Neutral Citation Number: [2009] IEHC 443

THE HIGH COURT

JUDICIAL REVIEW

2006 751 JR

BETWEEN

MARTA MARTIN

APPLICANT

AND

KIERAN GERAGHTY

CORONER FOR THE COUNTY OF DUBLIN

RESPONDENT

JUDGMENT of Mr. Justice McCarthy delivered the 2nd day of October 2009

1. On 26th June, 2006, Peart J. gave leave to the applicant to seek, inter alia, the following relief:-

> An order of prohibition by way of an application for judicial review or, in the alternative an injunction restraining, the respondent from taking any further steps in the inquest the subject matter of this application.

2. That leave was granted on the following grounds, namely:-

> (7) The respondent has, as is evidenced by his conduct to date, created the impression that a reasonable apprehension of bias has been generated in the minds of the applicant and her family in relation to the manner in which it is believed that he will approach his determination of the inquest herein and he is accordingly, by reason of that conduct, as aforesaid, disqualified from having any further part to play in or on the inquest in question.
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> (i) The respondent has, in addition to the manner in which it is believed he will behave and proceed, so conducted himself heretofore as to clearly establish an actual bias and prejudgment of the issue to be determined and specifically in this regard has determined that the facts and circumstances surrounding the death of Pamela Martin are straightforward and are such as to not realistically trouble his office other; than to formally record the death as aforesaid.
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> (ii) The respondent has closed his mind to such submissions as have been advanced to the effect that the death of Pamela Martin was anything but straightforward and has proceeded in the face of clear evidence to the contrary. He has additionally refused to be guided and/or bound and/or act upon the facts at his disposal and specifically those facts as are available to him arising from the reports and statements prepared for him by members of An Garda Síochána.
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> (iii) The respondent has made inappropriate comments to the solicitor for the applicant and her family, which said comments reinforce the reasonable apprehension of bias hereinbefore complained of. The comments, to the effect that illegal narcotics were found to be present in the deceased's system coupled, as this fact was, with a mistakenly held belief of an established history of depression and attempted suicide on the part of deceased, led all but axiomatically to the inference properly and reasonably to be drawn from the comments as aforesaid that her attempt had, on this occasion succeeded and this decision arrived at in the face of other relevant and material information and evidence which as a minimum established that the deceased had been beaten badly prior to death.
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> (iv) The respondent, as a medical practitioner, has failed, refused and/or neglected to bring his training to bear on the facts relevant to the issues herein or if so exercised has failed refused and/or neglected to apply such expertise in a reasonable way or at all.
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> (v) The respondent has acted in such a fashion, purportedly relying upon the provisions of the Coroners Act 1962, as amended, so as to deny to the applicant her constitutional rights and entitlements.
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> (vi) The respondent has breached the constitutional rights of the applicant to fair procedures and to be treated equally before the law in the exercise of his purported powers arising under and in accordance with the provisions of the Coroners Act 1962, as amended. Additionally, the respondent has failed, refused and/or neglected to furnish material documents and information to the applicant and has deliberately, consciously and recklessly failed, refused and/or neglected to investigate material matters of which he has actual knowledge or alternatively cause them to be investigated as aforesaid.

3. A notice of motion in terms of the said relief was issued on 12th July, 2006 and, ultimately, a statement of opposition was delivered on behalf of Dr. Geraghty dated 17th October, 2006 and beyond a number of traverses, there are a number of substantive pleas, and subject to a preliminary objection (to which I will refer, again, below). Those substantive pleas are as follows:-

> 13. The complaints made by the applicant in the within proceedings are premature in circumstances

where the inquest the subject matter thereof has not yet concluded. The applicant has not demonstrated any prejudice by reason of the matters complained of and could not be in a position to do so until the inquest had concluded.

14. The European Convention on Human Rights and Fundamental Freedoms (the "Convention") does not form part of domestic law and the reliance placed by the applicant directly on the provisions of the Convention is misconceived.

15. Without prejudice to the foregoing, the applicant has failed to state any grounds upon which the declaratory relief claimed in relation to a contravention of the Convention could be claimed.

16. It is denied that the Coroners Act 1962 (as amended) and as operated is and was so operated relative to the facts of the instant case as to be in contravention of the convention as alleged or at all.

17. The applicant has failed to state any grounds upon which the declaratory relief sought in relation to the unconstitutionality of the Coroners Act 1962 could be claimed.

4. With respect to the grounds of opposition at para. 18 there is an objection as to the failure of the applicant to commence these proceedings promptly: it seems to me that this plea cannot be sustained on the basis that it was at the hearing of 7th March, 2006, that the first question of recusal arose and in correspondence thereafter and in particular a letter of 16th June, 2006. It does not appear to me that the lapse of some months from that date is fatal to the application.

5. The remainder of those grounds merely traverse to each and every averment pleaded as grounds upon which relief is sought or deny the entitlement of the applicant to it.

6. When the matter came before me originally, it was grounded upon the affidavits of Mr. A. Derek E. Burke (sworn 26th June, 2006), the reply of the respondent thereto (sworn on 16th October, 2006), a further affidavit (in response to the latter) sworn by Mr. Burke on 13th November, 2006, an affidavit of one Garda John James Walsh sworn on 16th November, 2006, that of Anna Davenport (the coroner's registrar) sworn on 23rd November, 2006 and a second affidavit of Dr. Geraghty sworn on 4th January, 2007.

7. I requested that evidence be placed before me for the purpose of justifying, if it could be justified, the allegation of actual bias made against Dr. Geraghty at the hearing. In addition, objective bias was relied upon, but it is fair to say that it was the first of these which was emphasised at this stage. I took the view that having regard to the seriousness of the former proposition, a higher degree of specificity or particularity was required in the evidence and I gave leave to the applicant to deliver further affidavits (with an entitlement, of course, for the respondent to reply thereto) and the applicant swore an affidavit on 31st July, 2008, as did her daughter Martha O'Keeffe and Mr. Burke. Dr. Geraghty responded thereto by an affidavit sworn on 14th September, 2008.

