to prevent the bombings;*
   2. *(2)  Agent/Informant: whether WMP or any other state agency were engaged in concealing the actions of agents or informants who were responsible for the bombings, or whether there was other state involvement or collusion to enable the Birmingham Bombings to take place;*
   3. *(3)  Emergency Response: the response of the emergency services to the bombings, its adequacy or otherwise, and whether any failings caused or contributed to the deaths that resulted from the bombings;*
   4. *(4)  The Perpetrator Issue: the identities of those who planned, planted, procured and authorised the bombs used on 21 November 1974.*
3. *The Coroner accepted that the Forewarning issue was within scope of the Inquests. He made no ruling on the Agent/Informant issue, since further inquiries on the issue were necessary. He ruled that, for the present, an over-arching investigation into the emergency response fell outside scope of the Inquests.*
4. *He then ruled that the Perpetrator Issue was outside scope, expressing himself at §86:*

*In considering the exercise of my discretion on the question of scope I have therefore taken into account both the distinction between the roles of inquests and criminal proceedings and the statutory prohibitions in section 10(2) and paragraph 8(5) of Schedule 1. I have also looked at the particular circumstances of the instant case. Having done so, I conclude that the perpetrator issue should not be within scope in this case.*

1. *The reasons that led to and justified this conclusion were set out in parts of the ruling which preceded and followed this passage. It is only necessary for present purposes to summarise them:* 
   1. *(1)  Although a jury may conclude that the deceased was unlawfully killed it may not say by whom. The identity of the perpetrator is a matter for the police and the prosecuting authority (§76).*
   2. *(2)  The verdict of the jury may not be inconsistent with the outcome of the proceedings in respect of which the Inquests were suspended, see paragraph 8(5) Schedule 1 to the 2009 Act. It followed that the Inquest verdicts could not be inconsistent with the acquittals of the Birmingham Six (§§84-85).*
2. *(3)  To permit the perpetrators to be within the scope would be seen to be taking on the role of ‘a proxy criminal trial’, which, if it identified the perpetrators, would contravene the prohibition in s.10(2)(a) and, in the case of the Birmingham Six, the additional prohibition in paragraph 8(5) of Schedule 1 (§§87-8). It would also offend against the statement of principle set out in the judgment of Sir Thomas Bingham MR in R v. HM Coroner for North Humberside and Scunthorpe, Ex p. Jamieson [1995] QB 1 at 24(5):*

*... the verdict may not appear to determine any question of criminal liability on the part of a named person.*

