CO/4547/2014

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 28 July 2015

B e f o r e:

MR JUSTICE MITTING

Between:
THE QUEEN ON THE APPLICATION OF CHARLES ABE ROTSZTEIN
Applicant

v

HER MAJESTY'S SENIOR CORONER FOR INNER NORTH LONDON
Defendant

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Sam Grodzinski QC (instructed by Asserson Law Offices) appeared on behalf of the **Applicant**
Can Yeginsu (instructed by Withers) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE MITTING: At 7.39pm on 28 September 2014, Mrs Sarlotta Rotsztein (aged 86 years) was admitted to the Royal Free Hospital at the instigation of her general practitioner, Dr Adler. She had been unwell for a day with lethargy and "heaviness in the head". Her blood pressure, which had earlier in the year been very high, was very low. There was reduced air entry into the right lung. A blood sample was taken and analysed and sent for cultures to be grown. The purpose of that was self-evident: it was to determine whether or not there was any infection in the blood stream.

2. The initial "impression" of the medical staff at the Royal Free, as reported by Dr Mearns, a Locum Cardiological Registrar, was of septic shock possibly due to biliary sepsis. She was given antibiotics and hydrocortisone.

3. At 00.35 on 29 September Mrs Rotsztein lost consciousness. An ECG showed dynamic change. Her blood pressure was still low, despite treatment intended to raise it. The "impression" of the doctors at that stage was that she had had a possible cardiogenic shock with an underlying cardiac event; in other words, in common parlance, a heart attack.

4. The Specialist Cardiology Registrar, however, did not think that the clinical picture was of a primary cardiac event. Mrs Rotsztein died at 1.40am. Her treating consultant, Dr Nagus, advised referral of the case of her death to the coroner because the cause of death was unclear. Her general practitioner, Dr Adler, was consulted by Dr Mearns. He said that the cause of death could be the result of sepsis or a cardiac event, but he was prepared to certify the cause of death as (1) acute cardiac failure (2) myocardial infarction.

5. All of this information was set out in the report of the coroner's officer, Mr Hughes, which as far as I can tell was a verbatim copy of Dr Mearns's report. It was seen by the coroner on 29 September. She noted at the foot of the document:

   > "There is a direct conflict between view of hospital doctors and GP, so -> pm".

   Translated: because of the difference of opinion between the doctors about the cause of death, she directed that there be an invasive traditional autopsy.

6. Mrs Rotsztein was an Orthodox Jew. Jewish law strictly forbids the desecration of a corpse and requires it to be buried promptly, if possible on the day of death. As has been explained to me, and as is now set out in a signed witness statement by Dayan Solomon Friedman, the senior Dayan of the Union of Orthodox Hebrew Congregations in the UK, the former imperative, the avoidance of desecration of the corpse, is stronger than the latter, the avoidance of delay in burial.

7. Mrs Rotsztein's five surviving children believe that she would have been horrified by the performance of an autopsy on her corpse and sought to persuade the coroner not to

order one. Although the exact sequence of events is not precisely clear, I am satisfied that they very soon made clear to the coroner's officer, Mr Hughes, that they were prepared to pay for and requested a non-invasive post-mortem to be performed by Professor Roberts at the John Radcliffe Hospital in Oxford. He was, and is, possibly pre-eminent in his field, that of non-invasive post-mortem procedures. He is universally acknowledged to be a skilful and experienced pathologist. He, at the request of the family, was willing to perform a CT scan and coronary angiography. He has said on other occasions, and would no doubt have said on this occasion too, that if in his expert view those procedures did not reveal, with a high degree of probability, the cause of death of Mrs Rotsztein, he would have advised the coroner to proceed to an invasive autopsy.

8. By Mr Hughes the coroner notified the family that, although she had taken their religious objections into account, she was nevertheless satisfied that a traditional autopsy was necessary. She rejected their proposal. The family applied for an urgent, without notice, injunction restraining the performance of an invasive autopsy. That was granted on the terms by Leggatt J on the evening of 29 September 2014.

9. The injunction was notified to the coroner by 8am at the latest on 30 September 2014. The coroner then instructed solicitors. She also sought the opinion of Professor Sebastian Lucas, Emeritus Professor of Pathology and Consultant Pathologist at Guys and St Thomas's Hospital. She followed up her discussion with him by an email at 11.30am on 30 September to confirm her understanding of his advice.

