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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF AN APPLICATION BY HUGH JORDAN FOR JUDICIAL REVIEW

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GILLEN J

Introduction

[1] By this application Hugh Jordan, the father and next of kin of Pearse Jordan, applies by way of judicial review for a declaration that the respondent, the Secretary of State for Northern Ireland ("the respondent"), in breach of Section 6 of the Human Rights Act 1998 and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("The European Convention on Human Rights") has failed to provide the applicant with an Article 2 compliant investigation into the death of his son and, further, for an order of Mandamus compelling the respondent to provide the applicant with an Article 2 compliant investigation.

Background

[2] On 25 November 1992, the applicant's son was shot and killed by an officer of the Royal Ulster Constabulary. This incident has been the subject of a number of judgments including the judgment of the European Court of Human Rights in Jordan v UK (2001) ECHR 24746/94. The background facts of the case are set out in detail at page 63 of that judgment and have been adverted to in two judicial reviews by this applicant heard before Kerr J namely Jordan v Coroner (unreported judgment of Kerr J) (8 March 2002) and Jordan v Lord Chancellor (unreported judgment of Kerr J) (29 January 2002).

[3] The facts of this case have been the harbinger of litigation in a number of fora. Each judgment that seems to be the last word has proven merely to be the last but one. The salient decisions are as follows:

(a) Jordan v United Kingdom (2003) 37 EHRR 553.

On 4 May 2001 the European Court of Human Rights ruled that the proceedings for investigating the use of lethal force by the police officer in this case had been shown to disclose the following shortcomings:

(i) A lack of independence of the police officers investigating the incident from the officers implicated in the incident;

(ii) A lack of public scrutiny, and information to the victim's family, of the reasons for the decision of the DPP not to prosecute any police officer;

(iii) The police officer who shot Pearse Jordan could not be required to attend the inquest as a witness;

(iv) The inquest procedure did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed;

(v) The absence of legal aid for the representation of the victim's family and non-disclosure of witness statements prior to their appearance at the inquest prejudiced the ability of the applicant to participate in the inquest and contributed to long adjournments in the proceedings;

(vi) The inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

(b) Jordan v Lord Chancellor (unreported judgment of Kerr J) (29 January 2002).

In this matter the applicant challenged what he alleged was the failure of the Lord Chancellor to introduce the necessary legislation to ensure that the inquest system in Northern Ireland complied with Article 2 of the European Convention on Human Rights. The inquest into the death of the deceased in this case had begun on 4 January 1995. In February 1995 the Director of Public Prosecutions ("the DPP") decided that the evidence surrounding the incident remained insufficient to warrant the prosecution of any person in relation to the deceased's death. Various judicial review applications delayed thereafter the resumption of the inquest. Following the decision of the European Court of Human Rights as mentioned above, the inquest was further adjourned upon the application of the Lord Chancellor that it should not be held until the Government had decided whether to apply to have the decisions of the European Court of Human Rights referred to the Grand Chamber. On 6 September 2001 at the resumed preliminary hearing the legal representative of the Lord Chancellor indicated that the issues arising from

the decision were under active consideration. The inquest was resumed both on 9 October 2001 and again in January 2002 to allow the Lord Chancellor's position to be clarified. On 9 January 2002 the Lord Chancellor through counsel indicated that it was proposed to amend Rule 9(2) of the Coroner's (Practice and Procedure) Rules (Northern Ireland) 1963 to remove the exemption from compellability of persons suspected of causing the death. The Coroner ruled that he would hold the inquest on the basis of the existing Coroner's law and practice. He held that if before the inquest began he was informed that Rule 9(2) had been appealed he would issue a witness summons for the police officer who is believed to have discharged the shots that caused the death of Mr Jordan. In light of this, the applicant sought a judicial review on the grounds that the Lord Chancellor had been guilty of inordinate delay in introducing an amendment to Rule 9(2) and secondly on foot of the argument that in order to comply with Article 2 of the Convention, the inquest system in Northern Ireland required that the jury have the opportunity to examine the lawfulness of the force that it caused the death of the deceased. In the course of that judgment Kerr J said:

> "I do not consider that the theoretical possibility of an inquiry by the Ombudsman should deter the Coroner from performing the function that ECtHR clearly expected the inquest to perform."

The judge determined that the response of the Government to the judgment in the European Court of Human Rights had been appropriate and there had not been undue delay in making the proposal to amend Rule 9(2). In his opinion the abolition of the immunity from compellability of witnesses was imminent and should be in place before the inquest was held.