1. *(4)  It would not be fair or logical for named individuals, whether the Birmingham Six or others, to be paraded through the evidence in the hope that they might be identified as perpetrators (§88).*
2. *(5)  There would be practical difficulties: the sheer size and complexity of any investigation into the criminal responsibility of individuals 43 years after the event, in circumstances where years of police investigations, enquiries and reviews had yielded no clear result. The approach would inevitably be piecemeal and incomplete, relying primarily on books and the press in which various individuals had been named (§89).*
3. *(6)  The inquest process, without the resources of a police force, was incapable of carrying out the task (§89).*
4. *(7)  Such an investigation would be disproportionate to answering the four statutory questions: who the deceased were, how, when and where they came by their death (§89).*
5. *(8)  The jury would not be able to say that an individual was involved in the planning, planting, procuring or authorizing of the bombing without breaching the statutory prohibitions (§90).*
6. *(9)  The article 2 procedural duty does not require the state to investigate who perpetrated the bombings in circumstances where the state, through police investigations has already undertaken extensive investigations into the crimes (§91).*
7. *Conclusions on grounds 1 and 2*
8. *The first question is whether the Coroner posed the right question on the scope of the Inquests: whether the factual issue of the identity of the bombers (and those that assisted them) was sufficiently closely connected to the deaths to form part of the circumstances of the death. In our view, he did not. Furthermore, the two short conclusory sentences in §86 did not answer this question; and, we would add, some (but not all) of the reasons he gave did not support that conclusion.*
9. *In these circumstances, we will quash the decision and remit the matter to the Coroner so that he can make the decision in the light of this judgment.*
10. *It is because we recognise that the decision on scope is not straightforward that we offer the following guidance on factors which may bear on the Coroner’s decision, and which we do by reference to the matters set out above at [19] above.* 
    1. *(1)  The fact that the jury is precluded by s.10(2)(b) from making a determination which is framed in a way that determines any question of criminal liability of a named person, and the fact that the primary responsibility for detecting and prosecuting individuals for crimes vests with the police and prosecuting authority, are not (at least without more) reasons for excluding the identification of perpetrators from the scope of the Inquests. However, the implicit inhibition in s.5(3) and the explicit prohibition in s.10(2)(a) highlight the difference between the proper ambit of an inquest on the one hand, and the role of police investigations and prosecutions in criminal trials on the other.*
    2. *(2)  Mr Straw argued that it should be open to the jury to consider whether one or more of the Birmingham Six were the perpetrators of the Birmingham bombings, while maintaining that this would not be inconsistent with the outcome of the proceedings in respect of which the Inquests were suspended, see paragraph 8(5) of Schedule 1 to the 2009 Act. We see considerable difficulties with this submission both in terms of the statutory provisions and in terms of fairness (with which we deal below). It seems to us that it would be wholly inconsistent with the principle of finality in legal proceedings that those who have been acquitted of a homicide offence should then be the subject of a full enquiry as to whether they were in fact guilty, provided that no findings were in fact made.*
11. *(3)  To some extent we have dealt with the Coroner’s concern that to permit the identity of the perpetrators to be within the scope of the Inquests might be seen to be taking on the role of ‘a proxy criminal trial’ which might result in a contravention of the prohibition in s.10(2)(a) and in the case of the Birmingham Six, the additional prohibition in paragraph 8(5). We accept Mr Straw’s submission that the prohibition in s.10(2)(a) is confined to determinations of the questions in s.5(1) and (2). Although inquests should not become proxy criminal trials without the protections afforded to defendants, there may be inquests in which the identity of those involved in violent deaths may properly be within the scope of the inquest. Mr Straw gave the example of armed response police officers shooting a suspect.*
12. *(4)  As already indicated, issues of fairness and proportionality will be relevant. We recognise that fairness in the process may involve fairness to those who have a profound and abiding interest as relatives of the deceased as well as to those who may be implicated in a homicide. Mr Straw submitted that the coronial process can ensure fairness: the right to be treated as an interested party under s.47(2)(f) of the 2009 Act, the privilege against self-incrimination and the criminal standard of proof required for a conclusion of unlawful killing, see for example R (Anderson) v. HM Coroner for North London [2004] EWHC 2720 at [21] (Admin). In our view, these points do not entirely answer the question of fairness. The law does not recognise any time limits for the prosecution of defendants. However, it recognises the difficulties that witnesses may have in accurately recollecting events after a long passage of time; as it does the potential unreliability of hearsay and double-hearsay evidence from ‘confidential sources’ described in books and the press, whose provenance and reliability may be very difficult, if not impossible, to establish and which cannot easily be tested. Such considerations may go to the reasonableness and proportionality of the potential scope of an inquest.*
13. *(5)  We have already dealt with some of the practical difficulties. In our view the size and complexity of an investigation into the criminal responsibility of individuals, 43 years after the event, in circumstances where police investigations and reviews have failed to identify the perpetrators, is a relevant factor. However, it is not an overwhelming factor and the position may change if new information comes forward.*
14. *(6)  Mr Straw submitted that the availability of coronial resources was an irrelevant factor where there had been failure by the State to bring the perpetrators of mass murder to justice. As a statement of abstract principle, we agree. If the identity of the perpetrators is properly regarded as being within the scope of the Inquest, then we would not expect limitations on financial resources to inhibit the inquiry. However, the fact that significant police resources have been deployed without leading to the identification of the perpetrators is a potentially relevant factor in deciding where the line is to be drawn.*
15. *(7)  Although we have approached it in a different way to the Coroner, it is our view that proportionality is a material consideration.*
16. *(8)  We do not agree that the jury would be unable to identify an individual involved in the planning, planting, procuring or authorizing of the bombing without breaching the statutory prohibitions. The statutory regime would circumscribe certain aspects of an enquiry into potential perpetrators but s.10(2) applies to the conclusion not the investigation. A jury can plainly explore facts bearing on criminal and civil liability.*
17. *Conclusion*
18. *The Claimants sought the following relief:*
19. *(1)  An order quashing the Coroner’s decision under s.31(1)(a) of the Senior Courts Act 1981;*
20. *(2)  A mandatory order under s. 31(1)(a) of that Act, requiring the Coroner to include the Perpetrator Issue within scope;*
21. *(3)  A declaration under s.31(1)(b) of that Act, that the Coroner’s decision was contrary to Article 2 and s. 6(1) of the Human Rights Act 1998.*

*61. Subject to hearing further submissions as to the form of any order, we are minded to (1) quash the Coroner’s decision which excluded the Perpetrator Issue and remit the case so as to enable him to reconsider the decision in the light of this judgment, (2) refuse to make any mandatory order, and (3) refuse to make any declaration under s.31(1)(b) of the 1981 Act.*

The Law in England and Wales is to be found in the Coroners and Justice Act 2009 [“the 2009 Act”]. It provides:

1. Section 5 of the 2009 Act provides, under the heading ‘Purpose of Investigation’: 5. Matters to be ascertained

(1) The purpose of an investigation under this Part into a person’s death is to ascertain -

(a) who the deceased was;

(b) how, when and where the deceased came by his or her death;

(c) the particulars (if any) required by the 1953 Act to be registered concerning the death.