10. There may be some uncertainty about his answer to her understanding of his view that myocardial infarction was not the likely cause of death, but in the end it does not matter greatly whether that misunderstanding was put right by Professor Lucas in his response to her email, or whether there is a typographical error in his response. On the basis that there was no such error his advice was as follows: 1) Myocardial infarction was the likely cause of death;

    (2) It was unlikely that a CT scan and coronary angiography would provide an unambiguous pathological cause of death and might indicate a cause of death which was not in fact the main cause;

    (3) The coroner should follow up hospital test results, especially blood cultures. If positive they would provide a diagnosis. Professor Lucas did not go on to state the opposite, that if negative they would also contribute to a diagnosis, but, as I shall explain, the coroner dealt with the negative result that ensued in that way.

11. Correspondence between the coroner's solicitors and the claimant's solicitors about the precise effect of Leggatt J's order then took place, which, for my purposes, takes matters no further. At 5.12pm on 2 October the corpse was released to Professor Roberts to undertake a CT scan and coronary angiography. The coroner also followed up Professor Lucas's suggestion that she obtained the results of blood and urine cultures from the hospital.

12. Dr Mearns in a second report to her, dated 2 October, stated that blood cultures had shown no growth in blood and no significant growth in urine after 36 hours. On that basis he was able to exclude sepsis as the cause of death. At 6.13pm the coroner emailed Professor Roberts a copy of Dr Mearns's further report.

13. At 6am on 3 October Professor Roberts performed a CT scan and coronary angiography. He concluded that the cause of death was congestive cardiac failure and cardiogenic shock due to ischaemic hypertensive and valvular heart disease due to diabetes mellitus. One of the facts which led to that conclusion, cited in the comments appearing immediately after the statutory particulars of the cause of death, was that blood culture and urine culture were negative.

14. In his witness statement of 30 March 2015 Professor Roberts explained that the culture test confirmed his view, but were not essential to it. He would have reached the conclusion that the cause of death was established at over 90% probability without them. With them the probability approached 100%. The coroner accepted that the results of the blood and urine cultures, together with Professor Roberts's report, established to her satisfaction that the cause of death was as he described it.

15. This case thereupon became academic, but permission was granted by Sir Stephen Silber on the footing that it raised questions of principle which were likely to arise in other cases and could be determined on the facts of this case, so that the case should proceed to a substantive hearing. I have been greatly assisted by the submissions that I have heard from both sides.

16. The statutory background is set out in sections 1, 5 and 14 of the Coroners and Justice Act 2009 and is as follows:

> "1 Duty to investigate certain deaths.
>
> (1)A senior coroner who is made aware that the body of a deceased person is within that coroner's area must as soon as practicable conduct an investigation into the person's death if subsection (2) applies.
>
> (2)This subsection applies if the coroner has reason to suspect that—
>
> (a)the deceased died a violent or unnatural death,
>
> (b)the cause of death is unknown, or
>
> (c)the deceased died while in custody or otherwise in state detention."
>
> ...
>
> (5) Matters to be ascertained
>
> (1)The purpose of an investigation under this Part into a person's death is to ascertain—

(a) who the deceased was;

(b) how, when and where the deceased came by his or her death;

(c) the particulars (if any) required by the 1953 Act to be registered concerning the death."

...

(14) Post-mortem examinations.

(1)A senior coroner may request a suitable practitioner to make a post-mortem examination of a body if—

(a)the coroner is responsible for conducting an investigation under this Part into the death of the person in question, or

(b)a post-mortem examination is necessary to enable the coroner to decide whether the death is one into which the coroner has a duty under section 1(1) to conduct an investigation.

(2)A request under subsection (1) may specify the kind of examination to be made."

17. Regulation 11 of the Coroners (Investigations) Regulations 2013 contains one further relevant provision:

"Delay in post-mortem examination to be avoided

11. A coroner who considers that a post-mortem examination should be made under section 14, shall request a suitable practitioner to make that post-mortem examination as soon as reasonably practicable."

18. In a case in which a coroner decides that traditional invasive autopsy is required, Article 9 of the European Convention on Human Rights may come into play. As I have already noted, it is a settled tenet of the Jewish faith that desecration of a corpse is to be avoided. A similar principle applies in Islam. Article 9 provides:

"(1)Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

It is common ground in this case that it concerns the manifestation of a religious belief and that the performance of the coroner's functions is established by law, and is undertaken for one or more of the purposes spelt out in Article 9(2).

19. Proportionality is therefore in issue. Both sides are agreed, and I accept, that the current understanding of the principle of proportionality to be applied in the case of qualified rights is as stated by Lord Sumption in Bank Mellat v Her Majesty's Treasury (No 2) [2014] AC 700 at 771A to D. Paragraph 20 reads:

> "Their effect can be sufficiently summarised for present purposes by saying that the question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them...For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective."

