



AMICUS SUBMISSION

European Court of Human Rights

THERESA MAGEE

Applicant

V

IRELAND

Respondent

Application No. 53743/09

**WRITTEN COMMENTS
BY
THE IRISH HUMAN RIGHTS COMMISSION
PURSUANT TO ARTICLE 36 § 2 OF THE EUROPEAN CONVENTION ON HUMAN
RIGHTS AND RULE 44 § 3 OF THE RULES OF THE EUROPEAN COURT OF
HUMAN RIGHTS**

8 March 2012

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INTRODUCTION

1. The Irish Human Rights Commission (“IHRC”) is Ireland’s National Human Rights Institution (“NHRI”), established pursuant to the Human Rights Commission Acts 2000 and 2001. The IHRC has a statutory remit to promote and protect the human rights of all persons in the State. Its functions include keeping under review the adequacy and effectiveness of the law and practice in the State with regard to human rights standards deriving from the Irish Constitution and the international treaties to which Ireland is a party, which include the European Convention on Human Rights and Fundamental Freedoms (“ECHR”).¹ The IHRC is mandated to appear as *Amicus Curiae* in proceedings before the national Courts and has done so on fourteen occasions to date.²

2. The IHRC is fully compliant with the United Nations “Paris Principles”.³ These principles govern independent NHRIs⁴ and broadly set out the competences and responsibilities of NHRIs and the criteria under which they should function, namely:

- Independence guaranteed by Statute or Constitution;
- Pluralism, including in membership and
- A broad mandate covering all human rights and based on universal human rights standards.

BACKGROUND TO THE APPLICATION

3. By letter dated 17 February 2012, the Court granted liberty to the IHRC to intervene in *Magee v. Ireland* in the form of a written submission in accordance with Article 36 § 2 of the ECHR and Rule 44 § 3 of the Rules of the Court.

4. As set out in the *Statement of Facts*, the Applicant’s son, Mr Paul Magee, in police custody in 2002 aged 19 years. Mr Magee had been arrested and was allegedly displaying signs of paranoid delusions. After his arrival at the police station, he was handcuffed and placed in a cell. A short time later, he was observed to be unconscious. Mr Magee was brought by ambulance to hospital, where attempts to resuscitate him failed and he was later pronounced dead.

5. A post mortem indicated that the death was consistent with “*cardiac arrhythmia due to cocaine-related collapse*”. An inquest was opened in February 2004. The Applicant sought legal aid for the Inquest, but was advised that there was no provision for such legal aid available for inquests. As the applicant could not afford legal representation, she instituted proceedings in the High Court and the Inquest was adjourned.

6. The Applicant was successful in the High Court (where it was ordered, in October 2005, that she be provided with State funded legal aid), but lost on appeal in the Supreme Court (where it was held, in July 2009, that the constitutional right to publicly funded legal aid does not extend to inquest proceedings).

7. The Inquest (with a jury) proceeded on 6 January 2010 and the Applicant was legally represented on a *pro bono* basis. The verdict of the Jury was “*death by misadventure*”. The Jury also recommended:

- that international best practice be examined and adopted in Ireland so that all emergency services personnel be trained to recognise persons in a state of psycho stimulant toxicity.
- a public awareness campaign on the consequences of substance abuse.

STRUCTURE OF THE CORONERS SYSTEM IN IRELAND

8. In Ireland the legislative scheme governing the conduct of inquests is the Coroners Act 1962. A coroner is obliged to hold an inquest where he is of the opinion:

*“that the death of the deceased may have occurred in a violent or unnatural manner, suddenly and from unknown causes; or in a place or in circumstances which, under provision in that behalf contained in any other enactment, require that an inquest should be held”.*⁵

9. Inquests in Ireland are inquisitorial rather than adversarial in nature. There are no “parties” but rather “properly interested persons”; which includes family members, next of kin and personal representatives.⁶ The scope of the inquest is set out in section 30 of the Coroners Act 1962. Matters of civil or criminal liability are not examinable. Rather, the enquiry is concerned with establishing the identity of the deceased person and “...how, when and where the death occurred”.⁷

10. An inquest is conducted with a jury in certain circumstances.⁸ Proper notice should be provided to the family/ next-of-kin as to the time and location of the inquest and an opportunity must be given to such persons to be heard or represented at the proceedings, to cross-examine witnesses or to offer further evidence to assist the coroner in his investigation.⁹ An Garda Síochána (the Irish police) notify witnesses to attend an inquest on behalf of the coroner.¹⁰ The coroner has the power at any time before the inquest concludes to compel a witness to attend and give evidence.¹¹

11. A properly interested person is entitled to examine a witness or have their legal representative do so. The role of legal representatives at an inquest also includes assisting the coroner in the inquiry.¹² The coroner may reject any questions asked by interested persons or their legal representatives where he considers that they are immaterial, inappropriate or if directly or indirectly imputing civil or criminal liability.¹³

12. In addition to the statutory duty to investigate the circumstances surrounding the death, the coroner must record a verdict in relation to how the death occurred. The verdicts available to a Coroner are not set out in statute and would appear to have developed as a matter of practice and common law precedent.¹⁴ The following verdicts are available to a coroner (or jury) at inquest in Ireland: Accident; Misadventure; Suicide (self-inflicted death); Industrial Disease; Stillbirth; Natural Causes (if so found at inquest); Unlawful Killing and an Open Verdict.¹⁵

