Albion Chambers, Broad Street, Bristol BS1 1DR

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol

Email clerks@albionchambers.co.uk

www.albionchambers.co.uk

Number 6 June 2017

Albion Chambers INQUEST TEAM NEWSLETTER

Out of the frying pan

and into the fire?

There has been much comment upon the potential tidal wave of Article 2 inquests in DoLS cases and in relation to deaths in care homes, following the decisions in Cheshire West, and Ferreira. The Crime and Policing Act has resolved that issue; it is now clear that the coronial system will not be burdened with having to conduct an Article 2 inquest in relation to all such deaths. However, the relief which Coroners may have felt may be tempered when one considers the implications of the judgment of the European Court of Human Rights (ECtHR) in *Cevrioglu v Turkey ECtHR (Application no. 69546/12)* (4 January 2017).

Facts

In 1998 Mr Cevrioglu's ten-year-old son drowned, as did his friend, in an uncovered water-filled hole on a construction site near their home, where they had been playing. There followed much domestic litigation in Turkey. Three expert reports were prepared for the purposes of criminal proceedings brought against the Antakya Municipality and the owner of the construction site, "HC", for causing death by negligence and failing to comply with regulations and orders. These reports varied in their attribution of liability as between the children, the municipality, and HC. Nevertheless, there was a finding at the court of first instance that the Municipality and HC were 25% and 75% responsible for the incident respectively, as the Municipality had failed to inspect the construction site, and HC had failed to secure the site with wooden boards/cover the hole/supervise the site, and the accused were found guilty as charged. That judgment was subsequently quashed as a result of domestic legislation which provided for the suspension of certain criminal proceedings.

Mr Cevrioglu then brought proceedings for compensation in the civil courts against HC and the Municipality. For these purposes a further expert report was prepared which concluded that HC bore 85% responsibility, and the children the remaining 15%. The report dismissed the suggestion that the State bore any responsibility for the accident, as it had occurred within the boundaries of the private construction site, and not in a public space or other area under the direct responsibility of the State. It had had no involvement in the construction, aside from issuing the necessary permits. It was suggested that any alternative conclusion would mean the State being held liable for all accidents occurring in any construction. Accordingly, the case against the Municipality was dismissed, both for this reason, and on appeal, on the procedural ground that the complaints regarding the State's duty to inspect fell within the jurisdiction of the administrative courts.

Mr Cevrioglu duly brought proceedings in the administrative court. That court found, based solely on the expert report submitted within the civil proceedings which absolved the State of any liability, and without conducting any analysis of its own into the legislative responsibilities of the Municipality, that no fault was attributable to the State. Compensation claim dismissed, again.

And so, to the European Court. Mr Cevrioglu complained that the State authorities had failed to protect his son's right to life under Article 2. The Government's response was that the State authorities could not be held accountable as the responsibility for taking the necessary safety measures on a construction site lay with the owner of the site, HC. It was argued that it would impose an excessive burden on the State to hold Municipality officials responsible for the death, and that the procedural obligations under Article 2 had been discharged.

Decision

The Court noted that a number of domestic regulations imposed an obligation on the State to monitor, supervise and inspect compliance with any labour legislation, which in turn placed a responsibility on employers to take all necessary measures to protect workers' health and ensure occupational safety in the workplace. The Municipalities Act indicated that the Municipality's duties included the taking of precautionary measures to prevent the dangers caused by holes on building sites. The Court also noted the International Labour Organisation's Code of Practice on "Health and Safety in Construction", which states that "The competent authority should provide appropriate inspection services to enforce or administer the application of the provisions of the national laws and regulations and provide these services with the resources necessary for the accomplishment of their task, or satisfy itself that appropriate inspection is carried out".

The Court reiterated that Article 2 enjoins the State not only to refrain from the intentional taking of life, but to take appropriate steps to safeguard the lives of those within its jurisdiction. This obligation applies not only to situations concerning the protection of individuals identifiable in advance (known potential targets of violence, for example), but also to afford general protection to society [paragraph 50]. That protection covers a wide range of sectors, including the dangers emanating from buildings and construction work. The extent of the State's obligation to take regulatory measures must take account of the level of potential risk to human life. Additionally, the regulations must provide for appropriate procedures to identify shortcomings in compliance.

The Court concluded that there was "little doubt" that the positive obligation applied in this context; *"activities carried out on construction sites are amongst those that may pose risks to human life due to their inherently hazardous nature, and my therefore require the State to take reasonable measures to ensure the safety of individuals as necessary"* [para 56]. The State's obligation is not simply to put a regulatory framework in place, but also to ensure the effective functioning of that framework, otherwise the protection it afforded would be illusory. This was stressed by the International Labour Organisation's Code of Practice.