8. On perusal of Mr. Burke's affidavit of 26th June, 2006 (his first) he deposes to the fact that Pamela Martin, daughter of the applicant, then aged twenty-two and the mother of three young children, returned home having enjoyed the day out, a home which she shared with her partner Michael Fagan. It appears that an argument there ensued and it is said by Mr. Burke that there is independent evidence verifying the proposition that such argument was intense. It appears, further, that the noise and shouting which occurred during the course of that argument came to an end and, thereafter, that the door of the building was heard to bang.

9. Mr. Burke says that some time thereafter, Mr. Fagan approached the occupants of an adjoining apartment stating that his girlfriend, Pamela Martin, had hanged herself from the back of a door. Sadly, she subsequently died at Tallaght Hospital. It does not appear that what I might term a garda inquiry on the occasion of a "suspicious death" was, at that stage, commenced. Later, forensic examination was conducted (on 23rd February, 2004) and a number of items of potential evidential value were seized, thereafter being furnished to the forensic science laboratory. It appears that these items included a piece of cloth which was conceived to be a ligature (by implication at least), which may have been relevant to the manner of death. A sample was also taken from the top of the door from which it was alleged by Mr. Fagan that the deceased had hanged herself and on analysis of fibres taken from such lift, Dr. Forde concluded that matching fibres thereon with fibres from the ligature offered "very strong support" for the proposition that the fabric was in physical contact with the top of the door.

10. In the days, weeks and months following Pamela Martin's death, complaints were allegedly made to members of An Garda Síochána that the "facts" in question did not make sense and it is deposed to that similar and repeated complaints were made "on every available opportunity to Dr. Geraghty". It is further stated that such concerns were based, *inter alia*, on the fact that it was conceived that there had been a history of domestic violence in the perpetration of which Michael Fagan was the guilty party and because Michael Fagan allegedly said that he had killed Pamela Martin (on the occasion in question) and a perusal of statements taken by members of An Garda Síochána showed a person of "alarming disposition who repeatedly lied" pertaining to the "manner and circumstances" leading up to Pamela Martin's death.

11. Subsequent to deposing to what he understands are the background factors, Mr. Burke then turned to the matters which give rise, ultimately, to the proceedings. It is somewhat difficult to summarise, so far as material, the contents of the affidavits sworn on behalf of the applicant in as much as submissions and opinions are mixed with depositions as to fact but I believe that I adequately do so as set out below.

12. It is alleged that Dr. Geraghty "has at all times made it clear that he views the facts surrounding the death of Pamela Martin to be straightforward and that no issue arises in relation thereto" and Mr. Burke refers to correspondence he had with Dr. Geraghty "in terms of establishing the extent of the bias" of which the applicant and her family complained and in particular a letter of 16th June, 2006 and the reply thereto by Dr. Geraghty of 20th June. By that letter of the 16th June a prior application made orally to Dr. Geraghty for recusal by him was repeated and it was sought to rely upon the concept of objective (rather than subjective or actual) bias. By the letter of reply of 20th June, 2006, Dr. Geraghty, *inter alia*, rejected the request that he disqualify himself.

13. It had been adjourned from time to time and amongst the days on which it was so adjourned from 13th September, 2005; Mr. Geraghty contacted Mr. Burke orally prior to that date on 6th September, 2005 in the course of which

conversation Mr. Burke says that he (the respondent) had agreed to an earlier adjournment to facilitate counsel on behalf of the family adducing new and/or fresh evidence but that this had not been done that having reviewed the file, it was his view that the deceased "who was found to have had drugs in her blood and urine" was a person who presented with a history of depression "and who had attempted suicide in the past". As a fact, Mr. Burke says that the latter was not the case, that this proposition had been "fabricated" by Mr. Fagan (the deceased's boyfriend) and that it might be inferred that Dr. Geraghty had "closed his mind to any other eventuality other than that theory pre-determined by him, [*i.e.* suicide] and this even in the face of material in his file to the contrary". These matters are set out in his original affidavit of 26th June, 2006.

14. Mr. Burke has also referred to certain correspondence pertaining to a disputation entered into by or on behalf of the applicant and the respondent pertaining to the provision of new evidence and/or applications for adjournments here relevant to letters of the 8th August, 2005, the 16th August, 2005, the 6th September, 2005, and 8th September, 2005. Mr. Burke summarized the correspondence as establishing the fact that "at all times" it was made clear to Dr. Geraghty that he was mistaken in his belief that the applicant and her family had alleged that new evidence would be produced to the respondent and to the Gardaí and it was acknowledged "that the responsibility of investigating the facts and matters surrounding the death of Pamela Martin were matters exclusively within his preserve [*i.e.* the coroner's preserve] and that of the Gardaí with whom he works so closely in suchlike matters". He further says that it is clear from the correspondence that neither he nor the deceased's family "have, nor had, any meaningful part to play in the investigation of the death of Pamela save that in this regard they could but offer such information and/or evidence as they possessed". Mr. Burke went on to say that "much of the information possessed by the [a]pplicant and her family was not enquired of nor sought by either the [re]spondent or by the Gardaí, and this at a time when complaint was being made that the matter was not being properly investigated". This does not advance the resolution of any dispute pertaining to the events which occurred at the two hearings, 17th May and 13th September, 2005.