13. Coroner verdicts in Ireland do not address the ‘circumstances’ of the death but rather concern the narrower question of the medical cause of death. Importantly, in addition to delivering a verdict concerning how the deceased died, the jury or coroner has the power to make a general ‘recommendation’, which is appended to the verdict in an attempt to prevent future fatalities.¹⁶ The decision of a coroner or verdict of an inquest jury may be subject to judicial review.¹⁷

INITIATIVES FOR REFORMING THE CORONERS SYSTEM

14. The law in relation to coroners in Ireland has been the subject of much discussion and significant reforms have been proposed. Both the Coroners Review Group, established under the auspices of the Department of Justice, Equality and Law Reform (in December 2000) and the Coroners Rules Committee (in October 2003) recommended that this area of law needs to be comprehensively overhauled.¹⁸ Importantly, the Coroners Review Group noted that the scope of an inquest should not be confined to the proximate medical cause of death but should be extended to investigating the surrounding ‘circumstances’ of the death.¹⁹ Another significant observation was a lack of consistent criteria for reaching verdicts and proposals that guidelines be devised to ensure future clarity on the matter.²⁰ According to the Coroners Review Group, radical reform was required to ensure that the coroner service can cope with the complexities of modern life.²¹

15. The recommendations of the Coroners Review Group led to the introduction of the Coroners Bill 2005. In announcing the introduction of the Bill, the then-Minister for Justice, Equality and Law Reform confirmed that the purpose of the Bill was, *inter alia*, to give effect to developments in the interpretation of Article 2 of the ECHR. In this regard, the Department of Justice and Equality stated in January 2006 that:

“The Minister is conscious that the new coroner legislation must also meet the requirements of the European Convention on Human Rights. Judgments from the European Court of Human Rights and of the Law Lords in the UK which interpreted Article 2 as providing for a more extensive investigation of the circumstances of death seem to indicate that an extension of the scope of an inquest is effectively required to meet the obligations of the Convention.

The effect of some judgments of the European Court of Human Rights is that there must be provision for legal aid in cases where there is involvement of the State in the circumstances of the death. The Bill provides that the Minister may, with the consent of the Minister for Finance arrange for the granting of legal aid in proceedings before a coroner where a person has died in, or resulting from being in, State custody or in certain institutional care situations.”²²

16. The 2005 Bill was succeeded by the Coroners Bill 2007, which likewise responded to the recommendations of both the Coroners Review Group and the Coroners Rules Committee for reform. The Explanatory and Financial Memorandum to the 2007 Bill again confirmed that the proposed reforms take into account the “*jurisprudence of our courts and the European Court of Human Rights.*”²³ This position was further confirmed by the then Minister in parliamentary debates on the Bill.²⁴

17. Significantly, the 2007 Bill provided for the provision of legal aid and legal advice to parties before a coroner, where the death occurred in State custody or care. Section 86 states:

(1) Subject to this section, a person to whom subsection (4) applies may be granted legal advice pursuant to section 26(3A) (inserted by section 92 of this Act) of the Civil Legal Aid Act 1995 in respect of his or her involvement in an investigation by a coroner into the death of a deceased person under this Act.

(2) Subject to this section, a person to whom subsection (4) applies may be granted a legal aid certificate pursuant to section 28(5B) (inserted by section 92 of this Act) of the Civil Legal Aid Act 1995 in respect of his or her representation at an inquest into the death of a deceased person under this Act.

(3) The granting of legal advice or a legal aid certificate under the Civil Legal Aid Act 1995 for the purposes of an investigation or, as the case may be, an inquest shall be subject to the coroner certifying that in his or her opinion—

- (a) (i) the deceased was in Garda Síochána, military or prison custody at the time of his or her death or immediately before his or her death,*
- (ii) the death of the deceased may have occurred in an institution administered by or on behalf of the State, including a hospital or other institution for the care and treatment of mentally ill or intellectually disabled persons, where the person was being detained involuntarily, or immediately after being so detained,*
- (iii) the death was of a child in care, or*
- (iv) the death gives rise to complex issues of major public importance, and*

(b) there is a significant public interest in the person receiving legal advice for the purposes of the investigation into the death or, as the case may be, having legal representation at the inquest having regard to all the circumstances, including the following:

- (i) whether the person may be able to participate effectively in the investigation or inquest without legal advice or representation,*
- (ii) the nature and seriousness of any allegations which are likely to be raised during the investigation or at the inquest, and*
- (iii) whether other forms of investigation, including internal investigations by a public body, have taken place and whether the person has been or will likely be involved in such investigations.*

(4) This subsection applies to-

(a) any family member of the deceased, or

(b) in the absence of such family member, a friend of long standing of the deceased, provided that legal advice or, as the case may be, legal representation may only be granted to one such person in respect of any one investigation by a coroner into the death of a deceased person or any one inquest.²⁵

18. Section 86 clearly demonstrates that the State had intended to address the jurisprudence of this Court in relation to the provision of legal aid for inquests. The failure to enact this section is illustrative of a lacuna in Irish law insofar as the obligations under Article 2 are engaged (which are further examined below).

19. Another significant provision of the 2007 Bill was the extension of the ‘purpose of an inquest’ to include “*in so far as practicable, the circumstances in which the death took place including the medical cause of death*”.²⁶ The Coroners Bill 2007 was never enacted.