20. The claimant's challenge is brought on two bases:

(1) The coroner adopted the wrong test when she asked herself whether an invasive autopsy was required;

(2) She failed to take into account the guidance given by the Chief Coroner.

21. His Guidance No 1 of 4 September 2013 is headed "THE USE OF POST-MORTEM IMAGING (ADULTS)". I can deal with the second ground of challenge shortly because the coroner says, and I accept, that she did have this guidance in mind. Further, as Mr Yeginsu submitted, the guidance only sets out what a coroner should do once it has been decided that a non-invasive procedure should be adopted. That is clear from the opening words:

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

22. Although the guidance was produced following consultation with representatives of the established religious organisations, including the Jewish and Muslim faiths, it does not purport to give advice on whether or not to use non-invasive procedures. Accordingly, helpful though it is, in relation to the use of non-invasive procedures, it is of less utility as guidance to coroners on whether or not non-invasive procedures should be used.

23. The coroner's reasoning in arriving at her conclusion that an invasive autopsy was necessary is best, I think, discerned from her contemporaneous exchange of emails with Professor Lucas. It is apparent from the questions that she asked of him in the email of 30 September at 11.32, which summarised her discussions with him, that it was her view that there was a realistic possibility that non-invasive procedures would give an apparent medical cause of death, which was not in fact the correct medical cause of death. Accordingly, to paraphrase it, there was a real risk that non-invasive procedures would produce the wrong answer. She did not ask herself, at any stage, whether the use of non-invasive procedures first would compromise the use of invasive procedures thereafter should they be necessary. For reasons, which I shall explain, that seems to me to be a flaw in her reasoning which justifies the bringing of this claim.

24. Before I turn to the guidance which may be of use to coroners in the future, I wish to make one or two things clear. This case only concerns, and I am only concerned with, the discharge of the coroner's functions when the cause of death is unknown. I am not concerned with cases in which the deceased died a violent or unnatural death, or died whilst in custody or otherwise in state detention. Those cases may raise questions of their own, which do not arise on present facts, upon which it would be unwise for me to express any opinion.

25. Secondly, whether or not a post-mortem is ordered by a coroner is a matter for her judgment. No criticism is made, or could possibly be made on the facts of this case, of the coroner's decision to order a post-mortem. The question is what type of post-mortem should have been ordered. Thirdly, decisions about the type of post-mortem investigation to be ordered can only be made by a coroner on the basis of information which was available to her, or which she should reasonably have been expected to have obtained. The coroner has explained in her witness statement that she works under considerable pressure of time; she has some 20 or so deaths reported to her on an average day; in addition she has to spend time in court; and her work is discharged with the aid of, if all are in place, ten coroner's officers. It is unreasonable to expect perfection in decision-making by a coroner in those circumstances. What can reasonably be expected is a fundamentally correct legal approach.

26. Fourthly, it is obvious that objection to the desecration of a corpse on religious grounds is a manifestation of religious belief and is therefore qualified by Article 9(2). As I have already observed, the discharging of a coroner's functions is both authorised by law and is to be taken, for the purposes of Article 9(2), as a factor capable of qualifying the right to manifest religious belief. Fifthly, I am dealing with a case in which there was unity of view among the deceased's family. For the future, unless the coroner has reason to believe that there is disunity within the family, she can safely accept the view expressed by close family members to her as the view of the family.

27. Against that background, and within those constraints, I am satisfied that for a coroner to fulfil her Article 9(2) duty, and so her duty not to act contrary to the Convention under section 6 of the Human Rights Act 1988, the following propositions should guide her conduct. First, there must be an established religious tenet that invasive autopsy is to be avoided before any question of avoidance on Article 9 grounds arises. Secondly, there must be a realistic possibility -- not a more than 50/50 chance -- that non-invasive procedures, which can include a CT scan and a coronary angiography but also the growth of blood and urine cultures, will establish the cause of death and permit the coroner to fulfil her duty under section 5(1) of the 2009 Act. That proposition must of course be established in the circumstances which were known, or should have been known to the coroner.

28. Thirdly, the whole post-mortem examination must be capable of being undertaken without undue delay to fulfil the statutory obligation under regulation 11. Fourthly, and critically, the performance of non-invasive or minimally invasive procedures must not impair the effectiveness of an invasive autopsy if one is ultimately required. That is of course a matter of judgment for the coroner.

