Applications to the Attorney-General and s13 of the Coroners Act 1988

1. There are essentially two ways in which a person may challenge the sufficiency of inquest proceedings or a decision by a coroner not to hold an inquest at all. The first and most obvious is by way of judicial review proceedings. These must of course be brought promptly and no later than 3 months from the date of the decision or conclusion. The second is by way of a s13 application under the Coroners Act 1988. That can be brought at any time (provided the criteria are met) and can only be brought with the consent (*fiat*) of the Attorney General.

2. This paper will briefly consider the law and procedure pertaining to applications to the Attorney-General for a *fiat* and applications to the High Court pursuant to s13 of the Coroners Act 1988.

3. S13 of the Coroners Act 1988 (as amended) reads as follows:

> 13.— Order to hold [investigation]
> (1) This section applies where, on an application by or under the authority of the Attorney-General, the High Court is satisfied as respects a coroner ("the coroner concerned") either—
> (a) that he refuses or neglects to hold an inquest [or an investigation] which ought to be held; or
> (b) where an inquest [or an investigation] has been held by him, that (whether by reason of fraud, rejection of evidence, irregularity of proceedings, insufficiency of inquiry, the discovery of new facts or evidence or otherwise) it is necessary or desirable in the interests of justice that [an investigation (or as the case may be, another investigation)] should be held.
> (2) The High Court may—
> (a) order an [investigation under Part 1 of the Coroners and Justice Act 2009] to be held into the death either— by the coroner concerned; or
> ii. (ii) by [a senior coroner, area coroner or assistant coroner in the same coroner area]
> iii. (b) order the coroner concerned to pay such costs of and incidental to the application as to the court may appear just; and
> iv. (c) where an inquest has been held, quash [any inquisition on, or determination or finding made at] that inquest.
> v. [...]
> vi. [
> (3) For the purposes of this section, "*coroner*" means a coroner appointed under section 1 of this Act, or a senior coroner, area coroner or assistant coroner appointed under the Coroners and Justice Act 2009.

The process of applying for a *fiat* from the Attorney-General

4. The constitutional role of the Attorney-General is stated in the most general terms to be to uphold and promote the rule of law through his or her constitutional functions. One of the office's particular public interest functions is to bring applications for fresh inquests. In simple terms, this is because a person requires standing to bring a case before the court and it is the Attorney-General's *fiat* that grants a person the standing to do so. Once they have their *fiat*, they can go to court.

5. The process is not formalised and there are no particular rules. Older applications have referred to the need to draft formal 'memorials' to the Attorney-General, but the process is a simple one.

6. It makes sense to draft the application essentially in the same way that you would your application to the High Court. Liberty's recent applications for Attorney-General *fiats* for two of the Deepcut victims simply comprised detailed lengthy representations and several indexed files of evidence. [1] Those representations were then later easily transformed into a formal application and court bundles (see below). The representations addressed the criteria to be considered by the High Court in considerable detail.

7. The process is slow and has been criticised.[2] Our first Deepcut application took 5 months to be considered by the Attorney-General. It was considered in-house. Our second took almost a year and this time the Attorney-General instructed the Government Legal Dept. There is no possibility of the matter being 'rolled up' into a substantive decision on the merits, as could be the case in judicial review proceedings. The bereaved family essentially has to go through the same process, twice, once with the Attorney-General and once with the High Court, with all the attendant delays.

What test does the Attorney-General apply when considering whether to grant his *fiat*?

8. There appears to be no formal guidance as to the test to be applied by the Attorney-General when considering whether to grant his *fiat* in a s13 case. The issue has not been the subject of a great deal of judicial attention, not least because if an application is refused, unless the applicant attempts to judicially review the decision (more on which see below), that will be an end to the matter. The decision will not get before the court and will not be publicly reported. Therefore there have been few opportunities for a negative decision by the Attorney-General – and the test he has applied - to be scrutinised.

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[1] The process of getting hold of that evidence in order to make the application in the first place was a different matter. That material had been withheld from the family of Cheryl James for 17 years notwithstanding that Nicholas Blake QC (as he then was) had specifically recommended that the material be released to them. Surrey Police refused to disclose the material claiming that they could not release any statements without the express consent of the authors. It was only upon threat of judicial review proceedings (relying upon Articles 2 and 6 ECHR) that the material was eventually disclosed. Disclosure took almost 2 years and comprised almost 100 large volumes of materials.

[2] Bridget Dolan, "Is the s13 fiat process not in the interests of justice?" http://ukinquestlawblog.co.uk/rss-feed/26-is-the-s-13-fiat-process-not-in-the-interests-of-justice

9. Having regard to the small number of occasions when the High Court has considered the approach taken by the Attorney-General, the test to be applied appears to be one of reasonable prospects of success (although it is not stated to be so in terms). In *R v Attorney-General ex p Ferrante* (1995) Independent, 3 April, the claimant brought judicial review proceedings following the Attorney's refusal to grant a *fiat*. The Attorney had considered that the application would not have any reasonable prospects of success. The Court of Appeal held that the Attorney-General was entitled to have regard to the prospects of success of an application in terms of s.13(1)(b) and had not erred in law in applying the test that he did.