15. Garda Walsh in relation to the proposition that Mr. Toal requested an adjournment on the grounds that new evidence had been uncovered by the family and their representatives indicating that suicide was not the cause of death of the deceased, says that this was so said. He also stated that Mr. Toal had been asked by the coroner whether or not he had passed on any relevant evidence to the gardaí investigating the death of the deceased and that Mr. Toal had replied that he had not been asked. Garda Walsh says the matter was then adjourned with a direction from the coroner to release such evidence to the gardaí to enable them to further investigate the matter. He points that at the hearing of 13th September, 2005, it was "clear that there was a difference of opinion between the coroner … and (…) Mr. Alan Toal and whether or not that is so"; there is certainly a difference of opinion now; the parties are adamant to the extent that Garda Walsh says that Mr. Toal applied to Dr. Geraghty to recuse himself on the grounds that he had allegedly previously stated that the case was "straightforward": the recusal application appears however to have been made on March 14th subsequent. He goes on to say that Dr. Geraghty denied this, that he said that it was a difficult case, that it had been adjourned because Mr. Toal had allegedly come up with further information or evidence that would indicate that the death of the deceased was not caused by suicide and that he had requested Mr. Toal to provide this information or evidence to the Gardaí at the hearing of the 17th May, 2005, thereafter asking Mr. Toal whether or not he had done so. Mr. Toal responded by saying that he had not sought an adjournment on the grounds that he had obtained new evidence or information relating to the death of the deceased to indicate that her death was not caused by suicide. Dr. Geraghty's registrar, Anna Davenport, says that on 17th May, Mr. Toal requested an adjournment on the basis that the family "had evidence in relation to the case" and that when Dr. Geraghty asked the family's legal representatives (i.e. Mr. Toal) why "they had not given it to the Gardaí", he replied that they (by which she meant the deceased's family) "had not been asked", the matter being thereupon adjourned and, upon it being reopened on the 13th September, 2005, "the legal representatives" denied stating that they had such evidence.

16. Dr. Geraghty disputes the assertion that he viewed the facts surrounding the deceased's death as being "straightforward" and "no issue" arose in respect thereof. This is in response to a general assertion to that effect by Mr. Burke, as well as an inference sought to be drawn by the latter from the alleged facts deposed to by him and by reference to the exhibits in his affidavits. He goes on to say that he had "not reached any concluded view in relation thereto" and there is, of course, no reason to suppose that this is not true in every sense. He further swears that it is not the case that he is "acting, or prepared to act indifferently as to the existence of relevant facts". He further swears that in accordance with his duty under the Coroner's Act 1962 he intended to and would consider all relevant facts. He points out the extremely important fact that a jury is to be empanelled for the inquest and it is, of course, by the jury that a verdict will be delivered: these aspects are dealt with in his affidavit of 16th October, 2006.

17. In response to the assertion in Mr. Burke's affidavit that Dr. Geraghty had released only some of the statements relevant to the proceedings, he says that he released all of them and it seems that no dispute can now arise about that. One cannot build a proposition of bias of any kind thereon by reference to any issue of that kind: it seems that confusion, now resolved, arose in this connection.

18. In terms of the progression of events on and after the 17th May, 2005 when the inquest was first opened, Dr. Geraghty also says that on an application for an adjournment by Mr. Toal on the ground that he had "new evidence", after inquiry of Mr. Toal as to why he had not passed that information to the Gardaí, Mr. Toal said that he had not been asked to do so, and he adjourned the inquest to 13th September, 2005. When the matter was reopened on the latter date, Dr. Geraghty says that he enquired of Mr. Toal as to the "whereabouts" of the new evidence previously referred to and he further says that Mr. Toal denied that he had said anything about new evidence and claimed that there had not been an adequate investigation of the death of the deceased to allay "any rumours or suspicions in that regard", the matter being further adjourned until the 14th March so that further enquiries could be carried out. With exception of the reference to the date of the first recusal application the evidence of Garda Walsh and Ms. Davenport supports that of Dr. Geraghty in a number of respects.

19. The next step in the sequence, as outlined by Dr. Geraghty, pertains to the fact that on the adjourned date, Dr. Geraghty says that Mr. Toal said that on a previous occasion he (Mr. Geraghty) had stated that "the case was straightforward" (being something of which Dr. Geraghty has no recollection and which he believes was not said), and with demand (which he describes as having been made in a "very aggressive fashion") for disqualification, which was refused. He further says that Mr. Toal referred to another unrelated inquest held on the same day, in which the respondent granted an adjournment under s. 25 of the Coroner's Act 1962, and contended that he had no power so to do, Dr. Geraghty thereupon responding that Mr. Toal was not entitled to comment in relation to a matter in which he had no engagement. The matter was further adjourned until the 27th June, 2006 to permit application to this Court and, following further correspondence to a later date. The inquest is still pending.

20. Dr. Geraghty reiterates that he granted a number of adjournments to "give the family of the deceased an opportunity to pass on information to the gardaí and to facilitate further investigation of the death of the deceased", that he asked the gardaí to investigate the issues raised by the family of the deceased (this by reference to a letter to him forming part of exhibit A, D, E, B 4, from the gardaí to Dr. Geraghty in answer to certain inquiries of them by Mr. Burke).

21. Dr. Geraghty further deposes to the fact that he had a role in relation to the collation of evidence given the inquisitorial nature of the process and has access to evidence prior to the hearing. He also deposes to the fact that whilst he may be familiar with the content of evidence, it does not follow that he has prejudged the outcome and that by training and experience he is able to, and does, keep an open mind in relation to the cause of death until all the relevant evidence has been adduced and tested at the inquest.

22. In his further affidavit of the 15th November, 2006, Mr. Burke refers to the fact of a conversation with Jennifer Moss concerning the alleged statement of admission of Mr. Fagan, as well as the desire of the family for further investigation and the fact that they were "frustrated" in their anticipation that a further or more extensive investigation would be pursued. This statement does not appear to be relevant to the within proceedings to the extent that there is no suggestion whatsoever that the coroner was apprised of this fact. I do not see how a complaint can be made against the coroner springing from a fact of which he is unaware. Mr. Burke exhibited a document described as consisting of some eight pages of history prepared by the applicant but it constitutes, and I put the matter in summary form, a statement pertaining to the events surrounding Ms. Martin's death, events prior and – subsequent thereto, and certain dealings with a member of An Garda Síochána and Jennifer Moss. It cannot be relevant to the matter which I must decide here.

