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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY OWEN McCAUGHEY & PAT GREW FOR JUDICIAL REVIEW

WEATHERUP J

[1] This is an application by the fathers of Martin McCaughey and Desmond Grew, who were killed by soldiers on 9 October 1990, for Judicial Review of the decisions of the Chief Constable and the Coroner concerning the disclosure of documents for the purposes of the Inquests into the deaths. Since the Judicial Review proceedings commenced on 17 October 2003 there have been some developments in relation to the disclosure of documents and the application now concerns the disclosure to the Coroner of three documents retained by police. First, a copy of the police report prepared for the Director of Public Prosecutions. Second, the DPP directions in response to the police report, which directed no prosecution. Third, unredacted copies of intelligence reports gathered by the police, redacted copies having been forwarded to the Coroner by the police.

[2] The applicants' claim that the police are under a duty to disclose these documents to the Coroner under section 8 of the Coroners Act (NI) 1959 and at common law and under Article 2 of the European Convention on Human Rights. Further the applicants' claim a breach of Article 2 in that there has been a failure by the Coroner to act promptly and with reasonable expedition in the conduct of the Inquests.

[3] The deaths occurred on 9 October 1990; the Director of Public Prosecutions directed no prosecution on 2 April 1993; the papers were forwarded by the police to the Coroner on 26 October 1994; on 23 April 2002 the Coroner wrote to the police requesting certain documents; on 11 June 2002 the applicants' solicitors wrote to the Coroner requesting disclosure of documents; there then followed correspondence in relation to those documents involving all concerned parties; on 17 October 2003 the application for leave to apply for judicial review commenced;

on 21 October 2003 the police provided to the applicants copies of all documents supplied to the Coroner. This application is concerned with the disclosure by police to the Coroner of the three documents and is not concerned with any wider disclosure of the documents.

[4] The first document is the copy police report. The police object to disclosure on four grounds. The first objection is that the police report represents a confidential communication between the police and the DPP in connection with possible prosecutions. The second objection is that the contents of the police report represent the opinion and assessment of the investigating officer and as such the report is not relevant to the Inquest proceedings. The third objection is that an investigating officer might be deterred from being entirely frank in the assessment of witnesses if it were known that the document would become public. The fourth objection refers to a "chilling" effect, namely that the members of the public who would contribute to any criminal investigation might be less willing to do so if they knew that their contribution could be subject to unfavourable police assessments that could be made public.

[5] The issue of disclosure of police reports was considered in Toman's Application (Unreported 17th August 1994). The police reports in question were not the standard investigating officer's report but were the Stalker and Sampson Reports. Nicholson J stated the purpose for which the Coroner required those reports as being -

> " ……. solely to enable an ex-Detective Constable Chief Superintendent Thorburn, who was acting as second in command to Mr Stalker and under Mr Sampson, to refresh his memory of the events surrounding the death and the subsequent investigations… He added that Mr Thorburn had told him that it was not possible for Mr Thorburn to give material, accurate and helpful evidence in the absence of the opportunity so to refresh his memory."

[6] In Toman all witness statements had been given to the Coroner. Nicholson J stated that the police reports contained "recommendations, expressions of opinion, comments, criticisms and the like". That led Nicholson J to the conclusion that the Coroner was seeking material about the broad circumstances in which the killings took place in order to deal with rumours and suspicions that there had been a "shoot-to-kill" policy. Nicholson J considered that the Coroner had thought it was his duty to conduct an enquiry to provide all answers to all questions and if that was the Coroner's approach it was considered that he interpreted the function of an Inquest too widely. He stated that,

> "……in my opinion it is not proper for Mr Thorburn to give an 'overview' to the jury. The Coroner is entitled to

> sum up the facts to the jury but they are not entitled to express a view about criminal or civil liability.
> The reports are not relevant to the Coroner's inquiry and the overriding public interest in the integrity of the criminal process makes it 'oppressive and an abuse of the process of the Court' to permit production of the reports for the purpose sought by the Coroner."

[7] A number of developments have occurred over the years since Toman was decided in 1994. The Human Rights Act 1998 came into force in October 2000 and Article 2 of the European Convention has effect in both its substantive and its procedural aspects. Further, Jordan v The United Kingdom [2003] 37 EHRR 70 has been decided by the European Court and the shortcomings of the Inquest system in Northern Ireland were identified in the judgement. Further, the Government has confirmed that Inquests are to be taken as fulfilling the Article 2 obligations of the State in Northern Ireland.