10. In *R (oao Halpin) v Attorney-General* [2011] EWHC 3759 (Admin), (a s13 application into the death of Dr David Kelly), the issue of what test ought to have been applied by the Attorney-General arose because of the very detailed reasons the then Attorney-General Dominic Grieve QC MP had given for declining to grant his *fiat*. The Divisional Court considered whether the Attorney-General might have confused his role with the role of the Court. The Court observed that it was for the Court to ask itself whether it was desirable or necessary in the interests of justice for a fresh inquest to be held and it was the Attorney-General's role to decide "whether to bring an application for such relief before the court". In that case the Attorney-General argued that it had been important that he should reach his own conclusion as to the ultimate issue that the court would be invited to consider, since it would be he who would be the moving party seeking precisely that relief. But he acknowledged the possibility that a lower threshold test existed, observing on the facts of that case that given the strength of this views on the ultimate issue "it would be quite clear how any such lower threshold test would be answered". The Court was satisfied with that approach. (The obvious observation is that a case might pass a lower test (at Attorney-General stage) but fail a higher test (at High Court stage), as a number of applications have done, so this approach does not seem to answer the question at all satisfactorily).

11. The current Attorney-General has described the approach taken by his office to applications for fresh inquests:

> "*In considering sentences or inquests, the Law Officers are responsible for determining whether a case should be put before a Court. That is a question that in other areas might be considered by the Court itself, through a permission stage, as is the case in applications for judicial review, for example. But in these instances Parliament has said the Attorney General must grant permission before the Court can consider it. The decision the Law Officers take is not just whether previous sentencing decisions or inquests were legally flawed, we also look at whether there is a public interest in reopening matters. Let me emphasise again that we take these decisions extremely seriously and can only decide where the balance of the public interest lies by considering all aspects of it. These are executive powers to make rare exceptions to the important principles of legal certainty and the*

finality of court decisions. They are there for an important purpose. But they must be exercised circumspectly."[3]

Amenability of the Attorney-General to judicial review

12. The present Attorney-General Jeremy Wright QC stated confidently in a speech given at University College London in February this year (and citing authority from 1902) that his public interest functions (including his decision as to whether an application for a fresh inquest ought to be referred to the High Court) are not amenable to judicial review.

13. The case cited by the Attorney was *London CC v Attorney-General* [1902] AC 165, HL. There the House of Lords held that the jurisdiction of the Attorney-General to decide in what cases it was proper for him to sue on behalf of "relators" (in this sense, a party who would otherwise not have standing) was absolute.

> *In a case where as a part of his public duty he has a right to intervene … the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General.* [169] Lord Chancellor, Earl of Halsbury.

14. Authority for the proposition that the Attorney-General's decision in a s13 application may not be subject to judicial review also comes from the case of *Gouriet v Union of Post Office Workers* [1978] AC 435, HL. This case, which arose from a decision by the Union of Post Office Workers to boycott mail to and from South Africa, confirmed that a plaintiff with no special interest could not claim a declaration (or in that case, an injunction) from the court except in the name of the Attorney-General. The plaintiff had asked the Attorney-General to grant his consent to seek an injunction and he had declined to do so. The House of Lords held that the exercise by the Attorney General of his discretion in deciding whether to consent to a relator action was not subject to control and supervision by the courts. If the Attorney-General refused to give his consent, then there was nothing the courts could do.

15. However, it is notable that a number of applications for judicial review of a decision by the Attorney-General to decline to grant his *fiat* in inquest cases have been granted permission. If the decision was simply one which, as the House of Lords suggested in 1902, was "entirely beyond the jurisdiction of this or any other court", it is hard to see how the matter can have been considered arguable. Permission to judicially review the decisions of the Attorney General was granted in *Ferrante* (cited above) and in *Duggan v HM Coroner for Northern District of Greater London* [2010] EWHC 1263 (Admin).

16. The matter was more recently considered in *Halpin* (the Dr David Kelly case) when the Attorney argued that the High Court had no jurisdiction to review his decision not to refer the matter to the High Court. He relied upon *Queen v Solicitor-General ex parte Michelle and Lisa Taylor* [1996] C.O.D. 61, a case in which the Taylor sisters had brought judicial review proceedings against the Attorney-General following his decision to decline to prosecute certain

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3 https://www.gov.uk/government/speeches/the-attorney-general-on-who-should-decide-what-the-public-interest-is

newspapers for contempt of court. In that case, the Court had held that it had no jurisdiction to review the Attorney-General's decision because of his unique constitutional position. The Court maintained that only Parliament, not the courts, was entitled to review any decisions or alleged errors of judgment by him.