CIVIL LEGAL AID IN IRELAND

20. In the domestic proceedings, the Supreme Court, confirmed that no entitlement exists under the Irish Constitution by which the family or next of kin of a person who died in State custody can secure publicly funded legal representation in respect of the relevant inquest proceedings.²⁷

21. It is noted that although the Applicant won her case in the High Court, the decision was reached on the basis of domestic law. The European Convention on Human Rights Act, 2003

(which gives partial effect to the ECHR in domestic law) did not come into effect until 31 December 2003, and therefore could not be pleaded.²⁸

22. Civil legal aid in Ireland is governed by the *Civil Legal Aid Act, 1995*, and the *Civil Legal Aid Regulations 1996, 2002 and 2006*.²⁹ Certain conditions apply to the provision of legal aid in Ireland. There are, broadly speaking, three tests for assessing eligibility for civil legal aid. These tests are; an overarching principle test,³⁰ a merits test³¹ and a means test.³² It was accepted in the domestic proceedings that the Applicant would have satisfied the means test, however, inquest proceedings are not provided for under the *Civil Legal Aid Act, 1995*.

23. Ancillary to the statutory legal aid scheme is the Attorney General's Scheme, under which aid may be granted for legal representation in specific types of legal actions not already covered by the civil or criminal legal aid schemes.³³ The Attorney General's Scheme has been in operation since 2000 and applies to certain judicial reviews, bail applications, extradition and *habeas corpus* applications. The scheme is *ex gratia*, and financed by the State. Assistance in respect of legal representation at inquest proceedings is not covered by the Attorney General's Scheme.

24. The IHRC notes the existence of a non-statutory *ex gratia* Coroners Court Legal Aid Scheme, which has been available since in or about 2005. This scheme was specifically established to meet the costs of legal representation at inquests into deaths that occur in State custody such as police stations. It appears that the scheme may have been introduced in advance of the High Court judgment in the present proceeding.

25. The scheme operates at the discretion of the Department of Justice, Equality and Defence. There is no officially published information on the scheme and in this regard it is unclear how family/ next of kin or their legal representatives would become aware of the possibility of applying for assistance under the scheme. In addition the criteria for qualifying under the scheme and method of application are not publicly available, and there is no published information as to how many grants of aid are made each year, or indeed whether the grants made are sufficient to meet the necessary costs of legal representation in each case. While the scheme would have been placed on a statutory basis under the Coroners Bill 2007, as stated earlier, the Bill was never enacted, leaving the scheme to continue on an *ad hoc* basis.³⁴

STANDARDS IN POLICE CUSTODY

26. The Committee on the Prevention of Torture (CPT) Standards provide that certain rights are of particular importance for those detained by the police.³⁵ In Ireland, the treatment of persons in Garda custody is governed by the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987 (hereinafter "the Regulations"). The Regulations provide for respect to be accorded to people's personal rights and dignity while in Garda custody.³⁶

27. Section 8(1) of the Regulations provide that a person detained must be informed of both his right to consult a solicitor and to notify a person of his detention.³⁷ In relation to medical treatment the circumstances in which the police shall call a doctor include where the detainee is injured, under the influence of drugs or alcohol and unresponsive, appears to be suffering from a mental illness or otherwise appears to require medical treatment.³⁸ A person may

request to be examined by a doctor of his own choice but this will be at the expense of the person detained.³⁹

28. Notably, the Regulations stipulate certain requirements while a person is in custody.⁴⁰ Within this, it addresses the issue of the supervision of detained persons whereby a person kept in a cell must be visited at intervals of approximately half an hour. Where a person is drunk or under the influence of drugs this should be done at approximately fifteen minute intervals for two hours or longer if warranted by their condition. During this visit they should be spoken to and roused if necessary.⁴¹

RIGHT TO LIFE UNDER THE IRISH CONSTITUTION

29. Article 40.3.2° of the Irish Constitution provides for the protection of the right to life.⁴² The constitutional right to life, particularly in terms of the right to life of the unborn, has featured in a number of significant Irish cases.⁴³ However, the IHRC is unaware of any constitutional jurisprudence to date that would indicate that the State has a constitutional duty, akin to the procedural duties of the State under Article 2 of the ECHR, concerning the scope of inquest proceedings and the participation of next-of-kin/ family in such proceedings (this will be examined more fully below). As indicated above, Article 2 of the ECHR did not arise for consideration in the domestic proceedings in the instant application due to the fact that the European Convention on Human Rights Act, 2003 did not have retrospective effect. However, it is submitted that even if Article 2 was considered in detail, it is unlikely to have had any material impact on the outcome of the domestic proceedings insofar as the applicant is unlikely to have been provided with legal aid, due to the manner in which the ECHR has been incorporated into Irish law.⁴⁴

REQUIREMENTS OF THE CONVENTION

Article 2 – Right to Life

30. Article 2 safeguards the right to life.⁴⁵ It ranks as one of the most fundamental provisions in the ECHR and is a core value of the democratic societies making up the Council of Europe.⁴⁶ The obligations under Article 2, as distilled through the jurisprudence of the Court,⁴⁷ can be broken down into 3 main headings:

- The obligation on State authorities to refrain from intentional killing (**negative obligation**);
- The obligation to protect life (**positive ‘operational’ obligation** to take reasonable preventative measures);
- The obligation to put in place effective safeguards against the unlawful taking of life (**positive ‘procedural’ obligation** to put in place effective investigatory mechanisms in relation to suspicious deaths).

31. Article 2 requires an effective official investigation when individuals have been killed as a result of force used by State actors.⁴⁸ This obligation is not, however, confined to cases where it can be established that the death was caused by the State, but arises wherever life has been lost in circumstances potentially engaging State responsibility.⁴⁹ This includes deaths of prisoners, persons in police custody and others who come into State care or custody.⁵⁰ Indeed,

even where there is an absence of any direct State responsibility for a death, the applicability of Article 2 is not excluded.⁵¹

32. Article 2 must be interpreted and applied to require practical and effective safeguards which ensure the object and purpose of the ECHR are realised. The rationale behind the State's procedural obligations under Article 2 is that effective investigations into deaths act as a safeguard against unlawful violations of the right to life.