23. Mr. Burke also states in that affidavit that the complaint of the applicant and her family was to the effect that on more than one occasion Dr. Geraghty (allegedly) accepted or appeared to accept that by virtue of the applicant's statement, it followed axiomatically that Pamela Martin must have engaged in a similar enterprise (*i.e.* suicide) and that her death was accordingly suicide. He also refers to the "violent beating of a defenceless woman" and, *inter alia*, to the bruising about the face of the deceased and Mr. Fagan's "attempt to mislead the Gardaí". It is there deposed, also, that the respondent's assertion that he "at no stage suggested that the death as aforesaid was straight forward" (*sic*) is "vehemently denied" and apparently the applicant and members of her family were said, at that time, to be willing to give oral evidence. No such evidence was adduced. It is further said by Mr. Burke that it is "totally untrue" for Dr. Geraghty to say that he adjourned the inquest on 17th May, 2005, because of Mr. Toal's possession of new evidence and he prays in aid the correspondence aforesaid. Mr. Burke further alleged factual inaccuracies as to the events of 14th March, 2006, as set out Dr. Geraghty's affidavit. In that respect, he says that counsel on behalf of the family "attempted to address the respondent as to their concerns and specifically their concerns that a reasonable apprehension of bias had been generated by virtue of the respondent's conduct over the course of the proceedings had by that time" and that having "attempted" to make that point, Dr. Geraghty interrupted him, thereby frustrating counsel in or about making such submissions, Dr. Geraghty first saying that he would not adjourn the matter but which nonetheless occurred.

24. As we know, the applicant and her daughter Martha O'Keeffe, say that on an occasion which they do not identify, at one of the hearings, the respondent stated that he believed Pamela Martin's death to be straightforward. Both of them also say that at an informal meeting at Dr. Geraghty's office on what the latter says was the 18th March, 2005, he was of the view that the deceased had tried to take her own life many times previously.

25. In addition, generalised allegations have been made by Mr. Burke to the effect that "similar comments" were made in his hearing to the effect that the circumstances surrounding the death were "straightforward" and he further states, in a generalised way, and I somewhat summarise the matter, that in the course of his "ongoing dealing" with Dr. Geraghty, the latter "ventilated" his views that such death was so. The only specific incident to which reference is made by Mr. Burke related to that telephone conversation of 6th September, 2005, in respect of which he says that "it was clear that he believed, that by reason of the fact that Pamela had taken drugs, had a history of depression and had attempted suicide in the past, what was my problem (*sic*) and could your deponent or the family be really surprised (*sic*)". This appears to have been the telephone call referred to in Mr. Burke's original affidavit of the 6th September, 2005, the contents of which were amplified in his most recent affidavit of the 31st July, 2008. In the former affidavit, Mr. Burke says that Dr. Geraghty "continued to advise that having reviewed the file it was his view that the deceased, who was found to have had drugs in her blood and urine, was a person who presented with a history of depression, and who had attempted suicide in the past"; Mr. Burke went on to say that it was his view that "the only logical, reasonable and objectionable inference to be drawn from these last comments…was to the effect that he was satisfied that by reason of Pamela Martin's use of illegal drugs…it axiomatically followed in this instance that her attempt had succeeded and that would be an end to it".

26. In her affidavit, Martha O'Keeffe says that she attended at the inquest (on a date conceived to be the 1st February, 2004) and that Dr. Geraghty, in her hearing, stated that he believed her late sister's death to be straightforward. She states that she and her mother spoke with Dr. Geraghty at his office before the inquest, that he read from notes that he had and told them that he was of the view that Pamela Martin had tried to take her own life many times previously and she further states that she and her mother denied this and inquired of him from where he had obtained such information. He, in turn, responded that "it was said on the night that Pamela died by either her boyfriend, Michael Fagan, or his mother, Ivy Fagan". Having listened apparently, to what Mrs. O'Keeffe describes as a "suitable explanation for his belief as to Pamela's previous disposition", she says that he undertook to remove those notes from his file and stated that this would be done before the inquest. It is asserted that this was not done and she further states that "based on the impression created by the respondent" to the effect that the death was straightforward he "most certainly prejudged and predetermined, the manner of her death". Thus, by this affidavit, the allegation of actual as opposed to objective bias was again touched upon, though it seems to me that the assertion is to the impression allegedly received shades from the deposition of fact into comment.

27. Mrs. Martin says that she, as in the case of her daughter, and at the hearing of the inquest, heard Dr. Geraghty make reference in her hearing to the fact that he believed her daughter's death was straightforward. She also refers to the meeting with Dr. Geraghty, confirms what he says are the facts that Dr. Geraghty read from notes and told her and Mrs. O'Keeffe that her daughter Pamela had tried to take her own life many times previously. With two exceptions, the remainder of her affidavit is in substantively the same terms of that of Mrs. O'Keeffe, those are statement to the effect that the affidavits were so sworn by her previous solicitor in an effort to spare her the trauma of having to revisit again and again the death of her daughter, and, also, that the contents of the affidavits made on her behalf were true and that all denials "filed" on behalf of the respondent to the effect that no such remarks were made relevant to Pamela's death, are not.

