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SQUARE

BARRISTERS

Does AYBS cue the introduction of a fast track approach for the Coroner?

By Lorraine Harris

[R \(Adath Yisroel Burial Society\) v Senior Coroner for Inner North London \[2018\] EWHC 969 \(Admin\)](#)

[Lorraine Harris](#) looks at the recent case of [Adath Yisroel Burial Society \(AYBS\)](#) and its impact on how the Coroner should approach requests for the expedition of cases. Helpful analysis at the close of this piece for quick reference.

Our country has a reputation for queuing but the recent judgment in AYBS has cued up the opportunity for a different approach to some cases referred to the Coroner. This article addresses the concerns of those who feel that our love of queuing is coming apart at the seams.

In the past a proportion of Coroners have tended to deal with cases on a “first come” basis. In most circumstances, Coroners did not prioritise one case over another, instead dealing with matters in the order in which they were referred. There are exceptions such as cases of suspected homicide or deaths in which organ donation is being considered where a more immediate decision will be required by the Coroner.

In general circumstances, of course there are exceptions here too, most relatives would wish for any involvement with the Coroner to be concluded as soon as is possible. Coroners will try to deal with matters in as timely manner as they can, as per the following:

[Coroners and Justice Act 2009 Section 1](#) which states:

- “1. A Senior Coroner who is made aware that the body of a deceased person is within that coroners’ 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 dies 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.”*

[The Coroner’s \(Inquest\) Rules 2013 Rule 8](#) (echoed in [Chief Coroners Guidance Number 9](#)) states:

“Timing of the Inquest: - A coroner must complete an inquest within six months of the date on which the Coroner is made aware of the death, or as soon as is reasonably practicable”¹

Additionally, Coroners are obliged to inform the Chief Coroner the reasons for any delay in the hearing of an inquest over 6 months from notification of a body lying in their area. It can be seen that there is every effort to progress matters in the shortest time frame as is possible, but even so this has always still be subject to the chronological referral queuing system.

On a day to day basis Coroners review all referrals, usually with reference to the Coroner’s Officers report, and decide how to progress the matter – some will be no further investigation, others will need further enquiries, some include a post mortem examination or scan and eventually decide whether an inquest will be heard. During the time these investigations are ongoing the body of the deceased is under the legal authority of the Coroner (I stress the deceased is not the “property” of the Coroner). As such the investigation process can, without wishing to, affect a family’s grieving and funeral ritual arrangements. [Coroners \(Investigation\) Regulations 2013](#) give guidance for this:

Regulation 20 provides that:

- (1) A Coroner must release the body for burial or cremation as soon as is reasonably practicable.*
- (2) Where a coroner cannot release the body within 28 days of being made aware that the body is within his or her area, the coroner must notify the next of kin or personal representative of the deceased of the reason for the delay.*

Regulation 21 clearly states:

- (1) A coroner may only issue an order authorising the burial or cremation of a body where the coroner no longer needs to retain the body for the purposes of the investigation.*

The Coroner tends to be able to release the body either after deciding a post mortem is not necessary or if a post mortem has been conducted when the pathologist is able to confirm the no longer require the body. Of course, a Coroner will always seek to release the body as soon as they are able but all the time those investigations are taking place they may, in some circumstances, have to delay the release. All these decisions are judicial decisions and can only be challenged by judicial review.

¹ The matter of whether it is reasonably practicable to delay the inquest is a matter for the Coroner.

Facts of the case and the challenge:

The case of AYBS was brought to challenge a policy implemented which reflected the “first come” basis. The Court addressed the issue of whether there would be any reason to deal expeditiously with one matter over another in the coronial process, highly relevant in the investigative stage of the coronial process.

The Claimants, a charitable organisation responsible for managing and facilitating the burials of a large proportion of the orthodox Jewish population in Inner North London and a 79 year old Jewish lady challenged the lawfulness of a policy adopted by the Senior Coroner for Inner North London on 30th October 2017 which read:

“No death will be prioritised in any way over any other because of the religion of the deceased or family, either by the coroner’s officers or coroners.”

This policy was contained in a letter of 30th October 2017 from the Coroner to solicitors for AYBS which also said that she had *“devised a protocol for the future to ensure that the bereaved whose loved ones fall within the remit of HM Coroner for Inner North London are treated fairly, and the best use is made overall of the inadequate resources that have been placed at my disposal.”* The Coroner went on to explain in her grounds that there had been a negative impact on prioritising one sector of the community above others and that queue jumping places those who are pushed back further in the queue at a material disadvantage. Additionally, the previous guidance to issued by the then Chief Coroner His Honour Judge Peter Thornton QC stated *“the law does not allow the coroner to give priority to any one person over another, nevertheless coroners are always sensitive to the needs of certain faith groups.”*

The Claimant believed the Coroner should operate a system of triaging deaths, the Coroner rejected this due to lack of resources, stating triaging would cause delay for all as Coroner’s Officers would be diverted from progressing cases.