33. The importance of an adequately functioning inquest system in investigating the cause of death has been recognised by the Court as an essential component of the requirement for an effective investigation under Article 2.⁵² In the case of *Jordan v United Kingdom*, the Court articulated, broadly speaking, five features of an adequately functioning inquest system. In order for an inquest to be compliant with Article 2 it must be (1) independent, (2) effective, (3) conducted in a reasonably prompt timeframe, (4) possess a sufficient element of public scrutiny and (5) involve the next-of-kin to the extent necessary to safeguard his or her legitimate interests.⁵³

34. Regarding the legitimate interests of the next-of-kin at an inquest, the Court in *Jordan* found that the absence of legal aid for the victim's family prejudiced the ability of the applicant to participate effectively in the inquest.⁵⁴ Accordingly, the complete absence of publicly funded legal aid for a victim's family, where same are impecunious and in circumstances where the person was killed by State actors or died in State custody, is incompatible with a State's positive procedural obligations under Article 2. Without the involvement of the next of kin in the investigation of the circumstances of death, a key element of the positive procedural obligation under Article 2 will not have been met.

35. It is clear from the outcome of the domestic proceedings herein, that at the relevant time (2002), the State did not have a formal system of legal aid for next of kin wishing to participate in an inquest, even where that inquest directly engaged the responsibility of the State for a death in custody. Further it is noted that since that time a scheme of legal aid for inquests has been put in place, but on a purely *ad hoc* basis, where the accessibility of the scheme is questionable. This contrasts with the situation in the *Jordan* case where a statutory legal aid scheme was introduced during the course of the inquest proceedings.⁵⁵

36. A decision of the House of Lords of the UK (as it then was) is notable in the present context, insofar as it applied the judgment of this Court in *Jordan* in domestic proceedings, concerning the State's obligation to investigate a death in State custody, including whether the family of the deceased should be legally represented.⁵⁶ The House of Lords found that while a death at the hands of State actors might be "*a greater affront to the public conscience*", the death of a prisoner resulting from alleged negligence "*may often be more complex and may require more elaborate investigation*"⁵⁷. The House of Lords went on to find that an independent public investigation with the family legally represented were, following *Jordan* and *Edwards*, "*minimum standards which must be met, whatever form the investigation takes.*"(emphasis added).⁵⁸

37. Separately this Court in *Jordan* also cited the delay in commencing the inquest proceedings, together with delays in the conduct of those proceedings, as shortcomings in the procedural obligations owed by the State under Article 2.⁵⁹ Such proceedings, as noted above, should be conducted in a reasonably prompt timeframe. In *Jordan* the inquest proceedings commenced two years after the death of Mr Jordan and were, thereafter, significantly delayed

while the Applicant sought to enforce certain procedural protections (including access to publicly funded legal aid) through the domestic courts. The Court acknowledged that, in the circumstances, it was not unreasonable for the Applicant to have sought to adjourn the inquest proceedings.⁶⁰

38. In this regard, it is notable that the hearing of the inquest at issue in the present application proceeded eight years after the death of Mr Magee, being delayed while the Applicant sought to secure through the Courts an entitlement to legal aid which had, at the time of the death, already been established and expanded upon by this Court.⁶¹ It is submitted that at the point in time when the Inquest was initially proposed to take place (February 2004), the question of a right to legal aid in respect of inquest proceedings had not been determined in Irish law, and the Applicant may well have perceived that such a constitutional right existed. In the event she was successful before the High Court, and it was the State itself that brought an appeal to the Supreme Court. It is also noted that during this period the State also proposed to establish a system of legal aid in respect of inquest proceedings under the Coroners Bill 2005 and the Coroners Bill 2007.

39. The inquest in the present case resulted in recommendations being made by the jury for training of emergency service personnel about ‘psycho stimulant toxicity’ and, more broadly, a public awareness campaign on the consequences of substance abuse. Such recommendations enable lessons to be learned and are directed to saving lives in the future. Apart from their societal value, it is recognised that such recommendations can also comfort the family of the deceased. More fundamentally, the inquest in effect establishes the circumstances in which the person died; an essential ingredient of Article 2 in death in custody cases.

40. Further, the inquest is the only forum through which the next of kin may effectively participate in the process establishing such circumstances, while also providing society at large with confidence that the truth is established and that deaths in custody are properly investigated. Therefore the delay caused by the legal proceedings (see also Article 6 discussion below), wherein both the Applicant and the State sought legal clarity from the Courts in relation to legal aid, delayed the delivery of the important recommendations made by the jury. In addition, the delay did not assist to allay any suspicions and rumours arising from the circumstances of the death, or to provide answers to the next of kin in relation to the loss of their family member.⁶²

41. Where the potential exists for such outcomes to be delivered at an inquest, it is also important that the jury decision is adequately informed. The participation of the family/ next-of-kin has the potential to elicit evidence that can greatly assist in this regard. An inquest system which only allows for an overly narrow jury verdict to be delivered is unlikely to be incompatible with Article 2. As stated by the House of Lords in the United Kingdom:

“a verdict of an inquest jury (other than an open verdict, sometimes unavoidable) which does not express the jury's conclusion on a major issue canvassed in the evidence at the inquest cannot satisfy or meet the expectations of the deceased's family or next-of-kin. Yet they, like the deceased, may be victims. They have been held to have legitimate interests in the conduct of the investigation (Jordan, paragraph 109), which is why they must be accorded an appropriate level of participation (see also R (Amin) v Secretary of State for the Home Department, supra). An uninformative jury verdict will be unlikely to meet what the House in Amin, paragraph 31, held to be one of the purposes of an article 2 investigation:

“... that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.”⁶³

42. Regarding the purpose of inquest proceedings, the House of Lords has held that inquests should, in certain circumstances, and in order to be compatible with Article 2 ECHR, be capable of addressing the broader question of the ‘circumstances’ in which the death occurred, rather than merely the medical cause of death. Such verdicts, according to the House of Lords, would include an analysis of the events leading up to the death, such as any procedures under which the deceased came to be placed in a position where his/ her life was potentially put in jeopardy.⁶⁴ As indicated above, the Coroners Bill 2007 proposed to place this extended purpose of an inquest on a statutory footing, but was never enacted.

Article 6 –Right to Fair Proceedings

43. Regarding access to the courts, it has been acknowledged by this Court that:

“[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective... [t]his is particularly so of the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial.”⁶⁵

44. Central to the concept of fairness in civil and criminal proceedings is the principle of equality of arms, although this is not an absolute right guaranteeing parity of arms.⁶⁶ The key standard here is that “*each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary*”.⁶⁷ While an inquest may not be an adversarial process in principle, deaths in custody or allegedly at the hands of State actors will inevitably involve the State taking a defensive stance, *vis a vis*, the inquisitorial process before a coroner.

45. In the Irish context, where a question arises concerning State responsibility for a death, such as a death in Garda custody, it is the practice that any member of An Garda Síochána, who may be materially questioned at the inquest, will be legally represented by the State, and indeed the State itself may have separate legal representation. If the next of kin is not legally represented this immediately creates a significant inequality of arms between those involved in the inquest proceedings with a material interest in the outcome. Further, where criminal proceedings do not result, the inquest is likely to be the only State-led mechanism through which the circumstances of death can be established.

46. Recent developments in the United Kingdom are instructive in relation to importance of equality of arms where Article 2 is engaged.⁶⁸ In the matter of *R. (Humberstone) v Legal Services Commission*, the Court of Appeal examined the appellant’s claim that a decision to refuse funding for legal aid to a mother at an inquest into the death of her son was not unlawful, notwithstanding the fact that the Coroner had written to the Legal Services Commission (LSC) warning of the complexities of the inquest and the risk of self-incrimination for the mother as there had been allegations of negligence. The Coroner stressed that all other parties (nurses and doctors) would be legally represented at the inquest and there would be an inequality of arms as the mother would not be represented.⁶⁹ In determining whether there was an entitlement to legal aid in such exceptional circumstances, the Court referred to the judgment in *R (Amin) v Secretary of State for Home Department* where the House of Lords adopted this Court’s view that: “*the next of kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests*”.⁷⁰ In dismissing the

appeal the Court criticised the LSC for failing to consider the educational and social obstacles faced by the mother if left to attend the inquest unrepresented.

47. In addition to concerns regarding equality of arms, the complex nature of inquests themselves may call for legal representation to be available to next of kin to properly participate in the proceedings. Inquests involving a death in custody will almost invariably involve a jury. Hearings before a jury are significantly more complex than if an inquest is conducted by a coroner sitting alone. In Irish law, juries are only to be found in relation to serious criminal offences and in very limited circumstances in civil proceedings. Indeed, civil juries are confined to the High Court, which represents the highest level of originating jurisdiction in Ireland. As such, jury advocacy tends to be regarded as a specialised area of legal practice. For instance, there are often issues regarding admissibility of evidence, where it may be necessary to introduce procedures in the nature of a *voir dire* (legal argument in the absence of a jury). It is unlikely that a lay person would be capable of appreciating the procedural implications of a jury hearing. It may also be observed that a jury verdict offers much less by way of protection against arbitrariness than, for example, a reasoned decision or judgment. As such the need for professional representation is all the greater in cases of deaths in custody.

48. The IHRC also recalls, in this context, the Judgment of this Court in *Airey v. Ireland* where it was stated:

*“Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.”*⁷¹

49. That case related to judicial separation proceedings. The reference to emotional involvement being incompatible with the objectivity required for advocacy is particularly resonant in the context of a coroner’s inquest. If a family member, such as the Applicant in this case, is not legally represented before the inquest, then that person would have to directly cross examine witnesses whom they may regard as being personally implicated in the death of the deceased. The fact that a coroner’s court cannot determine issues of criminal or civil liability does not exclude a next of kin or family member from having a view on such issues.⁷²

50. It is submitted that insofar as an inquest is directed towards vindicating the right to life under Article 2, Article 6 may also be engaged. This will be the case where there is the possibility that all the relevant evidence in relation to the death would not be elicited without robust cross examination and indeed where the process of holding an inquest which permits the effective participation of next of kin is not subjected to unwarranted delay. This is notwithstanding the inquisitorial nature of an inquest. Further, it is submitted that while there is no specific information in the present application as to the nature of the ongoing civil proceedings, the fact of such civil proceedings should not inhibit this Court from considering whether the Applicant’s Article 6 rights were engaged in relation to the inquest proceedings.

**Irish Human Rights Commission
8 March 2012**

¹ Section 8(a) of the Human Rights Commission Act 2000.

² Section 8(h) of the Human Rights Commission Act 2000. The IHRC has previously submitted 3 amicus briefs to the Court on behalf of the European Group of National Human Rights Institutions – in the cases *DD v Lithuania* (Application No. 13469/06), Judgment of 14 February 2012; *Gauer v France* (Application No. 61521/08) and *O’Keefe v Ireland* (Application No. 35810/09).