The Court noted that the Government had failed to respond to the request to provide information regarding the domestic law governing inspection of construction sites. In view of the ambiguities surrounding the scope and conditions of the authorities' duty of inspection, which was apparent from the conflicting expert reports prepared in domestic legislation, the Court said that it could hardly be argued that an adequate enforcement mechanism which would ensure compliance with the regulations was in place. The absence of the necessary safety precautions in relation to any construction site, but particularly those in residential areas, had the potential for life-endangering accidents, which rendered the State's responsibility to inspect more compelling. Whilst the primary responsibility for ensuring the safety of the site lay with HC, the failure of the State to enforce an effective inspection mechanism was a relevant factor. The reasonableness of the expectation that the State should inspect construction sites for which it issued permits was directly linked to the gravity of the potential dangers which may emanate from unsafe construction sites [para 66].

The Court therefore held that the State had been in breach of both its positive obligations under Article 2 and its procedural obligations, since in none of the domestic proceedings had the courts definitively establish the shortcomings identified by the European Court. Mr Cevrioglu was awarded damages accordingly.

Implications

There is no difficulty in identifying that the state's Article 2 obligations (not to take and to protect life) extend to dangerous activities run by the State, such as military service, or waste disposal. The line may be considered less clear when considering activities carried on by private companies, which are not so obviously life threatening. Cevrioglu makes clear that deaths which occur in connection with such activities may necessitate an Article 2 inquest. The activities to which this judgment applies would include those regulated by the HSE, CQC and EA. There is nothing in the judgment to limit its application to work on construction sites. Practitioners need to consider carefully whether an Article 2 inquest is required even in cases where the State is not the primary actor.

There is scope for argument. Whether the State has a role in overseeing a privately run activity will, as the judgment recognises, depend in part on the magnitude and severity of the risks which that activity produces. It will be possible to argue that Article 2 does not apply where there is no pre-existing regulatory framework for State oversight, on the basis that the risk is not so severe as to require regular or regulated review of the activity by the State. Equally, if there is an obligation on the State to inspect and regulate the activity, those representing State bodies may successfully argue no Article 2 inquest is required where compliance with domestic and/or international law demonstrates that obligation has been discharged. In order for an Article 2 inquest to be necessary, it would also have to be demonstrated that proper State oversight would have led to action which would have reduced or extinguished the risk of death.

The trend for greater state responsibility, and the need for more intense scrutiny following a death, continues.

Anna Midgley

Beware the Chief Coroner's guidance notes

The introduction of the Chief Coroner's Guidance notes is very welcome indeed, to give a little structure and uniformity across the country, so parties, advocates and coroners have a set of foundations on which to base their decisions or arguments.

As additional guidance notes are issued, that consistency is spreading to some of the more difficult areas in coronial law, and this has to be a good thing.

However, there is a problem...

Re-drafts

As one would expect, on top of issuing new guidance notes, the Chief Coroner also updates existing guidance notes from time-to-time. Again, something to be applauded, there's no point having consistency if that consistency does not reflect the current state of the law.

The difficulty that has arisen relates to the process of re-drafting the guidance notes. The tweaking, the polishing, the piecemeal amendments, have not always produced a consistent or reliable outcome and as a practitioner, we must be aware of the flaws within the notes but also our own over reliance on them. They are not gospel.

An example

Chief Coroner's Guidance Note # 1 – The use of Post-Mortem Imagining (adults) underwent a redraft in January 2016. At paragraph 1 it shares the same stated intention as its predecessor, namely:

"The purpose of this Guidance is to provide a sound working procedure with minimum requirements where post-mortem imaging is used. This Guidance is not intended to be judgmental about the process of post-mortem imaging, merely to provide minimum standards where it is used."

In essence, the guidance is there to assist where the decision to use or not to use has already been taken.

However, later in the guidance at para 12, specific reference is made to the case of *Rotsztein v Senior Coroner for Inner North London* (2015), concerning the use of imaging in relation to a Jewish woman. Tensions between aspects of her religion meant the decision was not straight-forward.

However, for the purposes of this piece, the facts of the case are not relevant other than to say that *Rotsztein* very much focussed on a qualitative assessment of Post-Mortem Imagining. In addition, and this is where it causes difficulties with the guidance, *Rotsztein*, for the most part, deals with the making of the decision to use or not to use Post-Mortem Imagining, a decision which falls outside the stated ambit of the guidance.

Conclusions

Rotsztein is a very good judgment, every practitioner should read it. Similarly, the guidance in this area is sound, the foundations are strong and I have no quarrel with including *Rotsztein* in general guidance about Post-Mortem Imagining. The purpose of this piece is simply to highlight the risk of ongoing amendments, or additions to existing guidance notes, without also re-assessing the scope of that guidance. In the example given above, one could cite the guidance note's reference to *Rotsztein* in support of the coroner making the decision to use or not to use, whilst also citing the guidance's scope, excluding the relevance of the same authority.

Rotsztein is not the only example of this 'guidance creep' across the 23 current guidance notes, and we as practitioners must beware.

Richard Shepherd

Lawful killing...

Duggan revisited

A discussion of the elements of self-defence in light of the decisions in *Da Silva v United Kingdom [2016] 63 EHRR 12 and R (Duggan) v HM Coroner for Greater London and others* [2017] EWCA Civ 142

In short, the decisions in *Da Silva* and *Duggan* confirmed the test for self-defence and therefore lawful killing, in inquests, is the criminal test rather than the civil test. Accordingly, the reasonableness of the individual's belief is relevant to the question of whether the belief was honestly held, but not more.