29. Fifthly, there must be no good reason founded on the coroner's duty under section 5(1)(b) to ascertain how, when and where the deceased came by his or her death to require an immediate invasive autopsy in any event. Although I am not dealing with cases arising under section 1(2)(a), a forensic autopsy in a homicide case will either always, or almost always, be required and the need for it will either always, or almost always, override any religious objection. Sixthly, non-invasive procedures must be capable of being performed without imposing an additional cost burden on the coroner. In this case the family agreed to discharge the cost of instructing Professor Roberts. In other cases facilities at no additional cost may be available to coroners.

30. If the coroner had had that guidance in mind when she made her decision on 29 September, then she would, and should, immediately have realised from Dr Mearns's report of 29 September that blood cultures had been sent to be grown and would inevitably have revealed whether there was, or was not, infection in the blood stream in life. Accordingly, as ultimately happened, the absence of any sign of infection could have led to the practical exclusion to the point of mere certainty of sepsis as a cause of death. Once that was done then there was really no other plausible alternative cause of death and it was established to a high degree of probability by Professor Roberts's CT and coronary angiogram.

31. Because she did not ask herself whether the short delay required for analysis of the cultures and Professor Roberts's procedures would have made less effective an invasive autopsy if one had ultimately been required, her decision was flawed and would have been open to have been quashed on judicial review grounds. Because of the events which have occurred no point would be served by making a quashing order now, all that I need do, if counsel can agree upon the form of the declaration, is to make a declaration. Even though my judgment itself stands to explain my reasoning, I think it preferable that a declaration should be made and I would gladly make one once the form of words has been agreed.

32. This claim for judicial review therefore succeeds on one of the two pleaded grounds, the principal one, and I intend so to declare.

33. MR GRODZINKSI QC: I am grateful. No doubt Mr Yeginsu and I can agree a form of declaration over the course of the next day.

34. My Lord, the claimant seeks his costs of bringing the claim. Costs is a very important matter for the claimant and we would make our submissions on it as shortly as we can, conscious that that is an important issue. Could I ask you to turn to the bundle of authorities at tab 9, which is the decision of the Court of Appeal in a case called R (on the application of Davies) (No 2) v Birmingham Deputy Coroner [2014] 1 WLR 2739?

35. MR JUSTICE MITTING: I have read that many times.

36. MR GRODZINKSI QC: I am grateful. My Lord will then recall that the critical paragraphs are 47 through to 49, particularly 47 which is page 2754 of the judgment of Brooke LJ. Picking it up at the bottom of the page:

> "(i)The established practice of the courts was to make no order for costs against an inferior court or tribunal which did not appear before it except when there was a flagrant instance of improper behaviour..."

We are not in category (i). Then:

> "(ii) The established practice of the courts was to treat an inferior court or tribunal which resisted an application actively by way of argument in such a way that it made itself an active party to the litigation, as if it was such a party, so that in the normal course of things costs would follow the event;"

We say we are in category (ii).

37. MR JUSTICE MITTING: And the coroner says they are in category (ii).

38. MR GRODZINKSI QC: Precisely so. Paragraph 49 is also relevant:

> "Needless to say, if a coroner, in the light of the judgment, contents himself [or herself] with signing a witness statement in which he sets out all the relevant facts surrounding the inquest and responds factually to any specific points made by the claimant in an attitude of strict neutrality, he will not be at risk of an adverse order for costs..."

Just going back to 47(A), you will see what is said there by way of description:

> "[where] an inferior court or tribunal appeared in the proceedings in order to assist the court neutrally on questions of jurisdiction, procedure, specialist case-law and such like...

39. We rely upon the following matters to say that we are in category (ii), first of all, because of the flawed approach to decision-making that my Lord has identified: the claimant had to obtain an injunction from the court to prevent the defendant coroner from proceeding straight to an invasive autopsy. It is clear that had we not sought or obtained that injunction a serious violation of the claimant's Article 9 rights would have ensued. That is so, despite the injunction guidance given by my Lord and HHJ Thornton QC in R(on the application of Goldstein) v HM Coroner for Inner North London [2014] EWHC 3889 (Admin). That is the first factor.

40. The second factor is that the defendant, albeit seeking to characterise her position as neutral, has throughout these proceedings strenuously maintained that her original decision was lawful when my Lord has found that it was not. Can I take you please to a limited number of passages in the hearing bundle. The first is at tab 8. This is the summary statement of the defendant's submission at page 26, paragraph 7, where he says in summary and on the basis of the material available to her:

> "...the Defendant Coroner considers that there are no public law grounds for impugning her original decision to direct a post-mortem. Nor do there appear to be any grounds for the Court to continue to entertain an application in which the remedy sought by the Claimant has already in effect been granted."