³ *National institutions for the promotion and protection of human rights*, UN General Assembly Resolution 48/134, 1993.

⁴ A NHRI is a State-sponsored and State-funded organisation with a constitutional or legal basis, with authority to promote and protect human rights at the national level as an independent agency.

⁵ Section 17, Coroners Act 1962.

⁶ Such persons are not entitled to request access to papers in the coroner’s possession in advance of an inquest and the general rule prescribes that the coroner does not make available, before the inquest, to properly interested persons or legal representatives any statements or draft depositions. Farrell B., *Coroners: practice and procedure*, (Round Hall Sweet & Maxwell, 2000) at p 269-272. It is interesting to note that whilst Farrell contends that such a general rule exists in Ireland, he also observes that no authorities exist in Ireland in respect of the power of a coroner to provide statements to interested parties prior to inquest (p. 272).

⁷ Section 30, Coroners Act 1962.

⁸ An inquest will be held with jury where the deceased may have died by murder, infanticide or manslaughter, where the death occurred in a place or circumstances which require an inquest to be held, where an accident occurred, where there has been poisoning or disease which requires notice to be given to a Minister or Department of State, when a road traffic accident occurs or where the death took place in circumstances which if they were to continue or reoccur would pose a threat to the public’s health and safety; s.40 of the Coroners Act 1962.

⁹ *The State (McKeown) v Scully* [1986] I. R. 524.

¹⁰ Farrell B., *Coroners: practice and procedure*, (Round Hall Sweet & Maxwell, 2000) at p 290.

¹¹ Section 26 of the Coroners Act 1962. Persons failing to attend after such service are guilty of an offence or may be found guilty of Contempt of Court also operates in respect of inquest proceeding (sections 37 and 38 of the Coroners Act 1962 respectively).

¹² Farrell B., *Coroners: practice and procedure*, (Round Hall Sweet & Maxwell, 2000) at pp 275 – 276.

¹³ *Ibid* at p 277.

¹⁴ The verdict of ‘accident’ is applicable where there was no intention but a fatal outcome has resulted. The verdict of ‘misadventure’ is applicable where an intentional act results in a mishap ending in death. The verdict of ‘suicide’ has been historically available to coroners for many years but was used infrequently. Suicide remained illegal until the enactment of the Criminal Law (Suicide) Act 1993 and case law has approved a legal test for returning a verdict of suicide. The verdict of industrial disease is available in addition to or as an alternative to any other verdict where the cause of death is an occupational prescribed disease under the Occupational Benefits Scheme. A verdict of stillbirth can be returned where a child is born weighing 500g or more, is 24 weeks old or more and shows no signs of life. The verdict of natural causes involves a situation where the evidence establishes that natural illness or disease was the cause of death. The verdict of ‘unlawful killing’ has been examined by the Irish Courts, who have found that it is possible to return a verdict of unlawful killing and refrain from finding any particular person with criminal or civil liability. Unlawful killing is defined within the Coroner Act 1962 as where “the deceased came by his death by murder, infanticide or manslaughter”. An open verdict can be found in differing circumstances where the evidence does not completely reveal the means of the cause of death. See further Farrell B., *Coroners: practice and procedure*, (Round Hall Sweet & Maxwell, 2000) at p 347.

¹⁵ Farrell B., *Coroners: practice and procedure*, (Round Hall Sweet & Maxwell, 2000) at p 347.

¹⁶ Section 31, Coroner Act 1962.

¹⁷ Under Order 8 Rules of the Superior Courts, 1986. Any person aggrieved by the decision of a coroner or verdict of an inquest, may make application to the High Court for leave to bring proceedings to have the decision or verdict quashed by way of judicial review. In respect of inquests those aggrieved refer to a “properly interested person”, most typically a family member. Irish jurisdictional review regarding the decision making of the coroner has been widened by the courts to include not only excess of jurisdiction but also unreasoned decision-making and a violation of natural and constitutional justice.

¹⁸ *Report of the Coroners Review Group*, December 2000, and Report of the Coroners Rules Committee, October 2003 at p.1.

¹⁹ *Report of the Coroners Review Group*, December 2000 at p62.

²⁰ *Ibid* at p 62.

²¹ *Report of the Coroners Review Group*, December 2000.

²² Department of Justice and Equality; *Minister Announces Government Approval for Bill to Reform Coroners Service*, Press Release of 4 January 2006.

²³ Explanatory and Financial Memorandum, Coroners Bill 2007.

²⁴ During Seanad debates at the Second Stage of the Coroners Bill 2007 on 4 October 2007, the then Minister for Justice, Equality and Law Reform, Brian Lenihan T.D. outlined the main provisions of the Bill. He noted that section 86 of the Bill was of particular importance since “[t]he effects of judgements of the European Court of Human Rights – confirmed by the Irish Courts - is that there must be provision for legal aid in cases where there is involvement of the State in the circumstances of the death.”

²⁵ Section 86 of the Coroners Bill 2007.

²⁶ Section 46(1)(a)(iii) of the Coroners Bill 2007.

²⁷ *Magee v Farrell & Ors* [2009] IESC 60, Judgment of 28 July 2009.

²⁸ In *Dublin City Council v Fennell*, Unreported, Supreme Court, 12 May 2005 it was found that the European Convention on Human Rights Act 2003 did not have retrospective effect.

