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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY PAUL McILWAINE FOR JUDICIAL REVIEW

Before: Campbell LJ; Weatherup J and Sir Michael Nicholson

CAMPBELL LJ

[1] On 19 February 2000 David McIlwaine, aged18 died as a result of knife wounds that he received when he was attacked in Tandragee, County Armagh. Another young man, Andrew Robb, was also mortally wounded in the same incident.

[2] Shortly afterwards a number of people were arrested and questioned by the police and one of them was later charged with murder. However, the prosecution did not proceed with the charge and the person was released.

[3] Paul McIlwaine, the father of David McIlwaine and the respondent in this appeal, became concerned that there had been no effective and prompt investigation into the death of his son. On his instructions his solicitors wrote to the Coroner for County Armagh (the appellant) on 18 January 2002 expressing concern that there had been no inquest and referring the Coroner to the judgment of the European Court of Human Rights in *Jordan and others v United Kingdom* (2001) 37 EHRR 97 where the Court stated that inquests are to be held expeditiously. A request was made in the letter that before an inquest took place disclosure should be made to Mr McIlwaine's solicitors of all statements of witnesses that were held by the Coroner.

[4] In his response the Coroner indicated that he was keeping the matter under review with the police and that they had indicated to him that they were not in a position to provide him with statements of evidence to allow him to prepare proofs of depositions for presentation to an inquest. At the suggestion of the Coroner the solicitors contacted the police and were told by Detective Inspector Todd, the officer then in charge of the investigation, that inquiries were continuing.

[5] The solicitors advised the Coroner that the respondent's rights under Article 2 of the Convention were engaged and his response was that he did not consider that it would be proper to hold an inquest until the law had been clarified in the appeal to the Court of Appeal from the decision of Kerr J. in *re Jordan's Application* [2002] NI 151 and to the House of Lords from the decision of the Court of Appeal in England and Wales in *R (Middleton) v West Somerset Coroner* [2003] QB 581.

[6] On 21 November 2002, the respondent was granted leave to apply for judicial review of the decision of the Coroner to defer holding an inquest and for an order compelling him to do so and for other declaratory relief. At the substantive hearing Kerr J. delivered an extempore judgment and made a declaration that the failure to hold an inquest or other prompt effective and independent investigation into the death of David McIlwaine was a breach of Article 2 of the European Convention on Human Rights. A written judgment was handed down later and the order was filed on 27 July 2004.

[7] In the intervening period the decision of the House of Lords in *re McKerr* [2004] NI 212 was given on 11 March 2004. Following this on 29 July 2004 the Coroner served notice of appeal against the decision of Kerr J. on the ground that the death of David McIlwaine had occurred before the coming into force on 2 October 2000 of the Human Rights Act 1998 and, as had been established by the decision in *McKerr,* article 2 of the Convention was therefore not engaged and there was no Convention or other right under domestic law upon which the respondent was entitled to require an Article 2 compliant inquest to be held.

[8] When the appeal came on for hearing in this court on 4 April 2005 counsel for the respondent submitted:

> (i) that there is a requirement both at common law and under statute to hold an inquest promptly.
>
> (ii) that in the package of measures presented by the United Kingdom to the Council of Ministers in March 2002 it was indicated that where Article 2 of the Convention is engaged and an inquest was to be held the inquest would be Article 2 compliant.
>
> (iii) that where an inquest is held post October 2000 in respect of a death in February 2000 domestic law requires an Article 2 compliant inquest.

[9] It was suggested in *McKerr* that there is a separate overriding common law right corresponding to the procedural right implicit in art 2 of the convention. Lord Nicholls rejected this submission on the ground that a new common law right was being sought as a means of supplementing, or

overriding, the statutory provisions relating to the holding of coroners' inquests. This, he said, is not an appropriate role for the common law.