17. In answer to these preliminary submissions of the Attorney-General, the Court said at para 22:

> "*if hypothetically there were substantial grounds for considering that the Attorney had acted unlawfully in refusing his consent, it would be an unattractive position, to put it neutrally, if that illegality was beyond the power of the courts to judicially review*."

18. The Court then turned to the merits of the case. Ultimately, it dismissed them, but not on the grounds that it did not have jurisdiction to consider them.

19. Further, the power of the Attorney-General to refer an application to the High Court for a fresh inquest is analogous to the power of the Director of Public Prosecutions to decide on whether to bring a prosecution or not. Just like the Attorney-General's power, that power is also exercised in the public interest. It is possible to bring judicial review proceedings of the DPP. It seems hard to sustain an argument that the Attorney General ought not likewise to be subject to judicial review in relation to a decision of such a similar nature. [4]

20. It is also notable that none of the key cases repeatedly cited for the proposition that the Attorney's decisions are not amenable to judicial review in principle, arose from decisions taken concerning inquests. *Gouriet* concerned a boycott by postal workers, *London CC* concerned contracts for buses and *Taylor* involved a contempt of court action. These were important matters but did not engage fundamental rights, such as the right to life (and the investigative obligations that now flow from it). It is also notable that all 3 cases preceded the coming into force of the Human Rights Act.

21. A bereaved family has no choice but to ask the Attorney General for his consent where a coroner refuses to hold an inquest, or where the inquest has been inadequate for the reasons set out below. Nor is there any alternative route available to the family (save for, perhaps, a public inquiry but in many cases that may not be a realistic option). In such circumstances, the Attorney's consent is a vital and unavoidable step in the state's discharge of its investigative obligations under Article 2 of the European Convention on Human Rights (ECHR). As the court indicated in *Halpin*, above, it is unlikely to be impressed by a simple argument that there is no jurisdiction to examine

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[4] By way of example, judicial review proceedings may be brought against the DPP in relation to prosecution decisions where: the law has not been properly understood or applied, *R v DPP, ex p. Jones (Timothy)* [2000] Crim LR 858); where serious evidence supporting a prosecution has not been carefully considered (*R (on the application of Joseph) v DPP* [2001] Crim LR 489; where a decision is perverse, that is, one at which no reasonable prosecutor could have arrived (*R v DPP, ex p. C* [1995] 1 Cr App R 136); where CPS policy has not been properly applied and/or complied with (*R v DPP, ex p. C* [1995] 1 Cr App R 136; *R v DPP, ex p. Manning* [2001] QB 330; *R v Chief Constable of Kent, ex p. L; R v DPP, ex p. B* (1991) 93 Cr App R 416); or where a decision has been arrived at because of an unlawful policy (*R v DPP, ex p. C* [1995] 1 Cr App R 136).

the Attorney's decision. This is likely to be particularly but not exclusively so in a case where A2 ECHR is engaged.

22. It therefore seems that the question of whether the Attorney-General's decision in an inquest case is amenable to judicial review is still very much an open one.

Procedure for lodging the claim in the High Court

23. If and when the *fiat* from the Attorney is received, it must be lodged with the High Court within 6 weeks.

24. The Part 8 procedure applies. The Practice Direction (8A: Alternative Procedure for Claims) Para. 19 of the Practice Direction deals with applications under s13 of the Coroners Act 1988.

25. The Practice Direction specifies that the application must be accompanied by the *fiat*, state the grounds of the application, be filed at the Administrative Court and be served on all persons "directly affected by the application" within 6 weeks of the grant of the *fiat*.

26. A party should not be formally named as an interested party to the litigation unless they were a party at the original inquest. However the requirement to serve on all those directly affected by the inquest is drafted in loose terms. It does not reflect the definition of "interested person" in the Coroners and Justice Act 2009, which is expressed in terms of a list of family members of the deceased or anyone with a "sufficient interest".[5] "Directly affected" seems to be a smaller potential pool of persons than those with a "sufficient interest".

27. The application will be considered by a Divisional Court of the High Court. Even where the matter is unopposed (and consent orders signed), it appears that a Divisional Court must still be convened and pronounce that the relevant criteria are met, formally quashing the original inquest and ordering a new inquest. This will inevitably build in further delay but can also be a very important event and milestone for bereaved families.

On what basis will the High Court quash the original inquest and order a fresh investigation and inquest?

28. The criteria to be considered by the court are set out in the statute:

    (1) Whether by one of the following:

        i. fraud,

        ii. rejection of evidence,

        iii. irregularity of proceedings,

        iv. insufficiency of inquiry,

        v. the discovery of new facts or evidence

    (2) or otherwise

[5] s47(2) Coroners and Justice Act 2009

(3) it is necessary or desirable in the interests of justice that an investigation be held.

