HENDERSON CHAMBERS

Inquests

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Court of Appeal decides important questions of law and practice relevant to Coroner's inquests where the issue of whether the deceased committed suicide falls to be determined

By Abigail Cohen

In *R (on the Application of Maughan) v HM Senior Coroner for Oxfordshire* [2019] EWCQ Civ 809, the Court of Appeal (Underhill LJ, Davis LJ and Davies LJ), upholding the Divisional Court, has held that in inquest hearings the standard of proof applicable to the conclusion of suicide (whether short form or narrative) is the civil standard and not the criminal standard, contrary to what had been regarded as settled law and practice, (at least at Divisional Court level), for over 35 years.

Background

1. The inquest concerned the death of James Maughan ('the Deceased') who was found hanging in his cell at HMP Bullingdon. The principal issues raised at the inquest were whether the hanging was self-inflicted and deliberate; whether, if it was, the deceased intended to kill himself; and whether his

death was caused or contributed to by failures to protect his life on the part of the prison authorities.

2. At the conclusion of the evidence and having heard submissions from the Interested Persons, the Coroner accepted that the evidence was insufficient to enable a jury, properly instructed, to conclude to the criminal standard that the deceased had intended to take his own life. He therefore ruled that a short-form conclusion of "suicide" should not be left to the jury.

3. Having so ruled, he further decided that it would not be appropriate simply to elicit an open conclusion from the jury. He considered that it was requisite that, so far as possible, the jury's conclusion on the circumstances in which the deceased had died should be elicited by way of narrative conclusion from them.

4. The Coroner posed a series of questions to the jury inviting them to consider, *inter alia*, whether the deceased deliberately placed a ligature around his neck and whether he intended the outcome to be fatal. Written instructions were provided to the jury which made clear that, in reaching their conclusions on the questions posed, the jury were to apply a standard of proof by reference to the balance of probabilities when reaching their narrative conclusion. The jury concluded that, on the balance of probabilities, the deceased intended to fatally hang himself.

5. The Deceased's family were, understandably, very distressed by the conclusion reached. Evidence was permitted to be adduced in the Divisional Court to the effect that the Maughan family held strong Catholic beliefs. A statement of Deacon David Palmer dated 14 June 2018 indicated that the teaching of the Catholic Church is that suicide is contrary to love for the living God and is considered a grave sin. Following the inquest, the

Deceased's brother issued judicial review proceedings challenging the conclusion. The complaint, in essence, being that the jury were incorrectly instructed by the Coroner: they should only have been permitted to reach a conclusion of suicide by applying the criminal standard of proof.

Issues before the Court of Appeal

6. The appeal involved important questions of law and practice relevant to coroner's inquests where the issue of whether the deceased committed suicide falls to be determined.

7. The two issues before the Court of Appeal were:

   (a) Is the standard of proof to be applied the criminal standard (satisfied so as to be sure) or the civil standard (satisfied that it is more probable than not) in deciding whether the deceased deliberately took his own life intending to kill himself?

   (b) Does the answer depend on whether the determination is expressed by way of short form conclusion or by way of narrative conclusion?

Law and guidance on the applicable standard of proof

8. The Court conducted a review of the rules, guidance and authorities that had, to date, led to the settled understanding that the applicable standard of proof for a short form conclusion of suicide was the criminal standard.

Statute, Rules and Guidance

9. The Coroners and Justice Act 2009 and the Coroners (Inquests) Rules 2013, SI No.1616 are silent on the applicable standard of proof. However,

Form 2, the prescribed form for the Record of Inquest, includes a footnote which states that "*the standard of proof required for the short form conclusions of "unlawful killing" and "suicide" is the criminal standard of proof. For all other short-form conclusions and a narrative statement the standard of proof is the civil standard of proof.*"

10. The Chief Coroner's Guidance Note 17 on Conclusions also repeats the above and the Coroner Bench Book adopts the same approach.

11. The Court noted that whilst it appeared that the guidance that the criminal standard is applicable to the short form conclusion of suicide is derived from the legal authorities as then understood, the basis for the guidance that the civil standard applies to narrative conclusions "*did not derive directly from any decision of the courts but had been thought appropriate in the light of the perceived need to ensure compliance in a proper way with Middleton...and now with s.5(2) of the 2009 Act*" (para 32).

Authorities

12. The Court reviewed a number of authorities. At Divisional Court level the Court discussed, in particular, the decision in *R v HM Coroner for Dyfed, ex parte Evans* (unrep. 24 May 1984) in which it was "*an express part of the decision*" that the criminal standard applies at an inquest in the case of suicide and *R v West London Coroner, ex parte Gray* [1988] 1 QB 466, a decision on unlawful killing in which the reasoning is such that a conclusion that the criminal standard applies to suicide is "*a necessary part*" of the reasoning leading to the conclusion with regard to unlawful killing.