²⁹ The *Scheme of Civil Legal Aid and Advice*, a non-statutory scheme, was established following the decision in *Airey v. Ireland* 32 (1979) 2 EHRR 305. The scheme was later placed on a statutory basis by the *Civil Legal Aid Act, 1995*. The principal function of the Legal Aid Board is to provide legal aid and advice in civil cases to persons of modest means. A person receiving legal aid must first obtain a legal aid certificate from the Legal Aid Board, which specifies the legal services being granted. The recipient of legal aid must pay the legal aid contribution specified on the certificate.

³⁰ Section 24 of the Civil Legal Aid Act, 1995. The phrase “overarching principle” is used in the Law Society of Ireland document; *Civil Legal Aid in Ireland: Information for the Profession* (2008), at p. 18. This initial test is designed to assess whether an applicant has a legitimate case; one that a reasonable person would institute/defend and would be professional advised to do so. Under the overarching principle test, the Legal Aid Board is charged with assessing eligibility for legal aid or advice against an objective standard, namely that of a “reasonably prudent person”. The Legal Aid Board must be satisfied that a reasonably prudent person, who could afford to engage legal representation in similar circumstances at his or her own expense, would be likely to do so and where a solicitor or barrister, acting reasonably, would be likely to advise such a person to obtain those services at his/ her own expense.

³¹ Section 28(2) of the Civil Legal Aid Act, 1995. In order for the Legal Aid Board to grant a Legal Aid Certificate on foot of an application for legal aid, it must be satisfied that it is reasonable for the applicant to institute or defend the relevant proceedings. In carrying out this assessment, the Legal Aid Board is obliged to consider a number of factors, as follows: whether the applicant has reasonable grounds for instituting or defending the proceedings; whether the applicant is reasonably likely to be successful in the proceedings; whether a more satisfactory forum (other than recourse to the courts) exists which might be capable of delivering the outcome sought by the applicant; whether, in view of all the circumstances of the case, including the cost to the Legal Aid Board and the likely benefit to the applicant, it is reasonable to grant the legal aid.

³² Legal aid in Ireland is means tested. The assessment of means is conducted by the Legal Aid Board against the form prescribed by the Minister for Justice, Equality and Law Reform under Regulation 3(d) of the Civil Legal Aid Regulations 2006. Persons in receipt of legal advice/ aid must pay a contribution to the Legal Aid Board, which is assessed on the applicant’s disposable income and disposable capital. As of 1 September 2006, the minimum contribution is €10 for legal advice and €50 for legal aid. An applicant’s disposable income must be less than €18,000 to qualify for a grant of legal aid from the Legal Aid Board. See Section 29 of the Civil Legal Aid Act, 1995.

³³ The Attorney General’s Scheme is not an alternative to costs but instead its purpose is to provide legal representation for those who need it but do not have the funds. A person wishing to obtain a recommendation from the court to the Attorney General to have the Scheme applied must make their application when proceedings commence and must obtain said recommendation at that time. To obtain a recommendation the applicant must satisfy the court that they are not in a position to retain a solicitor (or where necessary Counsel) unless they receive the benefit of the Scheme. The Attorney General is not bound by a recommendation of the Court. Where there is one matter at issue but more than one applicant, the solicitor and counsel assigned will represent all the applicants. It is not within the discretion of the Attorney General to apply public funds to proceedings outside the scope of the Scheme as public funds can only be applied for the purpose for which they have been provided by the Oireachtas.

³⁴ Law Society of Ireland; *Civil Legal Aid in Ireland: Information for the Profession* (2008), p. 40.

³⁵ CPT Standards at para 36 [CPT/Inf/E (2002) 1- Rev.2010]. The three rights are:

- the right of the person concerned to have the fact of his detention notified to a third party of his choice (family member, friend, consulate),
- the right of access to a lawyer, and;

-the right to request a medical examination by a doctor of his choice (in addition to any medical examination carried out by a doctor called by the police authorities).

³⁶ Section 3 Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations, 1987.

³⁷ Section 8 (1)(b) &(c) Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations, 1987.

³⁸ Section 21 Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations, 1987. Subsection (2) provides that medical advice shall also be sought if the detained claims to need medication in respect of heart condition, diabetes, epilepsy or any other potentially serious condition or if the member in charge considers it necessary as the detained has any such medication in his possession.

³⁹ Section 21(4) Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations, 1987. This does not exclude examination of a doctor called by the member in charge once the person detained has consented to the examination.

⁴⁰ Section 19 Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations, 1987. These include issues such as reasonable rest, provision of meals and access to sanitary facilities. It is noted that in the High Court Judgment the argument of the Plaintiff was summarised as follows: "*The plaintiff argues that several issues arise concerning the deceased's death at a time when he was being kept in Garda custody including questions as to his treatment in custody and the extent to which the State or its agents were responsible through gross negligence or otherwise for the death of the deceased.*" (at pp 1-2).

⁴¹ Section 19 (6) Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Siochana Stations) Regulations, 1987.

⁴² Article 40.3.2 states the following: "The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen". See *Ryan v Attorney General* [1965] IR 294; *McGee v Attorney General* [1974] IR 284.

⁴³ In *Attorney General v X* [1992] ILRM 401 the Court was concerned with the balancing of the right to life of an unborn child as against the right to life of the mother. Hederman J. in his judgment observed the approach of the Court in *McGee v Attorney General*⁴³ where examination of s. 3 of Article 40 refers to the general obligation undertaken by the State to vindicate the life of its citizens and to protect their lives, and that such is applicable to all lives which would require protection in particular circumstances. In *Re a Ward of Court* (withholding medical treatment) Denham J. examined the Constitutional guarantee of the right to life. She held that the right to life is the pre-eminent personal right and that the State has guaranteed in its laws to respect this right. This respect is absolute and refers to all lives, which are respected for benefit of the individual and the common good.