41. MR JUSTICE MITTING: This was put in at the permission stage.

42. MR GRODZINKSI QC: This was put in prior to permission. I will take you to what happened now. Can we just look at a couple of other points in the summary grounds? Firstly on page 29 and critically on paragraph 22:

> "The Defendant Coroner is, however, under no doubt that she has acted lawfully throughout this case: this is not in her view an area of the law that requires clarification or guidance of an issue of general principle."

43. With great respect she was wrong on both counts. In her summary grounds she maintained two general positions: one is that it is all academic, there is no need for the claim to proceed, there is no need for guidance and that she was wrong; secondly, that her decision was lawful and my Lord has found that she was wrong.

44. Following those summary grounds being filed, those instructing me, in my respectful submission, quite properly sought the defendant's consent to ask to filing some amended grounds that took into account how matters had developed and would reply to the argument that the claim was academic. Had the defendant been neutral, as she says she was, she would have seen no reason to oppose that course, but she did oppose that course. We can see that, for example, from the letter to this court of 25 November at page 206 of the bundle:

> "We have, however, seen a copy of the Claimant's solicitors' letter to the Court dated 24 November 2014 requesting a delay in the papers being put in front of a Judge to allow them to *'submit a response to the Senior*

Coroner's Statement of Submission'.

> We do not agree that the Claimant should be allowed to file and serve any such response."

45. There is no provision for that in the CPR. Of course in adversarial proceedings it is open to a defendant to take whatever procedure points they wish to. That is exactly what is going on. This is an adversarial stance being taken by the defendant, rather than a neutral stance with a view to assisting the court.

46. Permission has then been granted, as my Lord has seen, and the matter proceeded by the defendant filing detailed grounds of defence. Those are at tab 10. Again I am going to take you to a very limited selection of the paragraphs. Paragraph 7, again at the bottom of page 50, says:

> "The Defendant Coroner does not consider there to be any public law grounds for impugning the Decision."

That is repeated later in the grounds.

47. Likewise in the skeleton argument prepared by my learned friend, no doubt on instructions, that was the position taken. We say her position has been far from neutral and has actively sought to oppose both the granting of permission and the remedies successfully now achieved from this court.

48. Finally, and perhaps most importantly, or at least certainly equally importantly, this is a case in which those instructing me have tried, on several occasions, to invite the coroner to discuss what might be the terms of an agreed order. In the course of conversation or debate with my learned friend, my Lord put forward various variations or fleshings out to the formulation that I have proposed and my learned friend engaged with my Lord. It may have been that had our invitation been accepted, as I said before, this could have been avoided. Can I just show my Lord the relevant correspondence briefly?

49. MR JUSTICE MITTING: I doubt it could have been avoided. Eventually guidance from the court has to be more than agreement between two parties to litigation, even though one of them is a public authority. Things have to be considered and they have to be debated.

50. MR GRODZINKSI QC: I, with respect, agree, but if a coroner or other inferior court or tribunal takes a position that we accept guidance is needed from the court and let us have a discussion about what that guidance might be so that a consent order from the court can be given, or we can assist the judge in arriving at a broadly consensual position subject to some tweaks here or there, then a coroner or other inferior court may come to court and say "I really did my best to assist. I did not take any active position in relation to whether my decision is lawful or not." I have no view on that, it is a matter for the court and here is what we can do to try and narrow the ground of dispute between us. That is not what happened.

51. Just very briefly I ought to take you to the correspondence. The first is a letter from those instructing me at page 208. This is a letter to the defendant in response to the one I showed you where the defendant was saying that there should not be an opportunity to assist the court further with a reply to the summary grounds. Just on page 208 under heading 1 "Issue to be tried" at paragraph 7 the coroner argued that there do not:

> "appear to be any grounds... to continue to entertain [the] application."

52. We disagree. We consider that the coroner misdirected herself when she refused to acquiesce to the request of the family to conduct (inaudible), and that is a submission that my Lord has upheld.

53. At the top of the next page:

> "In paragraph 34 of her Submission the coroner argues that Article 9(1) rights are qualified. We agree. The question which remains unanswered, and which we think that the Court should address, is the circumstances under which interference with this right can be justified by the coroner."