Kerr J went on to conclude:

> "… provided the inquest investigates the lawfulness of the force that caused the death of the deceased, it is not necessary that the jury express any view as to the guilt of any individual who may have been responsible for the death."

(c) Jordan v Coroner (unreported judgment of Kerr J) (8 March 2002).

A further judicial review was sought by the applicant of the decision of the Coroner on 9 January 2002 that he intended to hold the inquest according to the existing law and practice and that he did not intend to leave to the jury the option of returning a verdict of unlawful killing. The Coroner decided that the inquest would be able to enquire into the facts that are relevant to the lawfulness of the force that caused Mr Jordan's death but that it was not necessary, in order that the inquest be compatible with Article 2 of the

Convention, that the jury should have available to them verdicts such as unlawful killing.

In the course of his judgment, Kerr J now adopted the reasoning of Stanley Burton J in R v Western Somersetshire Coroner Ex Parte Middleton (2001) AER (D) 217 ("Middleton's case"). Kerr J said at page 47:

> "The duty to conduct an investigation which satisfied the requirements of Article 2 is cast on the State, not upon the individual public authorities within the State. If the State chooses to restrict the scope of an inquest and thereby renders it incompetent to carry out an Article 2 compliant investigation, the solution is not to require the Coroner to expand the inquest's scope by applying Section 3 of the Human Rights Act 1998 to the restricted provisions or by disapplying items of secondary legislation but to require the State to fulfil its Article 2 obligations by holding an inquiry which is freestanding of the inquest."

He went on to say:

> "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 not a matter for him but for the State. … Unless the State has committed itself unequivocally to the inquest as the exclusive means by which a death is to be investigated, however, it does not appear to me that any conclusion other than that that which was reached in the Middleton case is possible."

The judge also went to conclude that it was not necessary that a verdict of unlawful killing be available to the jury in order to establish the facts relevant to the lawfulness of the force that caused Mr Jordan's death. Accordingly he rejected both challenges to the Coroner's decision.

(d) Jordan v Coroner and Lord Chancellor (CA) unreported judgment of Carswell LCJ (28 May 2002).

Both decisions of Kerr J set out above are the subject of appeal. The Court of Appeal in Northern Ireland has adjourned both hearings pending final determination of the proceedings in Middleton's case and also the English

case of R (Amin) v Secretary of State for the Home Department (the latter case has now been determined and can be cited as Regina v Secretary of State for the Home Department (respondent) Ex Parte Amin (FC) (Appellant) (2003) UK HL 51. I delayed determination of this case for some weeks to permit counsel to address me on the outcome of this decision).

In the course of the hearing before the Court of Appeal in Northern Ireland, Carswell LCJ said at page 2:

> "We are very conscious of the very substantial length of time which has passed since the death of Pearse Jordan and of the desirability of concluding the inquest and of conducting the other inquests whose hearing is being held up pending the determination of the issue in question. As we stated at the last sitting, we are ready and willing to hear and determine the appeal and appreciate the desire of all parties to proceed as soon as is reasonably possible. At the same time, that factor has to be balanced against those which operate in favour of putting back the hearing. Moreover it has to be born in mind that the loss of time involved in waiting until the final determination of Middleton would not in reality be very great. If the House of Lords refuses permission to appeal, the present appeal can go ahead without delay and the loss of time is that which will elapse between our provisional listing date of 18 June and that hearing date. If their Lordships decide to grant permission, then the present issue could not in any event be resolved until their decision in Middleton is given, whether or not we proceed now to hear this appeal. … We consider, having looked at all the factors, that the most appropriate course is to adjourn this appeal now and to proceed as soon as the final determination of Middleton is known."

The applicant's case

[4] Both Mr Treacy QC who appeared on behalf of the applicant with Ms Quinlivan and Mr Morgan QC who appeared on behalf of the Secretary of State with Mr Maguire, have put before me skeleton arguments prepared with conspicuous skill which have been augmented with concise and comprehensive oral submissions. Mr Treacy's argument on behalf of the applicant can be summarised as follows:

(1) The finding of the European Court of Human Rights was that there had been a breach of the applicant's Article 2 rights in this instance. Mr Treacy submitted that the inquest mechanism failed to comply with the applicant's procedural rights under Article 2 of the Convention and even now he argued that it remains unclear as to whether the remit of the inquest will be sufficiently broad to comply with the obligations under Article 2.