What were the facts?

No doubt readers will be familiar with the factual circumstances of the death of Mark Duggan. Believed to be part of a gang known for violence, Mark Duggan was travelling in a minicab across North London when it was intercepted by police officers who suspected Duggan might be transporting a firearm. Seconds after exiting the minicab, Duggan was shot twice by officer V53, who believed he was holding a firearm. A gun was found 7.5 metres from Duggan's body, and expert evidence at the inquest suggested it could not have been thrown after he had been shot.

The jury were asked a series of questions in order to choose one of three available conclusions: unlawful killing, lawful killing, or an open conclusion. Eight of the ten jurors were sure that Mark Duggan did not have a gun in his hand when he was shot by V53; however a majority of eight to two concluded the killing was lawful. The other two jurors returned an open conclusion.

After that somewhat surprising result, the family sought to have the lawful killing conclusion quashed, via a judicial review application to the High Court. That application failed, but permission to appeal to the Court of Appeal was granted on 27 October 2015. The date is significant, because judgment was expected from the ECtHR in the related case of *Da Silva* in March 2016.

The *Da Silva* case concerned the death of Jean Charles de Menezes, a Brazilian national who was confused with a terrorist suspect in July 2005, and was shot and killed by members of the Metropolitan Police who mistakenly thought he posed a threat. The case came before the ECtHR because Ms Da Silva wished to challenge the lawfulness of the state's decision not to prosecute any individual police officers in relation to her cousin's death. It is perhaps noteworthy that counsel for the family in *Da Silva* also represented the family in *Duggan*.

The Chronology

The significant events in the timeline of these cases were as follows:

24 February 2014 – Pamela Duggan seeks JR of inquest conclusion

14 October 2014 – High Court reject the application

10 May 2015 – The *Da Silva* case was heard by the Grand Chamber

27 October 2015 – Pamela Duggan given permission to appeal to the Court of Appeal

30 March 2016 – The *Da Silva* judgment is published

2 March 2017 – The *Duggan* appeal is heard by the Court of Appeal

29 March 2017 – Judgment in *Duggan* is published

Self-Defence – Criminal or Civil Standard of Proof?

Following the inquest, the Duggan family were confronted with circumstances where the jury had been sure that Mark Duggan did not have a gun in his hand at the time he was shot, and yet had returned a conclusion of lawful killing. It was perhaps understandable that the family would seek some route to challenge the outcome.

The method of challenge was to suggest the test for self-defence should be the civil standard of proof rather than the criminal standard. The key difference between the two is the reasonableness of the individual's belief. For the criminal standard, the belief in a perceived threat only needs to be honestly held in order to be valid, even if it is mistaken. In the civil test, the belief also needs to be reasonable, i.e. even if it is genuinely held, if it is a mistaken belief that was not reasonable to hold, it will not provide a defence. Additionally, in a criminal case the prosecution must disprove the defence to the criminal standard, whereas in a civil case the party relying on self-defence must prove it to the civil standard.

The Duggan family were arguing that the question of lawful force should not be assessed subjectively, but rather that there needed to be objectively reasonable grounds for a belief in an imminent threat.

A similar point was raised in *Da Silva*, as it was argued that European case law (and specifically the case of *McCann and Others v the United Kingdom*) had implemented a test whereby the individual raising self-defence must have 'good reasons' for their belief, even if it turned out to be mistaken. However the ECtHR found that phrase was to be interpreted subjectively and that it was similar to the test of reasonableness in domestic law. The court reaffirmed that reasonableness was not a separate requirement but rather a relevant factor in determining whether a belief was honestly and genuinely held.

The conclusion of the ECtHR and the Court of Appeal on this point was clear – as far as inquests are concerned, the test to be applied when considering self-defence is the criminal test, not the civil test.

Key Principles from the decisions

- For conclusions of unlawful killing and lawful killing at inquests, the test for self-defence is the criminal test not the civil test;

- The coroner does not have to direct the jury that the reasonableness of the belief is relevant to whether it was honestly held. In fact, it is desirable not to give such a direction unless it is really necessary;
- The ECtHR concept of killing only when 'absolutely necessary' is the incorporated within the domestic law requirement for an act of self-defence to be reasonable/proportionate;
- Inquests are not concerned with determining questions of civil liability, and the procedural obligations of Article 2 do not impose a duty on the state to investigate a breach of the civil law.

Alexander West

Albion Chambers Inquest Team

Team Clerk Nick Jeanes

Kate Brunner QC
Call 1997 QC 2015
Team Leader, Recorder
Upper Tribunal Judge

Stephen Mooney
Call 1987

Fiona Elder
Call 1988

Paul Cook
Call 1992
Recorder

Jason Taylor
Call 1995

Kirsty Real
Call 1996

Richard Shepherd
Call 2001

Anna Midgley
Call 2005
Team Leader

Simon Emslie
Call 2007

Alexander West
Call 2011