[8] In the present case the applicants contend that the purpose for which the police report ought to be sent to the Coroner is not that of refreshing memory so that the officer who prepared the police report might give an overview of the case to the Inquest. Rather the applicants contend that the police report is potentially relevant because an examination of the contents by the Coroner may indicate lines of enquiry which the Coroner could consider relevant for the purposes of his investigation.

[9] The first police objection to the disclosure of the police report is the confidentiality of the police report. This application concerns disclosure of the police report to the Coroner so that he may determine what if any relevance it has to these particular Inquests. I am satisfied that there can be no confidentiality in such police reports prepared by the police as part of their public duty that would prevent them being received by a Coroner for the purposes of his public duty to conduct an Inquest, where the police report is potentially relevant to those proceedings.

[10] The second objection concerns relevance. In Jordan v UK the European Court of Human Rights found that –

> "Notwithstanding the useful fact finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred, and in that respect, falls short of the requirements of Article 2."

An effective investigation would include the Coroner considering any potentially relevant document generated by police. The police report is potentially relevant on the ground that it may indicate to the Coroner lines of enquiry that have been undertaken by the police or that may not been undertaken by the police that would be relevant to the task of the Coroner. Counsel for the Coroner did accept that potential relevance on this basis could not be excluded. I find that the police report is potentially relevant.

[11] The third objection concerns the impact of disclosure on the future candour of police reports. The fourth objection concerns a "chill" on public participation in criminal investigations if witnesses were subject to criticisms that became public. These matters are important general public interests that might impact on the efficacy of criminal investigations but I find that they do not apply to disclosure to a Coroner for the purposes of an Inquest. I do not find confidentiality, candour or "chill" to be grounds on which a potentially relevant police report should be withheld from the Coroner.

[12] The applicants rely on section 8 of the Coroners Act (NI) 1959, which obliges the police in the event of a death to "…give or cause to be given immediate notice in writing thereof to the Coroner….. together with such information also in writing as he is able to obtain concerning the finding of the body or concerning the death."

Further the applicants contend that a duty arises at common law as stated in Peach v Commissioner of Police of the Metropolis [1986] 2 All E R 129 at 138 where Fox LJ stated -

> "As I understand the position it is the duty of the chief officer of police to convey to the coroner, for the purposes of a public inquest, all material in its possession touching the cause and circumstances of the death (see 9 Halsbury's Laws (4th edn) para 1048).
>
> As a matter of sensible public administration it seems essential that the Coroner should have the material obtained by the police so that he, the Coroner, can decide what witnesses to call and to investigate the matter generally."

Further the applicant relies on the procedural aspect of the Article 2 provision that everyone's right to life should be protected by law.

[13] Section 8 imposes a duty on police to furnish to the Coroner such information in writing as may be obtained concerning the death. The police contend that this duty is limited by the statutory context that concerns the giving

of notice of the death to the Coroner. The additional obligation to provide information concerning the death arises "together with" the obligation to notify the Coroner of the death. It is therefore contended that the duty relates to information available at the commencement of and in the immediate aftermath of the death so that it could not apply to a police report prepared for the purposes of prosecution. I am unable to accept such a limited interpretation of section 8. It relates to such information as the police are "able to obtain …. concerning the death". There is no reason for that support not to extend to documents generated in the later stages of a police investigation. This is clearly intended to require the police to support the Coroner's investigation with relevant material. The contents of the police report to the prosecuting authority are potentially relevant.

[14] In relation to the applicant's submission on the common law position the passage from Peach refers to paragraph 1048 of 9 Halsbury's Laws. The text of paragraph 1048 considers the duty to report the death to the Coroner and to furnish information to the Coroner that may be relevant to the decision to hold an Inquest. The text includes reference to the historical liability of a township when a body was found in its area. That does not deal directly with the furnishing of information for the purposes of any Inquest the Coroner decides to hold. The modern position has a statutory context rather than considerations of township liability and it may be that Fox LJ was stating his understanding of the position under the statutory provisions to supply information for the purposes of the Inquest. While there was a common law duty to report a death to the coroner and to give information relevant to a decision to hold an Inquest I am not satisfied that there is a basis in the common law for the existence of a duty to furnish to the Coroner for the purposes of the Inquest the material now being sought.