28. In his replying affidavit to the three supplemental affidavits aforesaid, Dr. Geraghty identifies the meeting at his office with the applicant and Mrs. O'Keeffe as being on 18th March, 2005. He says that on that occasion the applicant and Mrs. O'Keeffe made "certain allegations as against the [d]eceased's boyfriend … and about his conduct and/or behaviour, including his conduct and/or behaviour in the period immediately prior to her death". He states that there was a discussion as to whether or not the deceased had, prior to her death, made previous suicide attempts but he says that he does not accept that the discussion took place "along the lines as suggested by the [a]pplicant" (and Mrs. O'Keeffe). Going into further detail on the events of that day, he says that the applicant and her daughter were continuing to grieve for the deceased and that he was anxious that they should have as much time as they needed to impart to him such information as they had, that he indicated to them as best he could that he would take their comments on board during the course of his inquiries and that he met them as a matter of courtesy. Incidentally he said that the meeting was "off the record" so to speak. There is in the context of an inquiry such an inquest nothing of this kind of course, but I infer that the intention was to have an informal discussion where no binding views were expressed. He says that he did not assert, indicate or express any particular views as to the cause of death of the deceased (on that occasion) nor did he express the view that she had tried to take her own life by the applicant and Mrs. O'Keeffe made "it clear to me that in so far as they were concerned, there was no substance to this". He states also that being anxious to ascertain whether or not the inquest might proceed on 13th September, 2006, he sought to communicate with Mr. Burke for the purpose of ascertaining whether or not new evidence had emerged over the period from May to September, that he was concerned to find out whether the applicant was in a position to proceed and whether it was the applicant's intention to make a further application for an adjournment, he being anxious to avoid the attendance of witnesses in circumstances where an adjournment might take place. He says that it was in these circumstances that he contacted Mr. Burke by telephone and he does not dispute the statements attributed to him by Mr. Burke on that occasion.

29. With respect to those elements of the conversations held privately between Dr. Geraghty and the applicant and her daughter Mrs. O'Keeffe, I cannot resolve the controversy which arises.

30. The applicant in her legal submissions, in substance relies upon the following factual matters (commencing on the sixth page) as set out at paras. (i) to (viii). These are as follows (in somewhat edited form):-

> (i) The respondent has on repeated occasions indicated that he believed the facts relative to the death of Pamela Martin to be straightforward.
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> (ii) He has wrongly accused the applicants legal advisors of not alone misleading the court but his office by alleging that new evidence would be offered by them.
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> (iii) He has closed his mind to the actual facts of the case or to the necessity of establishing those facts.
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> (iv) He has stated openly that by reason of the fact that the deceased had drugs in her system, had a history of depression and had attempted suicide in the past that it all but axiomatically followed that the deceased had committed suicide.
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> (v) He has made those comments complained of above at a time when the actual inquest has not been formally opened.
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> (vi) Has failed refused and/or neglected to take cognisance of the fact that the deceased was brutally beaten on the night of her death by her boyfriend in such fashion as to leave significant marks to her face, acknowledged by the pathologist as present, (but) denied by Garda Avril Sharp.
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> (vii) Has behaved with such invective towards the Applicant, her family and to her legal representatives as to stand disqualified on this ground alone from having any further part to play in the inquest relative to Pamela Martin.

31. It seems to me that whilst there is a certain overlapping in these mixed assertions of fact and law they fall in substance into three categories, namely, an allegation of objective bias and, secondly, allegations pertaining to substantive matters and, in particular, an allegation (at vi) as to an alleged failure refusal and neglect to take cognisance of certain facts – something which might arise after the decision or judgment a tribunal or court and would be raised only if it was sought to impugn the conclusion (something which cannot of course arise here). The third category is that based on a failure to conduct hearings in accordance with constitutional justice arising by reason of the allegation that the applicant's legal advisors were allegedly accused of misleading the court and behaving with invective towards them. These are propositions; there is no evidence going to the proposition that anything other than what I might term a common or ordinary disagreement occurred as to what might or might not have been in said court. This does not give rise to an allegation that legal advisors misled the court even if some heat entered into the hearing. It will be seen from my observations below, in any event, that I cannot resolve disputed issues including what might have occurred or have been said at hearings.

32. The difficulty about reliance upon these matters is that, in large part, they are assertions based upon disputed questions of fact, deposed to in the affidavits and I cannot, in general, as I pointed out at the hearing, accept as proof on the balance of probabilities (and it is the applicant upon whom the onus of proof lies in respect of any relevant fact) any disputed fact or resolve such disputed issues without oral evidence. Insofar as any alleged fact is disputed, and hence, accordingly incapable of resolution on affidavit, the applicant must be regarded as having failed to prove any relevant alleged fact on the balance of probability.

33. Dr. Geraghty, as we know, states that he has no recollection of making a remark to the effect that the case was "straightforward", and it is his belief that he did not so make that comment (as set out in his initial affidavit of the 16th October, 2006). In his subsequent affidavit of the 4th January, 2007, Dr. Geraghty says that "I reiterate that I have not expressed the view that the death of the deceased was straightforward". In his final affidavit of September, 2008 (I cannot read the date), he says that he cannot recall making any reference at any hearing to the fact (and I do not of course suggest it is a fact) that the death was "straightforward". He denies that at the meeting with the applicant and her daughter he had asserted, indicated or expressed any particular view as to the cause of death or that the deceased had tried to take her own life many times previously. With respect to the telephone call of 6th September, 2005, it is only asserted by Dr. Geraghty that there is a want of specificity in Mr. Burke's affidavit as to what passed between them.

34. With respect to the actual conduct of hearings I cannot be satisfied, on affidavit, that Dr. Geraghty either on the 17th May, 2005, or on any other occasion, stated that the inquiry was "straightforward". In particular, Dr. Geraghty, in his affidavit of the 16th October, 2006, disputes the assertion that "I have at all times made it clear that I view the facts surrounding the death of Pamela Martin to be straightforward…" or that he had "…characterised the death of Pamela Martin as straightforward" and he states there that he had not reached any concluded view in relation thereto. Furthermore, in his affidavit of the 4th January, 2007, he states, *inter alia*, "….I reiterate that I have not expressed the view that the death of the deceased was straightforward"; similarly, in substance, in his affidavit of September, 2008 (without the necessity, I think, of taking extracts therefrom). It is clear from his evidence generally that he denies any prejudgment. I cannot decide these disputed matters.