29. The essential criteria have not changed since the 1988 Act and a number of cases in the intervening years have clarified the approach to be taken by the courts when considering such cases, culminating of course in the Hillsborough case.

30. In *R (oao Sutovic) v HM Coroner Northern District of Greater London* [2006] EWHC 1095 (Admin), the High Court took the opportunity to review previous authorities and consider the factors to be taken into account. The Court noted that the power to order a fresh inquest was stated in very broad terms. Notwithstanding the width of the statutory words, the Court determined that the factors of central importance were an assessment of the *possibility* (as opposed to the probability) of a different verdict, the number of shortcomings in the original inquest and the need to investigate in light of new evidence. In a case where it was unlikely that a different verdict would result, the fact that the deceased may have died in custody would be a compelling factor suggestive that a fresh inquest was in the interests of justice. The lapse of time since the death might be a factor against ordering a fresh inquest, but not always so.

31. *Sutovic* was cited for many years. In *Duggan*, the Court observed that it was, in considering whether it was necessary and desirable in the interests of justice that the inquest be quashed, necessary to focus on the possibility that the outcome might be different if a fresh inquest was ordered. The Court reminded itself that the test was *possibility* not probability of a different verdict and recalled that a new inquest could be ordered even if there was a high probability that the verdict would be the same. An important factor, in light of fresh evidence, was whether there was a real risk that justice will not have been done and will not have been seen to be done.

32. The most authoritative statement of the approach to be taken is now set out in the *Hillsborough* judgment, *HM Attorney-General v HM Coroner of South Yorkshire (West) & HM Coroner of West Yorkshire (West)* [2012] EWHC 3783 (Admin), at para 10.

> *We shall focus on the statutory language, as interpreted in the authorities, to identify the principle appropriate to this application. The single question is whether the interests of justice make a further inquest either necessary or desirable. The interests of justice, as they arise in the coronial process, are undefined, but, dealing with it broadly, it seems to us elementary that the emergence of fresh evidence which may reasonably lead to the conclusion that the substantial truth about how an individual met his death was not revealed at the first inquest, will normally make it both desirable and necessary in the interests of justice for a fresh inquest to be ordered. The decision is not based on problems with process, unless the process adopted at the original inquest has caused justice to be diverted or for the inquiry to be insufficient. What is more, it is not a pre-condition to an order for a further inquest that this court should anticipate that a different verdict to the one already reached will be returned. If a different verdict is likely, then the interests of justice will make it necessary for a fresh inquest to be ordered, but even when significant fresh evidence may serve to confirm the correctness of the earlier verdict, it may sometimes nevertheless be desirable for the full extent of the evidence which*

tends to confirm the correctness of the verdict to be publicly revealed. Without minimising the importance of a proper inquest into every death, where a national disaster of the magnitude of the catastrophe which occurred at Hillsborough on 15 April 1989 has occurred, quite apart from the pressing entitlement of the families of the victims of the disaster to the public revelation of the facts, there is a distinct and separate imperative that the community as a whole should be satisfied that, even if belatedly, the truth should emerge.

33. The matter of statements of evidence having been altered or amended, as had occurred in up to 116 statements in *Hillsborough*, was described as "reprehensible" by the Court. However, the Court did not accept that the alteration of statements was necessarily relevant to the cause of death. The Court also noted that the alterations had already been made public through the work of the Independent Panel, which had preceded the applications. However, in this case, the Court concluded that it would remain open to the new inquest to consider whether efforts made by some of the authorities to conceal evidence relating to neglect and breach of duty may have some relevant bearing on the cause of death.

Other miscellaneous points to note

34. Where an inquest has been opened, adjourned but then, following criminal proceedings, a decision has been taken by a coroner not to resume it, a s13 application is not required. That is because the inquest has not been held, nor is it a case where the coroner is refusing to hold an inquest and therefore it does not fall within the scope of s13. Nor is the coroner *functus officio*. The Coroner may be instead invited to revisit the decision not to proceed further and any refusal would be amenable to judicial review on the usual grounds. (*Susan Flower v HM Coroner for County of Devon, Plymouth, Torbay and South Devon & Ors* [2015] EWHC 3666 (Admin)).

35. As long as a Coroner remains neutral on the matter of whether the original inquest ought to be quashed and a fresh inquest ordered, costs are unlikely to be awarded against her.

36. A court may consider it necessary in the interests of justice to order that a fresh inquest be heard before a different coroner to avoid embarrassment to the coroner, because of criticisms made of his conduct; and because there is the possibility of bias or a serious risk of the appearance of bias (even if no actual bias). (*R (oao Dr Dowler) v Coroner for North London* [2009] EWHC 3300 (Admin)).

EMMA NORTON

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