(2) To hold a compliant Article 2 inquiry rests on the Secretary of State. This court adjourned the present proceedings until the House of Lords had delivered their judgment in R v Secretary of State for the Home Department (Respondent) ex parte Amin (FC) (Appellant) (2003) UK HL 51 delivered 16 October 2003. ("Amin's case"). In Amin's case, following the death of the deceased in his cell at the hands of his cell mate, an internal prison inquiry was set up by a senior investigating officer of the Prison Service. The police investigated whether any charge might be brought against the Prison Service or any employee. Thereafter an inquest was opened but adjourned when the cell mate was charged with murder but not later resumed after his conviction. Mr Treacy relied on a number of propositions set out in the leading judgment of Lord Bingham as follows:

> "(a) Where agents of the State have used lethal force against an individual the facts relating to the killing and its motivation are likely to be largely, if not wholly, within the knowledge of the State, and it is essential both to relatives and for public confidence in the administration of justice and in the State's adherence to the principles of the rule of law that a killing by the State be subject to some form of open and objective oversight.
>
> (b) The essential purpose of the investigation was defined by the court in Jordan, paragraph 105:
>
> > '… to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter

> has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures …'

(c) The investigation must be effective in the sense that (Jordan, paragraph 107):

> "it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances … and to the identification and punishment of those responsible … This is not an obligation of result but of means."

(d) For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary (Jordan, paragraph 106):

> "for the persons responsible for carrying out the investigation to be independent from those implicated in the events … this means not only a lack of hierarchical or institutional connection but also a practical independence …".

(e) While public scrutiny of police investigations cannot be regarded as an automatic requirement under Article 2 (Jordan paragraph 121), there must (Jordan, paragraph 109):

> "be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case."

(f) The court does not require that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure: (Jordan, paragraph 143). But it is 'indispensable' (Jordan paragraph 144) that there be proper procedures for

> ensuring the accountability of agents of the State so as to maintain public confidence and allay the legitimate concerns that arise from the use of legal force."

[3] It was submitted that the House of Lords had made clear that Jordan's case specified an irreducible minimum standard of review however achieved which must not be diluted so as to sanction a process of enquiry inconsistent with domestic and convention standards.

[4] Accordingly Mr Treacy argued that it was for the State in this instance to decide how the investigative duty under Article 2 should be discharged and that it was not for the applicant to speculate as to the manner of that enquiry. He postulated that in this instance the only investigation which the State envisaged providing to the applicant was an inquest. In his submission that procedure failed to meet the minimum standards set by the European Court of Human Rights in the following respect:

(a) The State had failed of its own motion to seek to progress the inquest whether by seeking to persuade the coroner to hold the inquest promptly, seeking to persuade the coroner to hold an Article 2 compliant inquest, seeking to persuade the Lord Chancellor to enact Article 2 compliant Coroner's Rules or seeking to use the court to advance his Article 2 rights.

(b) The inquest was not, he submitted, capable of leading to a determination of whether the force used was or was not justified or to the identification and punishment of those responsible. If the coroner were to proceed to hold the inquest in accordance with current law and practice it was argued that the available verdicts were inadequate to sustain this obligation.

(c) The investigation which forms the basis of documentation available to the coroner was not carried out by persons "independent from those implicated in the events".

(d) The next of kin are not involved to the extent necessary to safeguard their legitimate interest.

[5] Mr Treacy submitted that the UK Government had been criticised by the European Court in May 2001 for delay in the holding of the inquest. The inquest has yet to be heard. He submitted that now some eleven years after the death the only investigations conducted had been those investigations criticised by the European Court of Human Rights which failed to meet the minimum standards required by Article 2. Over two years after the European Court of Human Rights had decided the issue, the inquest was still outstanding. He submitted that given the appeals that are currently outstanding, the end of 2004 will be the likely earliest date for the inquest to

be heard. The argument was that by awaiting the outcome of the appeals to the Court of Appeal, the applicant in effect was being penalised for the State's failure to take appropriate action to institute an Article 2 compliant enquiry.