Then under III "Restricted scope of this letter" we always make clear this is not a wide-ranging case, it was confined to establishing the legal position under section 1(1)(b) of the Act. Then over the page on page 210 we essentially spelled out the case that my Lord, with modifications or fleshings out, has upheld. Then right at the end (page 212) we say under the heading "Invitation to without prejudice or open discussions:

> **"We have written this letter in the hope that the parties might be able to narrow the issues, and even possibly reach agreement. If you think that there might be some benefit to be gained by the parties meeting to discuss the issue raised above, either on an open or without prejudice basis, our client would welcome that opportunity and would be prepared to agree an adjournment of the Court timetable to allow such discussions to take place. If we have not received a positive response to this proposal by Wednesday 31 December 2014 our client will proceed to prepare his replies to your client's submissions."**

That letter was met with a reply at page 220:

> "Thank you for your letter of 17 December 2014.
>
> As you are aware, we have already set out our position in our letter... to the Court. This is that the papers should be put as they are before a Judge to decide the question of permission. Our letter also raised our concerns about further costs and delay. We therefore do not propose to say anything further at this stage."

There is no acceptance of the invitation to discuss.

54. That led to those instructing me to prepare amended grounds of challenge, which were done (the original ones having been prepared within 24 hours by the original firm of solicitors) which raised squarely the Article 9 challenge that has in the end succeeded.

55. In response to that there was again no offer to discuss or narrow the issues, instead there was a detailed grounds of defence and evidence by the coroner filed. A further attempt was made to try and narrow the issues by those instructing me. If my Lord turns to page 226 of the bundle there is a letter to the defendant's solicitors:

> "Thank you for your letter of 3 February 2015.
>
> You assert that your client has *'no personal interest'* in the present proceedings, and adopts a *'neutral stance'.* Your client's actions to date do not appear consistent with this assertion. Neither is your most recent letter which continues to assert the lawfulness of your client's decisions.
>
> If your client does wish to take a neutral stance in this litigation, we invite her to agree to a consent order requiring her to follow the three-step procedure recommended by Professor Roberts, and ordered by Mitting J and Leggatt J."

Then we spell out what we suggested should be the position:

> "In the event that your client is, in principle, prepared to enter into a consent order along such lines, we believe that the precise wording could quite quickly be agreed."

Then there is our position making it clear that if we cannot agree something and we go on and we succeed, then we should have our costs.

56. The reply was at page 228, which was a repetition that they are taking a neutral stance and, with respect, they were not. Then the last paragraph:

> "Finally, as to trying to reach an amicable settlement, are we correct to understand that your client is proposing that our client enter into an order under which she will, when faced with a religious objection, have to instruct a pathologist to carry out the three steps set out in your letter?"

To which the answer then was at page 253 and this follows a subsequent conversation:

> "Since receiving your letter of 19 February 2015 our Mr Asserson spoke with your Mr Matthews, on 23 February 2015, to provide further explanation of the nature of the offer set out in our letter of 10 February 2015. In particular, Mr Asserson explained the basis on which he believed that the parties might move forward to agreeing the terms of a consent order to resolve this matter.

> In particular, Mr Asserson invited your client to agree either to sign a consent order or to agree not to oppose a consent order which required the coroner to agree to the three step procedure... Mr Asserson made it clear that this would not be a mandatory order for all circumstances. He suggested that the three step procedure need not be followed where there was 'some overriding reason where it would be inappropriate'."

He does not express himself with the same fullness that my Lord has in a judgment, but one can see the approach being adopted. In the penultimate paragraph on that page:

> "You asked us to confirm this in writing. We hope that the above is of assistance in this regard. Our invitation to your client to negotiate the terms of an order to which she will either agree, or the terms of which she would not oppose, remains open."

Then there is further discussions about costs.

57. Finally, we see at page 256 a letter saying, "We are taking our client's instructions" and at page 257 a rather long letter, the gist of which is, "We are not prepared to agree", with no counter proposal saying, "What we would be prepared to agree to do is A,B,C". Instead there are a variety of points made and objections taken to what was being proposed.

58. My Lord, at the end of the day we could not fairly have done more to try and resolve this. We have come to court. I am afraid I cannot help but go back to echoing what Lord Dan Brennan[?] said when I was a pupil and he was my pupil master at a hearing, "We came; we fought; we won; we should have our costs". That does not always apply, but in this case it does.

59. MR YEGINSU: You will not be surprised to hear that that application is resisted. On the neutrality point (I will try to take this as quickly as possible) this is a case in which the coroner has sought to be neutral from the very start. It would obviously have been unsatisfactory for the coroner not to participate in these proceedings at all. It would have been unsatisfactory arguably for the coroner to participate solely by providing a written witness statement to the court simpliciter. I hope you will have been assisted by the written submission that I drafted on behalf of the coroner. I hope you will have been assisted by the submissions I made on behalf of her, especially as they relate to general coronial practice and aspects of the coroner's jurisdiction.