13. The Court was also referred to *R v Wolverhampton Coroner, ex parte McCurbin* [1990] 1 WLR 719 – which was not discussed by the Divisional

Court below – in which Woolf LJ held as follows in respect of a conclusion of unlawful killing:

> *"It is true that, in many cases where it is open to a coroner's jury to find a verdict of unlawful killing, they may also have to consider the question of death by misadventure. However, in my view, this does not and should not give rise to problems. The coroner should indicate to the jury that they should approach, initially, the question as to whether or not they are satisfied so that they are sure that this is unlawful killing. If they come to the conclusion that it is unlawful killing, there is no need for them to go on to consider death by a misadventure. But, if they come to the conclusion that it is not unlawful killing, they are not satisfied so that they are sure that that verdict is appropriate, then they will consider the question of misadventure and, in so doing, they do not need to bear in mind the heavy standard of proof which is required for unlawful killing. They can approach the matter on the basis of the balance of probabilities. The situation is that**, just as it is important that a jury should not bring in a verdict of suicide unless they are sure**, likewise they should not bring in a verdict of unlawful killing unless they are sure." [emphasis added]*

14. The Appellant argued that the above decision constitutes binding authority that the applicable standard for a conclusion of suicide is the criminal standard, both for short form and narrative conclusions.

What is the applicable standard of proof?

A middle way?

15. In the course of the discussion of the authorities the Court addressed the question, which arose on a consideration of *ex parte Gray* and *McCurbin*, as to whether there could be a heightened standard of civil proof applicable in cases of suicide.

16. The Court was clear that there was no room for any intermediate standard of proof; it is either the civil standard or the criminal standard:

"As I have stated, an inquest is not a criminal proceeding. Nor is it a civil proceeding. But, that said, the clear conclusion at least has to be that, surely, no "intermediate" standard of proof can apply with regard to inquests. Accordingly, either it is the civil standard both for short-form and for narrative conclusions; or it is the criminal standard both for short-form and for narrative conclusions; or - as the Coroner here proceeded - it is the criminal standard for short-form conclusions and the civil standard for narrative conclusions. (No one could sensibly argue, or did argue before us, for a civil standard for the short-form conclusion and a criminal standard for the narrative conclusion.)" (para 51)

One standard for short form and another for narratives?

17. The Court also considered whether the current position, whereby the criminal standard applies to a short form conclusion of suicide but the civil standard appears to apply to findings in a narrative, is logical and should remain.

18. The Court held that it should not; there should be one standard for a conclusion of suicide whether reached by way of short form or narrative:

"71. The central point is then, in my view, that there seems a very real inconsistency in adopting a criminal standard of proof for a short-form conclusion but a civil standard of proof in a narrative conclusion. Where is the logic and sense in that hybrid approach? I cannot discern any. Moreover, not only would it create difficulties for juries in having differing standards of proof relating to various findings within its conclusions, depending on their nature, but also it could tend to create difficulties or confusion in terms of public perception of the outcome.

72. In saying that, I have every sympathy for the approach taken by the Coroner's Guidance and the Coroner Bench Book, and reflected also in the notes to the prescribed form: and which the Coroner in the present case understandably followed. But that approach is predicated on it having been understood that it was a legal requirement that the criminal standard applies. That understanding immediately led to an appreciation that that could have a restrictive impact, at least in Article 2 cases, with regard to the requirements of Middleton and of s.5(2) of the 2009 Act. It is this which, it seems, has then led to the awkward hybrid approach adopted in the notes to the prescribed form, the Guidance and the Coroner Bench Book.

73. Thus there is everything to be said for one and the same standard of proof applicable at each stage to cases of suicide at an inquest. The question then is: should that be the criminal standard (the appellant's approach) or the civil standard (the Divisional Court's approach)?"

Criminal or Civil standard for suicide conclusions?

19. The Court described the approach of the Divisional Court in "*departing from what had been regarded as settled law and practice, at least at Divisional Court level, for over 35 years*" as a "*bold*" one (para 69).

20. Nonetheless, it determined that the Divisional Court was right in the ultimate conclusion that it reached and held that:

    "The standard of proof to be applied at an inquest where an issue of suicide arises is in all respects, and whether for the purposes of a short-form conclusion or for the purposes of a narrative conclusion, the civil standard of proof: that is to say, by reference to the balance of probabilities." (para 88)

21. The Court's reasons were as follows:

(a) First, the essence of an inquest is that it is primarily inquisitorial, that it is investigative. It is not concerned to make findings of guilt or liability (even though I accept that not infrequently a narrative conclusion may in practice, to an informed participant, operate to identify individuals as potentially at fault). The underpinning rationale for the need to have a criminal standard of proof in criminal proceedings simply has no obvious grip in inquest proceedings, given their nature.

(b) Second, since 1961 suicide has ceased to be a crime. Suicide will of course be dreadfully upsetting to the family of the deceased; it may perhaps in some quarters also carry a stigma (although one would like to think that the predominant feeling of most observers in modern times would be acute sympathy); it may have other adverse social or financial consequences. But it is not a crime.