The rigidity of the policy was looked at, the Coroner admitted it was more flexible than it seemed and that organ donation and homicide were prioritised.

The Chief Coroner had initially approved the Coroner’s letter but later, after further consideration and clarification adopted a different standpoint.

The Claimants were keen to point out that they did not wish to usurp the law of the land but *“where delays can be avoided it, it is incumbent on Jews to take what steps they reasonably can to try to ensure they comply with Jewish law and belief to bury a person promptly after death.”* The Court had evidence before it that the policy impacted on Muslim communities too.

The following were the grounds of challenge to the Coroner’s policy:

(1) Breach of Article 9 of the Convention. The Chief Coroner, who had been joined to the proceedings as an Interested Party, submitted that, as a matter of public law and quite apart from the HRA, the Defendant's policy was unlawful on the grounds that it fettered her discretion and was irrational. On behalf of the Claimants, Mr Sam Grodzinski QC adopts the Chief Coroner's submissions on fettering and irrationality as part of his case on Article 9 and joins with Mr Jonathan Hough QC in inviting the Court to determine those issues, even though they were not raised in his original grounds of challenge.

(2) Breach of Article 14 read with Article 9.

(3) Indirect discrimination contrary to section 19 of the Equality Act 2010.

(4) Breach of the public sector equality duty ("PSED") in section 149 of the Equality Act.

The Judgement:

The Court were not persuaded that the Chief Coroner's issues of fettering and irrationality fit within the Claimants ground relating to Article 9 so they took the issues as follows (1) fettering of discretion; (2) irrationality; (3) breach of Article 9; (4) breach of Article 14, read with Article 9; (5) indirect discrimination under the Equality Act; and (6) the PSED.

The Court found that the Coroner's submissions of flexibility in the policy should always be expressed as such, a policy is a policy unless otherwise stated.

The Court heard that the average time between death and burial/cremation was 15 days and had evidence that many families were content for such delays in order to facilitate funeral arrangements. Of course, many families also often have to abide by the timetabling of stretched local authority resources.

The Court found the following:

(1) fettering of discretion;

It was an accepted principle of public law that policy should not be so rigid as to amount to fetter on the discretion of decision makers. Legislative source and Royal prerogative sources, although distinguished from Coroners powers, were examined. Although there is some basis in common law the functions exercised by a Coroner derives from legislation, akin to derived from statute and the principle against fettering of discretion applies. The policy introduced by the defendant coroner breaches that principle.

(2) irrationality;

The defendant coroner had accepted that some cases would be prioritised, despite her policy. The Court found, therefore, the policy was incapable of rational justification.

(3) breach of Article 9;

Article 9 of the Convention, set out in Schedule 1 Human Rights Act 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, 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 rights and freedoms of others."*

The Court highlighted that Article 9 protects those with or without a faith. It acknowledged the first 2 rights are absolute but the 3rd, freedom to manifest one's religion or beliefs is not and can in principle be subject to limitations. Such limitations only follow if the established 4 questions are answered (ie necessity and proportionality):

- Is the legitimate objective sufficiently important to justify limiting a fundamental right?
- Are the measures that have been designed to meet it rationally connected to that objective?
- Are they no more than are necessary to accomplish it? And
- Do they strike a fair balance between the rights of the individual and the interests of the community?

There was no dispute that the policy interfered with Article 9 as both Jewish and Muslim faiths believed that burial of the deceased should take place as soon as is possible, usually on the same day of death. The Claimants took no issue that this was not "prescribed by law". The Court highlighted that the Court system itself may well prioritise, for example in cases where there are child witnesses, and that reasonable people in society would not regard this as queue jumping. It found that Article 9 did not require favouritism, but there should be a fair balance struck between the rights and interests of difference people in society. Positive discrimination was distanced, rather the Court stated:

"What on its face looks like a general policy which applies to everyone equally may in fact have an unequal impact on a minority. In other words, to treat everyone in the same way is not necessarily to treat them equally. Uniformity is not the same thing as equality."

The Court went on to say that the May 2014 Chief Coroner's guidance was incorrect and the Coroner's understanding that the law would not allow her to give priority to one person over another was misguided.