[6] Counsel urged that this court would follow the approach adopted by the Court of Appeal in Northern Ireland in McKerr v Secretary of State (CA) (unreported judgment of Carswell LCJ) (10 January 2003). In that case a deceased was shot dead by police officers in circumstances of unresolved controversy. An inquest into the death of the deceased had subsequently been abandoned by the coroner. Subsequently the judgment of the European Court of Human Rights given on 4 May 2001 in the case of McKerr v UK (Application No. 28883/95) (conducted simultaneously with those in the cases of Jordan v UK and Kelly and Others v UK involving deaths at the hands of members of the security forces) concluded that the national authorities had failed in the obligation imposed by Article 2 of the European Convention on Human Rights to carry out a prompt and effective investigation into the circumstances of the death. The Court of Appeal in Northern Ireland held that there was a continuing breach of Article 2(1) which required to be addressed by the Government. In those circumstances the court made a declaration that the respondent Government had failed to carry out an investigation which complied with the requirements of Article 2 of the Convention but not to grant any other relief. Mr Treacy urges that in this case the investigation upon which the State relied in the European Court of Human Rights is incomplete and the applicant is thus entitled to have that investigation conducted in an Article 2 compliant manner.

The respondent's argument

[7] The argument of Mr Morgan QC can be summarised as follows:

(i) The question of whether the obligation to hold an Article 2 compliant investigation is met by the State's intention to hold an inquest which was currently outstanding is in fact one of the subjects of the conjoined appeals now pending before the Court of Appeal arising out of the two decisions of Kerr J to which I have adverted earlier in this judgment. It is the argument of the Lord Chancellor that the inquest system is Article 2 compliant and that the coroner should approach it in an Article 2 compliant manner. The Court of Appeal has decided that both hearings should be adjourned pending final determination of proceedings in Middleton's case. Mr Morgan QC argued that this court should not anticipate the outcome of the Court of Appeal.

(ii) The Government has prepared a package of measures responding to the judgments of the European Court of Human Rights including that of Jordan. The package was sent to the Secretariat to the Council of Europe on

19 March 2002. I have read the affidavit of David James Watkins who is a Director of Policing and Security in the Northern Ireland Office and my attention is drawn to paragraph 5 which records:

> "The package of measures has been considered by the Committee of Ministers on a number of occasions including as recently as June 2003 and will be further considered at its meeting in October 2003. Those measures include procedures dealing with a fact finding investigation through police investigations and the role of the DPP in providing public scrutiny and information to the victims families of the reasons of the decision of the DPP not to prosecute."

It is submitted that the package of measures which has been put in to effect by the Government in the wake of the decision by the European Court of Human Rights now constitutes a material change from the circumstances that were before Kerr J in both of the judicial reviews. Kerr J was not privy to these developments at the time of those hearings. In particular he was unaware that the Government has now publicly and unequivocally indicated its reliance upon the inquest as the means of delivering the Article 2 compliant investigation. In other words the coroner will now be obliged to assume that the inquest will be the only form of enquiry into the death of the deceased. It is clear from the extracts of the judgments of Kerr J which I have quoted on page 4 of this judgment, that this is a wholly new circumstance which serves to underline the wisdom of allowing the Court of Appeal to make the appropriate determination before I should take any precipitative step.

(iii) Whilst the respondent's case is that in this instance the inquest is the only means of delivering Article 2 compliance, there is no reason to believe that the inquest already opened in this case will not meet that obligation. A number of authorities have made it clear that an inquest can comply with Article 2 of the Convention. I shall be sparing in my citation of such authorities save to say that they include:

(a) Jordan's case before the European Court of Human Rights at paragraph H25(W) and (X).

(b) McShane v United Kingdom (2002) 35 EHRR 23 at page 598 paragraph (X).

(c) R (on the application of Middleton) v Western Somersetshire Coroner (2001) AER (D) 217 (DEC).

(d) Amin's case (supra).

Mr Morgan submitted that it was not without significance that the cases relied on by Mr Treacy include two instances where in fact no inquest was held, namely Amin's case and McKerr v Secretary of State (supra). Whether an inquest is compliant with Article 2 will depend on the circumstances of each individual case.

[8] Mr Morgan accepts the proposition that one of the specified minimum standards set by Jordan v UK is the requirement to act promptly and for the investigation to be perused with reasonable expedition. However in this case it is argued by the Secretary of State that the issue of delay has been addressed by the Court of Appeal in Northern Ireland (and for that matter by the House of Lords who refused leave to appeal). The Court of Appeal in Northern Ireland determined that whilst there had been a substantial length of time since the death of Mr Jordan nonetheless the interests of justice required that the matter be postponed until the final determination on Middleton's case before the House of Lords. This will determine whether or not there is to be compliance with Article 2 in the inquest. In terms it is submitted that this court is being asked by way of a side wind to evade the decision of the Court of Appeal.