[15] The procedural aspect of Article 2 includes a duty to undertake an effective investigation. For the Coroner to achieve that result there must be access to all potentially relevant material in the hands of the police. If the Inquest is required to be Article 2 compliant then the police as a public authority are under a duty to provide to the Coroner such potentially relevant material as may be in their possession.

[16] It is for the Coroner to decide on receipt of the report whether it is in fact relevant to the Inquest and if so, what directions he will give for the conduct of the Inquest or what steps he requires to be taken in his investigation.

[17] This application is not concerned with the disclosure by the Coroner of relevant material in a police report. If the police disclose a police report to a Coroner and there are issues of confidentiality or other sensitive issues or public interest issues arising the police should of course give notice to the Coroner to that effect and the issues can be addressed as the nature of the situation requires.

[18] In Jordan v UK [2003] 37 EHRR 70 at paragraph 121 there was recognition of the sensitivity that might arise in a wider distribution of the police report.

> "As regards the lack of public scrutiny of the police investigations, the Court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations, and therefore cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures."

[19] Next, the DPP direction for no prosecution. The police object to disclosure of this document to the Coroner and the reasons are similar to those that applied to the police report. First, that the document is one for which confidentiality would be expected and the express consent of the Director to disclosure should be obtained. The second objection concerns relevance, namely the document contains the opinions of the DPP in respect of a prosecution and that could not be relevant to the Inquest. The third objection is the candour argument concerning the author of the document. The fourth objection is the "chill" argument concerning the effect on the participation of the public. The Coroner does not consider the DPP direction to be potentially relevant. It is public knowledge that the DPP directed no prosecution and really what is involved are the reasons that were given for the direction for no prosecution.

[20] The Court of Appeal has recently reconsidered the issue of DPP reasons for directing no prosecution. In Jordan v UK it was stated -

> "Where no reasons are given in a controversial incident involving the use of lethal force this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and may prevent any legal challenge to the decision (para 123).
>
> The applicant was however not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected (para 124)."

[21] The Court of Appeal decided Jordan's Application [2003] NICA 54 on 12 December 2003. Nicholson LJ referred to the statement of the Attorney General on 1 March 2002 concerning a revised approach of the DPP to the giving of reasons. The general practice was that reasons were given in general terms and that each

case was reviewed when a request was made for the provision of detailed reasons. The Attorney General's statement provided that there may be cases in future, of an exceptional nature, where there would be an expectation of a reasonable explanation for not prosecuting where death was, or may have been occasioned by an agent of the State. The Director accepted that in such cases it would be in the public interest to reassure a concerned public, including the families of victims, that the rule of law had been respected by the provision of a reasonable explanation.

[22] However decisions not to prosecute those responsible for the death in Jordan were taken before the Human Rights Act came into effect. The Court of Appeal held that the decisions not to prosecute were not continuing decisions and the Human Rights Act did not have retrospective effect on the earlier decisions.

[23] I consider the application for disclosure of the DPP direction is in effect an application to consider the DPP reasons for no prosecution. That decision was taken in 1993. The application will not be acceded to for the reasons that prevailed in the Court of Appeal in Jordan's Application. I should add that the Coroner in any event did not consider that the DPP directions could be potentially relevant and I do not find any reason to disagree with that decision.

[24] The third item is a copy of the unredacted intelligence reports. The redacted reports were provided to the Coroner on 21 January 2003. The police object to the disclosure of the unredacted reports as it is the intention of the police to assert a claim for public interest immunity. The Coroner wrote to the police on 5 December 2003 requiring copies of the document as-

> "I have considered the papers in the matter and have formed the view that the redacted portions of the document disclosed are relevant and I require sight of them. I would, therefore, seek production of the unredacted documents in the first instance to myself. In the event that I consider any unredacted document is relevant and should be disclosed I would not propose to disclose the same in unredacted form without first affording an opportunity for public interest immunity objections to be raised before me and decided upon by me."