⁴⁴The European Convention on Human Rights Act 2003 (ECHR) came into effect in the Irish domestic legal order on 31 December 2003. Prior to 2004, a Plaintiff could thus not place direct reliance on the ECHR to ground a claim against the State, or an emanation of the State. It is also significant to consider the manner in which the ECHR was incorporated into Irish law and the remedies available there under for an alleged breach of the ECHR. Sections 3 and 5 are the only provisions of the 2003 Act which may be directly pleaded before the Courts. Section 3 places a statutory duty on every organ of the State to perform its functions in a manner compatible with the State's obligations under the Convention provisions, subject to any statutory provision or rule of law. The provision of legal aid is clearly delimited in the Civil Legal Aid Act 1995 and the Ministerial Regulations made there under. Insofar as section 3 is subject to any other statutory provision, the express terms of the Civil Legal Aid Act 1995 would most likely override the general obligation on organs of the State to perform their functions in compliance with the State's obligations under the ECHR. Section 5 refers to declarations of incompatibility, (which do not impact on the validity or application of the legislation or rule of law concerned in domestic law) similar to the United Kingdom's Human Rights Act 1998. As set out by the Court in *Burden and Burden v United Kingdom, Judgment 12 December 2006* such declaratory relief does not constitute an effective remedy.

⁴⁵ Article 2 of the ECHR provides that: 1. 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. 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

⁴⁶ *Nachova and others v. Bulgaria*, Judgment of 6 July 2005 at para. 93.

⁴⁷ See, inter alia: *McCann and Others v United Kingdom* (1996) 21 EHRR 1; *Jordan v. United Kingdom* (2001) 37 EHRR 52; *Finucane v. the United Kingdom*, Judgment of 1 July 2003, 37 EHRR 656; *Oneryildiz v. Turkey*, Judgment of 30 November 2004, 41 EHRR 325 at para. 91; *LCB v United Kingdom* (1998), 27 EHRR 212.

⁴⁸ *Çakıcı v. Turkey*, Judgment of 8 July 1999, ECHR 1999-IV at para. 86.

⁴⁹ *Oneryildiz v. Turkey*, Judgment of 30 November 2004, 41 EHRR 325 at para. 91.

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- ⁵⁰ *Keenan v United Kingdom* (2001) 33 EHRR 913; *Mojsiejew v Poland* (App. 11818/02), 24 March 2009.
- ⁵¹ *Menson and others v. The United Kingdom*, admissibility decision of 6 May 2003.
- ⁵² *Jordan v. United Kingdom* (2001) 37 EHRR 52; *Finucane v. the United Kingdom*, Judgment of 1 July 2003.
- ⁵³ *Jordan v. United Kingdom* (2001) 37 EHRR 52, paras. 106 to 109.
- ⁵⁴ *Ibid.* at para. 142.
- ⁵⁵ *Ibid.* at para 132.
- ⁵⁶ *R. (Amin) v Secretary of State for the Home Department* [2003] UKHL 51.
- ⁵⁷ *Ibid.* at para 50
- ⁵⁸ *Ibid.* at para 32.
- ⁵⁹ *Jordan v. United Kingdom* (2001) 37 EHRR 52 at para. 142
- ⁶⁰ *Ibid.* at para. 137.
- ⁶¹ *Jordan v. United Kingdom* (2001) 37 EHRR 52; *Keenan v United Kingdom* (2001) 33 EHRR 913; *Edwards v The United Kingdom* (2002) 35 EHRR 487.
- ⁶² See *R. (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 at para. 31
- ⁶³ *R. (Middleton) v West Somerset Coroner* [2004] 2 AC 182 at para. 18.
- ⁶⁴ *Ibid.*, at para. 31.
- ⁶⁵ *Airey v Ireland*, (Applic No. 6289/7) Judgment 9 October 1979. The applicant in this case argued that since legal aid was not available for those seeking a judicial separation her right of access to the Courts was violated.
- ⁶⁶ *Steel and Morris v The United Kingdom* (2005) ECHR 103
- ⁶⁷ *Ibid.* at paragraph 62.
- ⁶⁸ See *R. (Humberstone) v Legal Services Commission* [2010] EWCA Civ 1479
- ⁶⁹ *Ibid.* at para 25.
- ⁷⁰ *R (Amin) v Secretary of State for Home Department* [2004] 1 AC 653. See also *Khan, R (on the application of) v Secretary of State for Health* [2003] EWCA Civ 1129 where the Court noted that “*the Convention imposes on states the obligation to conduct an effective investigation in a case like this, and without Mr Khan's participation the inquest cannot fulfil that role*”. This case involved the death of a young girl in hospital. Her father had applied for funding for legal aid at the inquest as the circumstances surrounding his daughter’s death were far from clear. There was evidence that the hospital has erred in its treatment of his daughter and contributed to her death. The Court concluded that the circumstances of the death appeared to require publicly funded representation to enable the coroner to conduct an effective investigation.
- ⁷¹ *Airey v Ireland*, (Applic No. 6289/7) Judgment 9 October 1979, at para 24.
- ⁷² It is noted that in the High Court Judgment the argument of the Plaintiff was summarised as follows: “*The plaintiff argues that several issues arise concerning the deceased’s death at a time when he was being kept in Garda custody including questions as to his treatment in custody and the extent to which the State or its agents were responsible through gross negligence or otherwise for the death of the deceased.*” (at pp 1-2).