[9] It was submitted on behalf of the Secretary of State that if this court made a declaration that the inquest is not the proper method of complying with Article 2, not only would I be usurping the position of the Court of Appeal, but the abandonment of the inquest as such a vehicle would necessitate the introduction of legislation, inter alia, to secure a process for an alternative vehicle which could compel witnesses, secure access to documents, introduce investigative powers for whoever conducts the enquiry, provide a mechanism for attendance of witnesses and all the other attendant problems of abandoning the inquest procedure. This in itself is likely to institute further delay without in any way guaranteeing that the current problems would be obviated.

[10] Insofar as the applicant submits that there is no procedure capable of determining the lawfulness of the use of lethal force in the inquest, Mr Morgan submits that this has already been considered and determined by Kerr J in Jordan v Lord Chancellor (supra). In that judgment, Kerr J, referring to the European Court of Human Rights in Jordan, said at page 61:

> "The deficiencies in the procedure identified by the court in these passages relate to the effect of the investigation carried out at the inquest rather than the nature of the inquiry itself. Thus, it appears that if there were in Northern Ireland a procedure akin to that in England and Wales whereby the DPP was required to reconsider a decision not to prosecute and

> was obliged to give reasons for his decision, the procedure as a whole would satisfy the requirements of Article 2. That outcome is not dependent on the jury being able to return a verdict of unlawful killing. What is vital is that the inquest should be able to play its part in the identification of criminal offences and to contribute to the prosecution of the offenders by bringing the offences to the attention of those who are responsible for directing prosecutions. In turn they should be required 'to give reasons which are amenable to challenge in the courts'."

Accordingly Kerr J has concluded that the inquest will be able to enquire into the facts that are relevant to the lawful use of the force which caused Mr Jordan's death as well as making findings that can play an effective role in securing a prosecution which may be disclosed.

[11] In dealing with Mr Treacy's argument on disclosure, the Secretary of State makes the case that the Crown have now introduced a package of measures which provides a comprehensive code for pre-inquest disclosure of relevant documents. The coroner is currently in the process of viewing or has viewed the relevant documentation held by the Police Service of Northern Ireland in relation to the death of Pearce Jordan. The determination of any outstanding disclosure issue will be a matter for the coroner.

Conclusions

[12] I have been persuaded by the very compelling arguments of Mr Morgan QC and accordingly I have come to the conclusion that this application must be refused. Without simply rehearsing those submissions, I can economically summarise my reasons for so concluding as follows:

(i) There is little issue between the parties as to the general principles that govern a case of this kind. The problem is not in formulating the generalisations but in specifying the circumstances under which those principles are breached I am not persuaded that there is any breach of the applicant's Article 2 rights in this instance.

(ii) I consider that this application is in essence an attempt to seek a determination of issues which are to be determined shortly before the Court of Appeal in Northern Ireland once the Middleton decision has been determined in the House of Lords. It is an inappropriate task for this court to intervene in those issues which will shortly fall to be determined by that

superior court. I do not consider this to be proper use of judicial review. In the absence of a finding by the Court of Appeal I am unpersuaded that the inquest procedure in this case will not be Article 2 compliant and thus meet the irreducible standard of review predicated in Amin's case. I see no reason why the next of kin of the deceased may not be adequately involved in this procedure.

(iii) As I indicated during the course of this hearing, the question of an independent investigation by the police was not part of the Article 53 application and indeed this point was not pursued by Mr Treacy, although I did offer him an opportunity to amend his pleadings.

(iv) I am not persuaded there has as yet been any failure to provide full disclosure of all relevant material held by public authorities in connection with the deceased's death pending a final determination by the coroner.

(v) I do not consider that there has been undue delay in the carrying out of the inquest in this case given the particular circumstances of the judicial reviews which have arisen out of the proceedings and the pending determination of the Court of Appeal in Northern Ireland.

(vi) I am unconvinced that the national authorities have failed to give effect to the judgment of the European Court of Human Rights in the decision of Jordan v UK given the package of measures that have been introduced and are under consideration by the Committee of Ministers together with the reliance by the Secretary of State upon the inquest as the means of delivering the Article 2 compliant investigation.

(vii) I see no reason to take a different view from that set out by Kerr J in the two judicial reviews to which I have adverted in the course of this judgment concerning the adequacy of the procedure to determine the lawfulness of the use of lethal force and the capacity of an inquest to enquire into the facts relevant to the lawfulness of the force that caused Mr Jordan's death.

[13] Accordingly this application is dismissed.