[10] As similar issues to those raised by counsel at (ii) and (iii) above had arisen in appeals from decisions of this court in *Re Jordan's Application for Judicial Review* [2005] NI 144 and *Police Service of Northern Ireland v McCaughey and Grew* [2005] NI 344 which were then pending before the Appellate Committee of the House of Lords the court deferred making any decision on the issues raised by the respondent in the present case until those appeals had been concluded. The ruling of the House of Lords in *Jordan v Lord Chancellor and another* and *McCaughey v Chief Constable of the Police Service of Northern Ireland* [2007] 2 AC 226 has confirmed that as the Human Rights Act 1998 does not have retrospective effect not only does it not apply to a death which occurred before it came into force but also to any investigation into such a death. The House also rejected the suggestion that the common law should be developed to recognise a substantive right to life coupled with a procedural right. In line with the decisions of the House of Lords the three grounds of appeal initially raised by the respondent must be dismissed.

[11] Shortly before the hearing of the appeal in April 2005 the respondent raised a fresh issue as to whether there is an equivalent procedural obligation under customary international law to the procedural obligation under Article 2 of the Convention and, as such, incorporated into domestic law. This had not been raised before Kerr J. and the court required further skeleton arguments to be filed and shown to counsel for the Lord Chancellor so that he would have an opportunity to apply to intervene should he see fit to do so.

[12] In the event the Lord Chancellor did not wish to intervene and the court heard argument on the point on 3 May 2005 as it was considered that it would be of assistance to Coroners conducting inquests into deaths occurring before 2 October 2000 to have this question resolved.

[13] The source of this argument is found in the opinion of Lord Steyn in *McKerr* at para. [54] where he said;

> "At a late stage of the appeal before the House I did wonder whether customary international law may have a direct role to play in the argument about the development of the common law. The idea was suggested to me by a valuable article: Andrew J Cunningham, *The European Convention on Human Rights, Customary International Law and the Constitution,* 1994, 43 ICLQ 537. The writer stated the following propositions [538]:

> 'First, that treaties may generate rules of customary international law: the accepted view that unenacted treaties 'cannot be a source of rights and obligations' in England is thus effectively sidestepped, since it is not the treaty itself which is the source of rights. Second, that the numerous human rights treaties and other instruments, of which the European Convention is but one, have given or, at least, may give rise to rules of customary international human rights law. Third, that customary international law forms part of the common law of England. If these three be accepted, it follows that, to the extent that the content of any right encompassed in the European Convention is the same as its content in customary international law, the right in question will be recognised in English law as a part thereof.'
>
> Along these lines there may be an argument that the right to life has long been recognised in customary international law, which in the absence of a contrary statute has been part of English law since before the 1998 Act came into force. One has to remember, however, that the procedural obligation recognised in *McCann* only dates from 1995, i.e. thirteen years after the deceased was shot and after the inquest in Northern Ireland was closed. It may be unrealistic to suggest that the procedural obligation was already part of customary international law at a time material to these proceedings. The point has not been in issue in the present case. It has not been researched, and it was not the subject of adversarial argument. It may have to be considered in a future case. The impact of evolving customary international law on our domestic legal system is a subject of increasing importance."

[14] As Lord Steyn observed the common law has always recognised the fundamental importance of human life. *Blackstone* in his *Commentaries* stated that it was the first of the three absolute rights saying;

> "The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support."

The argument advanced on behalf of the respondent is that the common law incorporates not only the right to life but also a co-extensive procedural obligation to investigate deaths as a consequence of customary international law.

[15] In *McCann and Others v United Kingdom (*1996) 21 E.H.R.R. 97 the ECt.HR confined itself at [161] to noting;

> "that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State." See also *Kaya v Turkey* (1998) 28 EHRR 1 at [102] and *Gűlec v Turkey* (1999) 28 EHRR 121 at [77]."

[16] In *Jordan v Lord Chancellor* Lord Bingham with reference to the decision of the court in *McCann* observed at [28];

> "This procedural or investigative obligation as it came to be called, if foreshadowed at all by previous jurisprudence, had not been generally appreciated."