(c) Third, whatever the prevarications in the past, the civil courts nowadays generally apply in civil proceedings the ordinary civil standard - that is, more probable than not – even where the proposed subject of proof may constitute a crime or suicide (see re B; Braganza). There is no sliding scale or heightened standard. There is no discernible reason why a different approach should apply in coroner's proceedings, at all events in relation to suicide (which is not even a crime).

(d) Fourth, the importance in Article 2 cases – although in my view there actually is no reason in principle to distinguish between standards of proof in suicide cases depending on whether or not Article 2 considerations arise – of a proper investigation into the circumstances of death under s.5(2) of the 2009 Act strongly supports the application of the (lower) civil standard. The approach intended to be applicable, viewed objectively, surely would be expected to be inclined towards an expansive, rather than restrictive, approach. That also

would enhance the prospects of lessons being learned for the future: one of the functions of such an inquest. I accept Ms Monaghan's point that Article 2 procedural requirements are not incapable of being met by the application of a criminal standard of proof. But context is all: and the present context of an inquest relating to suicide, and the answer to the question "how?", strongly favours the imposition of a lower standard of proof than the criminal standard.

(e) *Fifth, the application of the civil standard to a conclusion of suicide expressed in the narrative conclusion would cohere with the standard which is on any view applicable to other potential aspects of the narrative conclusion (for example, whether reasonable preventative measures should or could have been taken and so on).*

22. The Court rejected the suggestion that by virtue of the footnote in Form 2 (Record of Inquest), this amounted to an existing rule governing the position. The Court noted that in light of its decision:

"It may well be that the Chief Coroner will accordingly wish to reconsider, as a matter of expedition, the current Guidance and Coroner Bench Book in these respects; and so, likewise, may those having responsibility for the drafting of the notes to Form 2 as currently appended to the Coroners rules." (para 89)

23. Further the Court stated that:

"*…it seems to me to be unfortunate that so important a matter as the standard of proof applicable in inquests (extending not only to unlawful killing but also to suicide) has thus far been left to, in effect, a piece-meal decision making process by the courts and by practice guidance. Given the availability of the relevant rule-making power in s.45 of the 2009 Act, it surely would be greatly preferable, and*

would put matters beyond all debate, if the desired position was now explicitly articulated within the Coroners rules themselves." (para 96)

24. As to authority, the Court held that the decision in *ex parte Evans* is to be over-ruled. As to *ex parte Gray* and *McCurbin* both were cases of unlawful killing and not suicide and in *McCurbin* the Court held that the reference to suicide is "*clearly obiter*" (para 86). Accordingly, "*the reasoning in ex parte Gray (in so far as it relates to suicide) and the dictum of Woolf LJ in McCurbin with regard to suicide are not to be followed*" (para 88).

Unlawful Killing

25. Whilst not directly in issue, the Court considered that it was incumbent upon it to comment on the standard applicable to cases of unlawful killing.

26. The Court held that Coroners should "*in cases where unlawful killing arises as an issue, continue to instruct juries by reference to the criminal standard of proof in the way that they currently do*." (para 95)

27. In reaching this decision the Court made clear that it did not necessarily agree with this position but that, on this issue, it was bound by authority, namely *McCurbin*:

"*I should not be taken as necessarily agreeing myself that this ought to be the outcome. I can see a very powerful case for saying that the standard of proof applicable to unlawful killing cases in inquests should also be the civil standard (as for all other available conclusions), both as a matter of principle and as a matter of practicality. But that, as I see it and in particular in the light of the decision in McCurbin, is not the current state of the law: a state of the law which, in fairness, cannot be said to be altogether devoid of supporting arguments." (para94)*

Comment

28. This important decision means a significant change in approach in inquests where the question of suicide is in issue. The lower standard of proof means that a conclusion of suicide will now be open to a Coroner or jury in more cases than previously as evidence of intention no longer has to surmount the beyond reasonable doubt hurdle.

29. This may not be a welcome development for families where the issue of suicide is a sensitive one for religious or other reasons. It may also impact on the recording of statistics, for example, as to the number of suicides in custody which is a topic currently receiving increased media and political attention. More broadly, it has been suggested that an increase in cases where suicide is the recorded conclusion may bolster those lobbying for the need for increased mental health provision.

30. For those representing interested persons who are care providers or whose actions might otherwise be under scrutiny at an inquest concerning a self-inflicted death, it will be important for representatives to be aware of the increased possibility of a suicide conclusion and to consider and address the evidence in that regard accordingly.

31. However, the matter is not necessarily yet at a close and it is understood that when handing down judgment in *Maughan*, the Court of Appeal took the step of granting the Appellant permission to appeal to the Supreme Court, having regard to the importance of the issues raised.

Abigail Cohen
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