[25] Accordingly the Coroner has decided that the unredacted reports are potentially relevant, indeed he goes further and says that they are relevant. The police are under a duty to disclose them to the Coroner on the same basis that applied in relation to the police reports under section 8 of the 1959 Act and Article 2. Public Interest Immunity will be dealt with by the issue of a Public Interest Immunity Certificate. The issue will be dealt with by the Coroner. The police

oppose disclosure of the unredacted reports to the Coroner. The Coroner proposes to apply for a subpoena to compel the production of the reports under Section 67 (1) of Judicature (NI) Act 1978. The Coroner's letter makes clear that he will hear the public interest immunity objections to any disclosure by the Coroner. His decision will be subject to Judicial Review. These established procedures are in place. As far as disclosure by the police to the Coroner is concerned the unredacted reports are potentially relevant and there is a duty to disclose them under section 8 and Article 2.

[26] The final matter to be dealt with is the issue of delay in the progress of the Inquest. Under Article 2 there is a duty to proceed with the investigation promptly and with reasonable expedition. I consider that it is implicit in the statutory scheme that the investigation be undertaken promptly and with reasonable expedition. In this case the deaths occurred in 1990 and in 2003 there has not been an Inquest into these deaths. There has undoubtedly been inordinate delay.

[27] The next question that arises is whether there has been a breach of Article 2 as a result of the delay that has occurred. The Human Rights Act came into force in October 2000 and does not operate retrospectively. From October 2000 to date over three years have elapsed and the State has not provided an investigation. It might be said to have begun but any investigation has not proceeded with reasonable expedition. The State is in breach of its obligation to arrange an Article 2 compliant investigation promptly and with reasonable expedition.

[28] There is a further issue raised as to whether the Coroner, as a public authority, is in breach of his obligation to proceed promptly and with reasonable expedition. In Jordan' Application [2002] NIQB 19 Kerr J dealt with the issue as to whether the Coroner should proceed to hold the Inquest according to the existing domestic law and practice. Kerr J followed the decision of Stanley Burnton J in R v Western Somersetshire Coroner ex parte Middleton [2001] All ER (D) 217, which is on appeal to the House of Lords, that it was not appropriate to impose the obligation to hold an Article 2 investigation on the Coroner until such time as the State determined that that was the mechanism by which the State proposed to satisfy its Article 2 obligations. At page 13 of his decision Kerr J stated -

> "It appears to me, therefore, that the Coroner was entitled to reach the view that in the absence of any change in the law, he was not only entitled but was required to apply the law as it existed. He was not obliged to assume that the inquest would be the only form of inquiry into the death of the deceased. That was a matter not for him but for the State.
>
> Unless the state has committed itself unequivocally to the inquest as the exclusive means by which the death is to be investigated, however, it does not appear to me that

> any conclusion other than that reached in the Middleton case is possible."

[29] As the State had not committed itself unequivocally to the Coroner being the mechanism for Article 2 compliance Kerr J decided that it was not for the Coroner to take that role upon himself. Again, matters have moved along because on 21 November 2003, on the hearing of McIlwaine's Application for Judicial Review of decisions of the same Coroner in another Inquest, Senior Crown Counsel, on behalf of the Secretary of State, indicated to the Court that it was, and had been since October 2002, the intention of the Government in relation to deaths occasioned by agents of the State that Inquests were to be the forum for the Article 2 compliant investigation. October 2002 was the date on which the Government published the proposals to the Council of Ministers on measures to be taken in response to the finding of the European Court of Human Rights in Jordan V UK.

[30] There is an issue as to the date from which the inquest system was to be the mechanism for compliance with the State's Article 2 obligations. While the Government considers that this has obtained since October 2002, that has not been apparent to the Coroner. In a letter from the Parliamentary Under Secretary of State for Northern Ireland dated 6 May 2003 it was stated that it would be preferable to await the decision of the House of Lords in Middleton before deciding whether Inquests were to be the sole means of meeting Article 2 procedural obligations. The Coroner does not accept that this obligation was imposed on Coroners by the publication of the proposals to the Council of Ministers. Nevertheless the Coroner accepts that from 21 November 2003 he is on notice that the Government has unequivocally committed itself to the Inquest being intended to be Article 2 compliant. The Coroner can not be held to have been in delay in proceeding with an Article 2 compliant investigation when was not on notice that he was supposed to be undertaking that task. I find that the Coroner is not in breach of Article 2 in this regard.

[31] I find that the Chief Constable is under a duty to furnish to the Coroner the police report and the unredacted intelligence reports as documents potentially relevant to the deaths. I find that the investigation of the deaths has not proceeded promptly and with reasonable expedition for the purposes of Article 2.