[17] The clearest statements as to the need for an effective investigation are confined to the judgments of the ECtHR though there is a reference to such a requirement in the judgment of the Inter-American Court of Human Rights in *Velásquez-Rodríguez v. Honduras*. July 29, 1988. Series C No. 4. In that case there was a violation of the *American Convention on Human Rights* and the Court referred to an obligation on the State to investigate every situation involving a violation of the rights protected by the Convention. As counsel for the respondent noted the obligation recognised in *McCann* was informed by the UN Principles on Extra-Legal Executions adopted in May 1989 by Economic and Social Council Resolution 1989/65 which mandated

"thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions."

[18] Counsel for the appellant referred to the requirement that customary international law be 'satisfactorily evidenced' as the Court of Appeal said in *JH Rayner (Mincing Lane) Ltd .v Department of Trade and Industry* [1989] Ch 72 at 179 and 252-3 per Kerr and Ralph Gibson LJJ. He submitted that the small number of judgments of the ECtHR in this period provided insufficient evidence to enable a court to arrive at the conclusion that there was such a rule of international law.

[19] How does such a rule become one of customary international law? The answer provided by Lord Bingham in *R(European Roma Rights Centre) v Prague Immigration Officer* [2005] 2 A.C. 1 at [23] is:

> "The conditions to be satisfied before a rule may properly be recognised as one of customary international law have been somewhat differently expressed by different authorities, but are not in themselves problematical. Guidance is given by the International Court of Justice in *In re North Sea Continental Shelf* (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) [1969] ICJ Rep 3, paras 70-71, on the approach where a treaty made between certain parties is said to have become binding on other states not party to the treaty:
>
> > '70. The court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention [on the Continental Shelf, 1958] no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent state practice-and that this rule, being now a rule of customary international law binding on all states, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries

> between the parties' respective continental shelf areas in the North Sea.
>
> 71. In so far as this contention is based on the view that article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained'."

The relevant law was, I think, accurately and succinctly summarised by the *American Law Institute*, *Restatement of the Law*, *Foreign Relations Laws of the United States*, 3d (1986), 102(2) and (3):

> "(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.
>
> "(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."

This was valuably supplemented by a comment to this effect:

> "c. *Opinio juris*. For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (opinio juris sive necessitatis); a practice that is generally followed but which states feel legally

> free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (e g, by official statements) is not necessary; opinio juris may be inferred from acts or omissions."

[20] It has not, in our opinion, been demonstrated that a procedural obligation to investigate deaths by means of a coroner's inquest is generally and consistently accepted by states from a sense of legal obligation.

[21] Having reached this conclusion we will deal briefly with some of the other points that have been raised by counsel in the written arguments that they have helpfully provided. Although judgment in *McCann* was given some five years' before the death of David McIlwaine it was not until May 2001, that the ECtHR gave judgment in *Jordan, Kelly, McKerr and Shanahan v United Kingdom* (2003)37 EHRR 52. There it identified the key requirements of an effective investigation. The formulation in *McCann* was altered to read;

> "…that there should be some form of effective official investigation when individuals have been killed as a result of the use of force."

The additional words "*…by, inter alios, agents of the State* "used in *McCann* disappeared and have not reappeared in judgments since then. Counsel for the appellants suggested that prior to this it was understood that the procedural obligation applied where individuals had been killed as a result of the use of force by agents of the state or where there was uncertainty as to whether the State was involved as in *Kaya v Turkey*. This tends to support the view that there was uncertainty even in the ECHR context as to the procedural obligation as recently as the year 2003.

[22] If, contrary to the view that we have expressed, the procedural obligation is a rule of customary international law a further issue raised by the appellant is whether the obligation can be incorporated into domestic law where the procedure of the Coroners' Court is regulated by statute in the Coroner's Act (NI) 1959 and Coroners (Practice and Procedure) Rules (NI) 1963 and has been interpreted by the Court of Appeal. If the existing law is deficient, in our opinion, there would be an obligation on the State to provide a form of investigation by legislation that would comply with article 2 of the ECHR.

[23] For the reasons given the appeal will be allowed.