(2) Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998 ... the purpose mentioned in subsection (1)(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.

(3) Neither the senior coroner conducting an investigation under this Part into a person’s death nor the jury (if there is one) may express any opinion on any matter other than -

(a) the questions mentioned in subsection (1)(a) and (b) (read with subsection (2) where applicable);

(b) the particulars mentioned in subsection (1)(c).

1. Section 10 of the 2009 Act provides under the heading ‘Outcome of investigation’:

10. Determinations and findings to be made -

(1) After hearing the evidence at an inquest into a death, the senior coroner (if there is no jury) or the jury (if there is one) must -

(a) make a determination as to the questions mentioned in section 5(1)(a) and (b) (read with section 5(2) where applicable), and

(b) if particulars are required by the 1953 Act to be registered concerning the death, make a finding as to those particulars.

(2) A determination under subsection (1)(a) may not be framed in such a way as to appear to determine any question of -

(a) criminal liability of the part of a named person, or

(b) civil liability.

1. Section 11 of the 2009 Act identifies that Schedule 1 makes provision for the suspension and resumption of investigations where criminal charges may be brought or a public inquiry is pending.
2. Paragraph 8(5) of Schedule 1 to the 2009 Act provides:

(5) In the case of an investigation resumed under this paragraph, a determination under section 10(1)(a) may not be inconsistent with the outcome of:

* 1. (a)  the proceedings in respect of the charge (or each charge) by reason of which the investigation was suspended;
  2. (b)  any proceedings that, by reason of subparagraph (2), had to be concluded before the investigation could be resumed.

Additionally, Section 6(1) of the Human Rights Act 1988 provides that it is unlawful for a public authority to act in a way which is incompatible with a right conferred by the European Convention on Human Rights (‘the ECHR’). Article 2 of the ECHR provides materially:

Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The key provisions in the Birmingham case and in the 2009 Act are the implicit inhibition in s5[3] and the explicit prohibition in s10 [2] [a] . The High Court said that these provisions were not reasons for excluding the identification of perpetrators from the scope of the Inquests. Although Inquests should not be “proxy criminal trials” …there may be inquests in which the identity of those involved in violent deaths may properly be within the scope of the inquest. Most significant was the statement that

1. *We do not agree that the jury would be unable to identify an individual involved in the planning, planting, procuring or authorizing of the bombing without breaching the statutory prohibitions. The statutory regime would circumscribe certain aspects of an enquiry into potential perpetrators but s.10(2) applies to the conclusion not the investigation. A jury can plainly explore facts bearing on criminal and civil liability.*

So what of the application of this judgment to Northern Ireland inquests?

The first point to make is that , being a decision of the High Court of England and Wales, it is not binding on Northern Irish Courts.

Secondly, the English decision is not an appeal, nor does it substitute the decision of the High Court for that of the Coroner. The case has given the Coroner guidance as to how he should conduct the public phase of the inquest.

Thirdly, the Coroner has announced an intention seek leave to appeal the decision to the Court of Appeal.

Fourthly , the law in Northern Ireland is largely governed by different statutes; the Coroners Act (Northern Ireland) 1959 [“the 1959 Act”] and the Coroners (Practice and Procedure Rules) 1963 [“the Rules”] , these provide :

Rule 15 “The proceedings and evidence of an inquest shall be directed solely to ascertaining the following matters, namely:-

1. (a)  who the deceased was;
2. (b)  how, when and where the deceased came by [his] death;
3. (c)  ... The particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning the death.”

Rule 16 goes on to provide that:

“Neither the Coroner nor the jury shall express any opinion on questions of civil or criminal liability or on any matter other than those referred to in the last foregoing Rule.”

Happily, the statute law in both jurisdictions is largely comparable, except for the provision of s5 [2] re Convention rights.

It is also accepted via Section 6 (1) of the Human Rights Act 1988 that inquests should be Article 2 compliant.

The English High court has held that the factual issue of the identity of the bombers is sufficiently closely connected to the deaths to form part of the circumstances of the death.

On the face of the English High Court decision, there is no reason why such an argument could not be made before a Coroner here, in any similar case.

Having said that, the counter arguments of the Coroner are well made and the High Court decision travels into entirely new legal territory. The arguments are finely balanced. It may come down to the question which is often asked. Is an inquest the proper forum for the apportionment of blame in cases such as the Birmingham bombing or the Kingsmills Massacre?

The English decision is likely to go beyond the Court of Appeal, to the Supreme Court, subject to the ability of the families to raise the necessary funds or to secure legal aid, which to date has been unavailable.

It is an argument which is likely to be unresolved before the end of 2018.