35. I cannot decide, equally, of course, whether or not the adjournment on the 17th May, 2005, was requested on the grounds that new evidence had been uncovered by the family, indicating that suicide was not the cause of death, or that Dr. Geraghty granted an adjournment on the basis that all evidence in the possession of the family or their representatives be released to the gardaí (having regard to the conception on the part of the family that the death was not a suicide), but that the family's representatives had not been asked to furnish the material in their hands to the gardaí, on the one hand, and the contention, on the other hand, that counsel for the applicant had not sought an adjournment upon that ground.

36. In any event, however, the matter was adjourned to the 14th March, 2006, when it appears that a greater level of controversy arose. Dr. Geraghty apparently proposed to proceed with the matter on that day. It is asserted, to put the matter shortly, that counsel sought to address the applicant, unsuccessfully concerning the family's "concerns" the apprehension of bias and the issue of recusal; it was further contended that counsel was interrupted by the respondent thereby inhibiting him from making the submissions which he desired to so make, the matter ultimately giving rise, at a later stage, to the within proceedings. Criticism is made of Dr. Geraghty's refusal to further adjourn the matter without production of an order of this Court and, it is further contended that it was at his suggestion that the matter be brought before this Court; it appears to me that those matters are irrelevant, though they have been sought to be relied upon as indicative of a hostile or unfavourable attitude to the applicant or her lawyers. The controversial events, however, are, at bottom, relied upon, I think, as breaching the constitutional entitlements to a hearing which was fair and seen to be fair.

37. Having regard to the fact that I cannot resolve disputes of fact, I am left only with two upon which I can proceed, namely, the un-contradicted evidence of Mr. Burke concerning his discussion by telephone with Dr. Geraghty on 6th September, 2005, and the fact alone of controversy at at least two hearings before the coroner, namely, the disputation on the 13th September, 2006, on the topic of the basis upon which an earlier adjournment had been sought and the subsequent acrimony between Dr. Geraghty and Mr. Toal on the 14th March, 2006, I cannot make findings of fact as to what might or might not have been said on either occasion in court, especially on the issue of whether or not the hearing was so conducted as to inhibit counsel from making submissions because Dr. Geraghty has explicitly characterised Mr. Burke's account of the inquest and the sequence of events attendant thereon (which I infer refers to all three hearings) as being "very inaccurate".

38. The nature of a coroner's inquest as an inquisitorial fact finding exercise, as has been pointed out in the applicant's submissions with reference to a number of authorities, including *R. v. South London Coroner ex-parte Thompson* [1982] 126, S.J. 623, *Northern Area Health Board v. Geraghty*, [2001] 3 I.R. 321, *Farrell v. Attorney General*, [1998] 1 I.R. 203 and *Morris v. Dublin City Coroner* [2000] 3 I.R. 592. The relevant principles are not in question in these proceedings in any substantive way.

39. As to the question of bias specifically in the context of coroner's inquests the applicant has referred to Farrell "*Coroners: Practice and Procedure*" (Dublin, 2000). In the context of the rule against bias real or perceived he made reference to a relevant portion of *R. v. H.M. Coroner for Inner West London* [1994] 4 All E.R. 139 as follows:-

> "The correct approach to the identification of bias is to be found in the judgment of the House of Lords in *R. v. Gough*…[1993] A.C. 646. More particularly in the present context, it was necessary to show in the first instance an appearance of bias, and then on examination of all the facts that there was a real possibility that the coroner may unconsciously have felt resentful towards the appellants in such a way as to have influenced his approach to their case for a resumption of the inquest… there were indications in the coroner's correspondence indicating that he regarded the applicants… as being an unrepresentative, mentally unwell faction; and although this would not, per se, be sufficient to establish the existence of bias, it was a relevant factor in concluding that representations made by such people could not reasonably be expected to be judged on their objective merits."

40. It seems to me, however, that one decision of relevance in this jurisdiction in terms of dealing with the issues of actual or apparent bias is *Orange Communications Limited v. The Director of Telecommunications Regulation and Another* [2000] 4 I.R. 159. The matter was addressed in the judgments of Keane C.J. and Murphy, Barron and Geoghegan JJ. Keane C.J. agreed with the observations of the latter three. I think the observations of Barron J., are of assistance as to the nature of bias. In the first instance he points out that bias will "always predate the actual decision or contemplated decision" and that

> "Bias does not come into existence in the course of a hearing. It may become apparent in the course of a hearing and in that way alert a party to the possibility of bias and so enable such party to establish facts which show that the attitude adopted by the decision maker in the course of the hearing was one which might have been expected having regard to those facts. The essence of bias then is the perception – the strength of that perception not being relevant for the purpose of this definition - once all the facts are known that the particular decision maker could never give or have given a decision in relation to the particular issue uninfluenced by the particular relationship, interest or attitude. Obviously, if it perceived that it may influence a decision yet to be given, it must exist at that stage".

In the present instance, we are concerned with the proposition that the conduct or observations of Dr. Geraghty to date give rise to an appearance of bias, in circumstances, where, of course, ultimately, any suggestion that there was actual bias was abandoned.

41. In *Dublin Well Woman Centre Limited and Others v. Ireland and Others*, [1995] 1 I.L.R.M. 408 an application was

unsuccessfully made to the learned trial judge to discharge herself from hearing the proceedings, which pertained to access to information on abortion services, a topic on which the learned trial judge, in her capacity as chairwoman of the second Commission on the Status of Women had engaged in correspondence with an Taoiseach and where a public statement bearing upon the topic had been made by it. Denham J. quoted from the statement of Hewart L.C.J. in *R. v. Sussex Justices (ex-parte McCarthy),* [1924] 1 K.B. 256 (at 259) to the following effect:

> "… a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made an observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect has to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but what might appear to be done. Nothing is to be done which creates even a suspicion that there has been improper interference with the course of justice".