60. The coroner has sought throughout to emphasise that she is not defending but explaining her decision. She has never intimated through her solicitors, or otherwise, that if successful she would seek her costs against the claimant. My Lord, the point made by Mr Grodzinski by reference to the solicitors' correspondence at page 206 is a response from Withers, acting on behalf of the coroner, to the claimant's solicitors' letter where they would like to submit a response to the senior coroner's statement of submission. The final paragraph says:

> "We do not agree that the Claimant should be allowed to file and serve

any such response."

61. What happened in the end is that an amended statement went in and we did not actively resist, we just did not consent here. There was a lack of certainty as to what the response was going to look like. The point being made by Withers there is that there is no provision in the CPR that says when you put in a summary grounds the claimant has an opportunity to respond. Of course an amended claim is a different matter.

62. What Mr Grodzinski says (I hope I am not mischaracterising it) the claimant was trying to settle this, or at least narrow the issues and the coroner was having none of it. At page 226 this is a letter that comes after permission has been granted on 10 February. At paragraph 2:

> "If your client does wish to take a neutral stance in this litigation, we invite her to agree to a consent order requiring her to follow the three-step procedure recommended by Professor Roberts, and ordered by Mitting J and Leggatt J. In particular, where the family of a deceased requests it on religious pathology to carry out.
>
> ...
>
> In the event that your client is, in principle, prepared to enter into a consent order along such lines, we believe that the precise wording could quite quickly be agreed."

63. There is a response to that proposal nine days later at page 228 where Withers seeks clarity as to the scope of any such consent order. The way it is worded in the letter from Asserson Law Offices is very wide indeed. It applies where the family of a deceased requests it on religious grounds. There are no caveats subject to if:

> "in principle, [you are] prepared to enter into a consent order along such lines, we believe that the precise wording could quite quickly be agreed."

64. Withers response is 19 February. That is responded to in June by Asserson Law Offices where there is a record of a conversation recorded in this letter between Mr Asserson and Mr Matthews (then of Withers) where Mr Asserson allegedly provided a further explanation of the nature of the offer set out in 10 February letter. Then my Lord you will see that there is new wording. There is mention of some overriding reason, which is the first time that has been suggested. Also the suggestion that such a reason might be, for example, where there is no realistic likelihood than a non-evasive autopsy would establish the cause of death.

65. That is responded to by Withers at page 257. Withers confirmed that Mr Asserson's account of the conversation with Mr Matthews of Withers does not recall with Mr Matthews's recollection. My Lord, I would ask you simply to read page 258, which sets out the coroner's concerns about signing up to a consent order on the terms suggested by the claimant. (pause).

66. My Lord, you have that. One point about neutrality that I should have addressed before is: an indication by a decision-maker that they do not think what they did was unlawful is not the same as not taking a neutral stance in the proceedings. It is a relevant consideration for the court whether the coroner thought what she was doing was lawful. This court has given guidance in the light of that. That does not mean de facto that any approach she takes is going to be adversarial. In our submission, in this case the coroner has strictly stuck to the Davies (No 2) principles in respect of her participation to date.

67. There are two final particular points that I would make in respect of parts of this litigation: first, that there were two sets of solicitors involved for the claimant; second, that there have been occasions in this litigation where those instructed on behalf of the coroner have actively sought to dissuade the claimant from taking a certain course of action. The most obvious one is the episode with Leggatt J of mandatory verses probity injunction argument. In the event, there was a lot of to-ing and fro-ing and costs incurred and then an application was made in circumstances where, in my respectful submission, the reading of the order by the claimant, who has leading counsel instructed, was absurd.

68. My Lord, the primary position is neutral: no order as to costs, the secondary position is if an order is made for costs it would not be for everything, especially in circumstances where the claimant has, as he was entitled to do, pursued this claim on the wider basis.

69. MR JUSTICE MITTING: Is there anything in reply, Mr Grodzinksi?

70. MR GRODZINKSI QC: Very briefly. Firstly, my learned friend expresses the hope that my Lord was assisted by his submissions. No doubt my Lord was. That is not the test identified in Davis or any other case law. Courts are hopefully always assisted by counsel's submissions, but it does not mean that costs should not follow the event.