(4) breach of Article 14, read with Article 9;

Article 14 of the Convention rights, the equality principle, provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth or other status.”

The Court reiterated the importance of equality and indirect discrimination and found the policy violated the principle of equal treatment in Article 14.

(5) indirect discrimination under the Equality Act;

The Equality Act 2010 Section 19, 29 and 31 were quoted which set out the key concepts of discrimination and that fact that a person or service provider cannot discriminate against a person requiring a service.

Initially jurisdiction to decide the matter was accepted. The Court found that the Claimants were at a particular disadvantage when compared with other persons.

(6) the PSED:

The Public Sector Equality Duty is encompassed in Section 149 of the Equality Act 2010. The Court felt the fact that they had found the Defendant Coroner’s policy discriminated unlawfully against those with certain religious beliefs did not lead to the conclusion that the Coroner had breached the PSED and this ground of the challenge failed.

The Court were alive to the fact that the Chief Coroner would issue guidance on this matter and in May 2018 Guidance Number 28 – [Report of Death to the Coroner: Decision Making and Expedited Decisions](#) was available to all Coroners.

At paragraph 160 of the judgment the Court helpfully *“pulled together the legal threads of their judgment”* in the following way:

160:

- (1) A Coroner cannot lawfully exclude religious reasons for seeking expedition of decisions by that Coroner, including the Coroner’s decision whether to release a body for burial.*
- (2) A Coroner is entitled to prioritise cases, for religious or other reasons, even where the consequence of prioritising one or some cases may be that other cases will have to wait longer for a decision. It is not necessary that all cases are treated in the same way or in strictly chronological sequence.*
- (3) Whether to accord one case priority over another or others is for the Coroner to determine. The following further points apply:*
 - a) It is in principle acceptable for the Coroner to implement a policy to address the circumstances when priority will or may be given, so long as that policy is flexible and enables all relevant considerations to be taken into account.*

b) The availability of resources may be a relevant consideration in drawing up that policy or in making the decision in any individual case but limitations on resources does not justify discrimination.

(4) It would be wrong for a Coroner to impose a rule of automatic priority for cases where there are religious reasons for seeking expedition.

161:

- *We would add this important rider. Any decision reached by a Coroner in an individual case, assuming that all relevant matters are taken into account, will be subject to a “margin of judgement”..... This means that the Court will not second guess the Coroner just because his or her decision is not to the liking of a particular family or others. Anyone seeking to challenge a decision of the Coroner on grounds that the Coroner has breached Convention rights will have to demonstrate that a Coroner has exceeded the margin of judgement which is afforded to him or her by the law.*

At first blush this decision may lead you to think that it only assists certain faith groups to effectively carry out funeral rituals however interpretation shows that decision making could be expedited in a variety of circumstances. Now Coroners will be alert to situations whereby it could be seen to be justified in treating it as especially urgent. For example, where next of kin are attending from abroad and only have a short window of opportunity to attend to their relatives affairs or the death of a child whose parents would like them removed to a children’s hospice chapel of rest or another suitable location as soon as is practicable. That said, religious grounds are likely to be the most common reason for requests for Coroners to consider whether the matter could be dealt with more expeditiously.

This is not about prioritising one faith group over another. This is not about queue jumping. The judgment itself said it wished to “*pull together the legal threads of the judgment*”. What it has done is show that there are many different patches to our society with common bonds of humanity and understanding. Those legal threads have sewn together law, values and society to make a blanket that can comfort the bereaved at their greatest time of need.

Analysis:

- Coroners will now consider representations made by families, whether for religious reasons or otherwise, that the case should be expedited.
- It is unlawful for a Coroner to adopt a policy ruling out the possibility of prioritising consideration of death on religious grounds OR on reasonable non-religious grounds.
- A Coroner can make their own assessment of a case, without it being referred by a relative, and consider that it should be dealt with expeditiously.

- Where a Coroner is asked to consider whether to expedite a case, it is for the Coroner alone to make the decision based on all the relevant information available to them.
- There will be a “margin of judgment”. Any such judgment can only be challenged if it is unreasonable or if it clearly fails to strike a fair balance between the rights of one family and the interest of other families affected. Those challenges can only be brought by way of judicial review.
- This does not mean that a priority is given per se to any particular faith or any particular group over another. Coroners have been reminded that they must still act within the framework of their legal duties, but they are encouraged by the Chief Coroner to pay appropriate respect to the wishes of those whose faiths dictate a particular ritual with regard to the body or burial.
- It is important to balance interests of those seeking expedition and others who may be affected.