42. Denham J. also quoted from the judgment Finlay C.J. in *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419 which pertained to an allegation of bias by pre-judgment and hence might be conceived to be of particular relevance here. Finlay C.J., as quoted by Denham J., there expressed himself:-

> "… satisfied that the proper standard to be applied by this Court which does not appear to be wholly different, though it may be subtly different from the standard which was applied in the High Court, is the question as to whether a person in the position of the plaintiff, Mr. O'Neill, in this case who was a reasonable man, should apprehend that his chance of a fair independent hearing of the question as to whether his services [as a doctor] should be continued or terminated does not exist by reason of the pre-judgment of the issues which are involved in that by the members of the [hospitals] board. That in my view is the proper test to be applied in this case, and it fulfils what I understand from the authorities as being the test which has been accepted in this country and by this Court in relation to a case of this description".

43. Denham J. stated that the latter was the standard applicable, that there was no suggestion of personal favour or personal interest (*i.e*. subjective bias of the learned High Court judge) and that the actual state of mind of the judge was: -

> "… not in issue. What is now in issue is the objective test:
>
> > '…Whether a person in the position of the appellant in this case, being a reasonable person, should apprehend that his chance of a fair and independent hearing of the question at issue does not exist by reason of the previous non-judicial position, statements and actions, of the learned High Court judge on issues which are at the kernel of this case."'

44. Denham J. further quoted Lord Denning, M.R. in *Metropolitan Properties Company (FGC) Limited v. Lennon*, [1969] 1 Q.B. 577 (at p. 599) as follows (in part) –

> "[T]he court … does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, that he should not sit. And if he does sit, his decision cannot stand… Nevertheless there must appear to be real likelihood of bias. Survive or conjecture is not enough. There must be circumstances in which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right minded people go away thinking: The judge was biased".

Obviously, we are not dealing here with a *lis inter partes* but no one could doubt that analogous principles arise in the context of an inquest i.e. that prejudgment as to the outcome or conclusion to be reached by the party conducting the inquisition or presiding over it as, say, to the cause of death in a given case falls into the same category as a bias by prejudgment in favour of a party.

45. One of the issues relevant in *Usk and District Residents Association Limited v. An Bord Pleanála & Ors* was the question of objective bias. In his as yet unreported judgment of the 8th July, 2009, MacMenamin J. addressed it in a manner in which I find helpful, as follows:-

> "22. Objective bias is to be distinguished from the subject of bias. To establish the former, it must be shown that there existed some factor, extraneous to the decision making process, which could give rise to a reasonable apprehension that the decision maker might have been biased. An overt or declared bias is an example of this. This comes under the heading of pre-judgment: *O'Neill v. Beaumont Hospital Board* [1990] I.L.R.M. 419 was an illustration of this concept.
>
> 23. The test Finlay C.J. applied there was whether members of that hospital board had gone so far as to express prior views on the issue before them in a very definite fashion, or if there had been a exercise of a judgment of the merits (as opposed to mere form) of the contested questions of fact which would go to determine the issue. As identified in O'Neill "pre-judgment bias" is the expression of a view on the actual facts or merits of decision, rather than on the correctness of a procedure or approbation of the actions of a person to whom a decision was delegated. It is an objective test (see Fennelly J. in *O'Callaghan v. Mahon* [2008] 2 I.R. 514)."

And later he went on:-

> "26. In *Mahon*, Fennelly J. (for the majority of the Supreme Court) approved the test in *O'Neill*, insofar as it was one of a hypothetical observer, neither oversensitive nor careless of his own position. That was properly comprehended

> in the notion of "the reasonable observer". He pointed out that it was necessary that a person who apprehends there is a risk of bias invoke its existence where it is apprehended. He emphasised the objective nature of the test. It is not based on the apprehension, even the reasonable apprehension of parties"

Further on this topic Denham J. in *Bula Limited v. Tara Mines Limited (No. 6)* [2000] 4 I.R. 412, said in this connection:-

> "It is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party, it is an objective test – it invokes the apprehension of the reasonable person."

That passage was quoted with approval by Fennelly J. in O'Callaghan and also by MacMenamin J.. One need hardly say that one is dealing with a well informed observer.

46. It may well be that one in a given case could pray in aid a disputation between a tribunal (including a coroner) and counsel, in open court, as to what might or might not have been said on a previous occasion or as to whether or not an adequate opportunity to be heard had been given, in support of an allegation of bias of either type, or an allegation of deprivation of constitutional justice. Reliance seems to be placed on these incidents for the former purpose. This is because there is an allegation that Dr. Geraghty "behaved with such invective towards (*inter alia*) the applicant's … legal representatives as to stand disqualified on this ground alone" as set out in the applicant's submissions. Furthermore, one of the authorities referred to in that context is *R. v. (Donoghue) v. The Justices of County Cork*, [1910] 2 I.R. 271 where the decision was quashed because one of the justices had a long history of personal animosity towards a party. Three other authorities were in this context quoted; the second, *R. (Kingston) v. The Justices of County Cork*, [1910] 2 I.R. 658, concerned an adjudication involving a farmer who was boycotted immediately after a meeting of the United Irish League. There was evidence that the boycott was a result of the meeting in question. The meeting was attended by justices who subsequently presided over a case involving the farmer. The third *R. (Harrington) v. Justices of County Clare*, [1918] 2 I.R. 116 is really authority for the proposition that the failure to take an objection to bias on the part of the bench, at the hearing, though generally a bar to raising it afterwards on certiorari is not an absolute bar to so doing. I cannot find *R. v. Abingdon Justices (ex-parte Cousins)* [1964] 108 Sol. Jo 840 D.C. on the materials available to me but since it was not opened I presume it is not a decision which advances the matter one way or another.