71. Secondly, my learned friend pointed to page 228 and said all that it was doing was seeking clarification as to the nature of the proposal, but I repeat the point I made earlier, that there was never at any stage from the coroner any counter proposal meaningful or otherwise. Thirdly, (and I did not bring this to my Lord's attention before because somehow it was not in my bundle) the very last two pages in the bundle (pages 260 and 261) are from a letter of 29 June 2015 from Asserson Law Offices to Withers once again offering to meet up, confirming the view that the final resolution of this matter is indeed a matter for the discretion of the court, and pointing out that there has been no counter proposal. That is all I want to say on the main issues.

72. As to my learned friend's last two points, first of all, he says there were two sets of solicitors here. If there is any duplication that can be sorted out by a costs judge on an assessment of costs (inaudible) not agreed a particular figure. Finally, he says that there was a lot of to-ing and fro-ing about what Leggatt J's order meant and whether it entailed a mandatory order or not. That to-ing and fro-ing lasted one and a half days. It would be entirely unfair, in our respectful submission, to reduce to any extent the costs order in our favour to deal with that one and a half days worth of correspondence.

73. MR JUSTICE MITTING: If I am to treat the coroner as a traditional defendant fully participating who has lost, then I think you have to recognise that you have lost on the subsidiary issue and also, in my view, were not right about the interpretation of Leggatt J's order. It would be a case, I think, for a proportionate order rather than a full order.

74. MR GRODZINKSI QC: Can I just deal with each of those points? As to the second ground, my Lord, I accept my Lord's judgment, as I am bound to, on the scope of the guidance. I have to say I looked for this during the course of my Lord's judgment. Nowhere in Mr Yeginsu's written arguments, either the summary grounds of submission, the detailed ground or his skeleton argument, did it say this guidance is irrelevant because it only applies once a decision has been taken to proceed to a CT scan. It is a fair point for him to have taken in oral argument. I do not deny that he was entitled to take it. I can say I took him by surprise, that is my fault not his, and my Lord has upheld the submission. In terms of the overall proportion of the argument--

75. MR JUSTICE MITTING: It is not great.

76. MR GRODZINKSI QC: It is not great. Why one asks rhetorically, when one is looking at costs, could it have any significant impact when it was a point only conceived as a winning point at the very last minute[?].

77. (Instructions taken) I am told generously by those instructing me that they will be prepared to pay the defendant's costs in relation to the application in relation to the misunderstanding to do with Leggatt J's order. In that event the costs order, in our respectful submission, should be: the defendant to pay the claimant's costs of the case subject to paragraph 2, which is that we pay no costs in relation to --

78. MR JUSTICE MITTING: I do not like offsetting orders. It is much neater and requires less effort if one makes a proportionate order one way only.

79. MR GRODZINKSI QC: In those circumstances may I respectfully suggest that no less than 90% would be the appropriate costs order?

Ruling on Costs

80. MR JUSTICE MITTING: In my judgment, the coroner in this case has not adopted a neutral stance simply seeking to inform the court about the reasons for her decision. To an extent it has been helpful that she has adopted a somewhat less than neutral stance, because it has permitted the issues to be fully debated and resolved. However, in adopting a stance which, despite Mr Yeginsu's oral submissions, actually on paper amounted to a purported justification of her actions, she takes the risk of an adverse order for costs if she loses. She has lost in substance. Having taken that risk then the ordinary order for costs must follow. However, she has won on the subsidiary issue which occupied little time of the court and was not, in any event, determinative of anything significant, and she was right about a disagreement between the parties about the effectiveness of Leggatt J's order immediately after it was made. That should be reflected in my judgment in a proportionate order.

81. I therefore order that the defendant should pay 90% of the claimant's costs to be the subject of a detailed assessment if not agreed. Although I may be presented with itemised bills, I think too much has occurred in this case for it to be possible for me to do justice to the parties by assessing a bill today.

82. MR GRODZINKSI QC: We were not going to invite you to do that. All that remains is that Mr Yeginsu and I will seek to formulate a declaration. Those behind me and those behind my learned friend took a careful note of my Lord's judgment. Does my Lord have in mind, as you actively invited us to formulate a declaration, seeking to encapsulate the general guidance that you gave or just the declaration that on the facts of this case--

83. MR JUSTICE MITTING: No, the general guidance will come from reading the judgment. I think an attempt to set out that in the form of an order is not likely to be helpful. Apart from anything else, I have not corrected it yet. On the assumption it is sent to me for correction, I would like to tidy it up slightly and perhaps, in one or two sentences, type that wording [?]. As far as the declaration is concerned, it is only the relief which you have obtained in relation to the decision actually made.

84. MR GRODZINKSI QC: I am grateful. That can be done in short order.

85. MR JUSTICE MITTING: Thank you both of you for your assistance in an interesting and, for the religious communities involved and indeed the coroners, an important case.