47. Considerable emphasis has been placed by counsel for the respondent on the unreported decision of the Supreme Court in *McAuley v. Keating & Ors* [1998] 4 I.R. 138. I think that I have sufficiently elaborated the principles applicable, but *McAuley* is of some assistance in terms of how the facts might be approached. There is no doubt that it is clear from *McAuley*, as submitted by Mr. Byrne, that any acts or statements relied upon as showing some element of pre-judgment must be seen in their context. In that case the first respondent, a Chief Superintendent, commenced a disciplinary investigation under Regulation 33 of the Garda Síochána Code of Conduct for Students/Probationers. The first respondent, in commencing the proceedings under the Regulations, stated that he had decided that the applicant had "committed a breach of discipline", but O'Flaherty J. took the view that the Regulations required that there must be *prima facie* evidence of a breach before the process of a hearing (or any ultimate removal of a student garda) took place. O'Flaherty J. agreed with the trial judge (O'Sullivan J.) that this statement, *inter alia*, was merely a formalistic statement of a conclusion which pertained to the "verbal intricacies" of the Regulation. The offending form of words was used in the context of a letter which plainly provided for an inquiry into the "alleged" incident giving rise to the invocation of the disciplinary process against the appellant, and O'Flaherty J. pointed out that the course of conduct of the first respondent in proceeding with the inquiry showed that he was "taking it very seriously" and had not engaged in any form of pre-judgment. In Murphy J's. opinion it was "crystal clear" that the first respondent was applying the garda code and had merely made a "tentative, preliminary decision" and was affording the applicant an opportunity to be heard thereafter or to have the benefit of a full inquiry. All three judges (the third was Lynch J.) rejected any element of actual or objective bias.

48. Mr. Byrne has also stressed a passage from the unreported decision of O'Sullivan J. at first instance in that case (judgment delivered 8th July, 1997) (at p. 22) where that learned judge said that:-

> "I must apply the objective test…to a determination as to whether in all the circumstances the first respondent is culpable of pre-judgment bias. In my view he is not. I think a reasonable man, praised of all the circumstances which I have set out in this judgment, might well come to the conclusion that the first respondent had expressed himself in an infelicitous fashion, or that a legal adviser would have insisted on rephrasing the utterances relied on. I also think, however, that the same reasonable man would be obliged to take note of the careful if not elaborate preparations conducted by or at the direction of the first respondent in advance of the oral hearing, his manifest and repeatedly stated concerns to comply with the requirements of the relevant code and indeed his explicit statement to the applicant on the 25th November, 1996, that he proposed to hold an oral inquiry before coming to a final decision, quite apart from his sworn statement to the like effect in his affidavit. In my judgment the applicant's apprehension of bias is not a reasonable apprehension as identified in the relevant authorities, and I must refuse the application on this ground also."

49. It seems to me that the conversation on the 6th day of September, 2005 represented an effort by Dr. Geraghty to request Mr. Burke to proceed with the inquest: it appears to me that such a course of action by a coroner is legitimate. He has stressed on affidavit that it was his desire if not obligation to proceed and one fully understands his position.

50. The conversation of the 6th September is not set out in verbatim any of Mr. Burke's affidavits. He, however, exhibits an attendance note and a letter to the respondent of that date. I have already referred to the relevant passages set out in the affidavits in my attempt to summarise relevant facts. Mr. Burke has also deposed to the fact that he considered the conversation to be of such significance that he made the note and subsequently wrote the letter.

51. Against the offending conversation of September 6th and the controversy in court, it seems to me that one must weigh in the balance the fact that the inquest was adjourned on a number of occasions, whatever else, at the behest of the applicant's representatives (whether or not any such adjournment arose because there was additional evidence or not – a matter in dispute which I have not been able to resolve) and thus affording ample opportunity to the applicant and her lawyers to prepare and address all issues which might arise; the process being inquisitorial, it gave rise to a necessity

on the part of the coroner to at least reach some tentative or preliminary views in order to decide how he should proceed (e.g. who were interested parties, who might be relevant witnesses and what documents should be disclosed and to whom); it seems to me that it is legitimate for officers such as coroners to press lawyers to proceed with an inquest if possible (and, of course, there may be very good reasons why the same ought not to proceed on a given occasion), and it will sometimes occur that a person might express himself:

> "An infelicitous fashion or that a legal adviser would have insisted on rephrasing the utterances relied upon."(Per O'Sullivan J.);

Needless to say, it must be anticipated, *prima facie*, that a coroner, as would anyone else exercising ministerial or *quasi judicial* functions will exercise his statutory power constitutionally; the *prima facie* one is not entitled to presume that in conducting the inquest, he will fail to do so. In that regard one must stress the fact that the burden of proof is upon the applicant. Furthermore, Dr. Geraghty has deposed to the fact of his open mindedness and he will sit with a jury.

52. I do not think that any reasonable person, even if the matter is taken at its height from the perspective of the applicant, could say that there was a level of invective or personal the animosity or appearance thereof, by reason of what transpired at hearings or any other dealings between Dr. Geraghty and solicitor or counsel, (including correspondence or the telephone conversation of the 6th September, 2006): as to imply bias. Robustness, *per se*, or occasionally somewhat acrimonious clashes between such persons occur in court or in relation thereto: mutual respect is not thus undermined as between lawyers or an officer such as a coroner and does not itself give rise to an apprehension of bias; something much more substantial then what occurred is necessary. Indeed, I should say that at no time is it alleged that personal invective was directed towards the applicant or her daughter, Mrs. O'Keeffe. Whatever disagreements may have taken place it is very significant that it did not touch these ladies.

53. In all of the circumstances it seems to me that a reasonable observer would not consider that the words spoken on 6th September, 2005, as spoken and coupled with the previous controversy in court, indicated a strength of view which went beyond a mere tentative or preliminary view essential to the conduct of a coroner's work, to the point where he might reasonably consider pre-judgment existed. It seems to me that the fact that a jury would make the ultimate decision cannot be decisive one way or the other but is merely one of the factors in the totality of the circumstances, favouring, in this case, refusal of the application.

54. I am not persuaded that taking all relevant factors into account in circumstances where the burden of proof is on the applicant that it has been shown that a reasonable observer would conclude that there was bias, and in particular, objective bias.