Neutral Citation No. [2013] NIQB 74 | *Ref:* **STE8935**

Judgment: approved by the Court for handing down | *Delivered:* **04/07/2013**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

_____

Jordan (Hugh)'s Application (Leave stage) (13/002996/1) [2013] NIQB 74

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

_____

STEPHENS J

Introduction

[1] This is an application for leave to apply for judicial review of various rulings of the Coroner, Mr Sherrard, who conducted the hearing of an inquest into the death of Patrick Pearse Jordan which application is brought by Hugh Jordan, the deceased's father.

[2] Mr MacDonald, QC, SC and Ms Quinlivan QC appeared on behalf of the applicant. Mr Simpson QC and Mr Doran appeared on behalf of the coroner, the proposed respondent.

Factual background

[3] The factual background to this case has been set out in a number of judgments. The European Court of Human Rights in its judgment in the case of Jordan v United Kingdom [2003] EHRR 2 at paragraphs [12]-[27] and under the heading "Events relating to the death of Pearse Jordan" set out an account of the events. I incorporate those paragraphs as part of this judgment. In addition I briefly summarise those paragraphs.

[4] On 25 November 1992 Patrick Pearse Jordan was shot and killed at Falls Road, Belfast, by an officer of the Royal Ulster Constabulary ("the RUC") later identified as Sergeant A. Sergeant A was a member of the RUC's Headquarters Mobile Support Unit and on 24 November 1992 he had been briefed concerning reports of a planned distribution of kit, ammunitions including weapons, explosives

and mortars by the Provisional IRA in West Belfast. On 25 November 1992, as part of an anti-terrorist operation and whilst in a police vehicle attempts were made to stop a vehicle which attempts were followed by a high speed chase and a collision whereupon the driver got out of the vehicle. Sergeant A states that he saw the driver running across the road, from left to right, at an angle away from him. He was looking over his right shoulder in Sergeant A's direction as he ran. Sergeant A said that he called out "Police. Halt." or "Halt. Police." The driver turned towards him. He could not see the man's hands which were below his waist. His vision was either obscured by the roof of the police car in front of him or the arrival of another police car on the scene. As he could not see the man's hands, he thought that his own life or the life of his own driver might be at risk. He feared the man was armed as he had spun round so quickly. He fired a short burst from his MP5 at the trunk of the man. When he made the split second decision to fire, the man was facing him but he could not say whether he had turned or moved in some other way. He was aware of other police officers shouting.

[5] The case on behalf of the applicant is that his son, who was unarmed, did not turn but rather was running away presenting no threat when he was shot in the back and killed by Sergeant A. In brief, that the account of Sergeant A is false. Alternatively, that if his son did turn in the manner indicated then that subjectively Sergeant A did not believe that his life or the lives of others were in danger and/or that the use of lethal force was not an appropriate response in the circumstances. Again, in brief, that Sergeant A's evidence as to his subjective belief was not only unreasonable but false.

Illustration of some of the issues which were the subject of rulings by the coroner

[6] One of the issues that arose for decision by the coroner before evidence was heard was whether to sit with a jury. Section 18(1) of the Coroners Act (Northern Ireland) 1959, as amended, requires the coroner to conduct an inquest with a jury in certain cases, for instance if it appears to the coroner that there is reason to suspect that the death occurred in prison. Section 18(2) provides the coroner with discretion to conduct the inquest with a jury in any other case if it appears to the coroner that it is desirable to summon the jury. This case did not fall within any of the category of cases specified in Section 18(1) and accordingly the coroner was not required to conduct the inquest with a jury. However the coroner had discretion to do so under Section 18(2). The attitude of the applicant as to whether the coroner should exercise discretion to convene a jury was that a jury should not be convened. It was suggested on behalf of the applicant that the objectivity and impartiality of a jury could not be guaranteed. The reasons advanced by the applicant to the coroner included the controversial nature of the inquest, which involved a fatal shooting of an alleged IRA member by a member of the RUC, the contention that problems of perverse verdicts relating to sectarianism in a divided society was widely recognised to be a continuing problem, the fact that there was a requirement for unanimous verdicts, the statutory anonymity of jurors which taken with the requirement of unanimity meant that there were no effective safeguards against a perverse verdict

(FS1/68). The PSNI did not express a view one way of the other as to whether a jury should be convened. On 6 June 2012 the coroner decided and gave his reasons for deciding to convene a jury (FS1/67-71).

[7] Numerous other issues arose for the coroner's decision both prior to and during the course of the hearing. I do not intend in this judgment to set out all the issues but will describe briefly some aspects of the issue in relation to the Stalker/Sampson report. The deceased died on 25 November 1992. It is the applicant's case that events surrounding a number of deaths in 1982 were relevant to the inquest into the death of the deceased in 1992. The deaths in 1982 were the subject of the Stalker/Sampson investigation. The reports of those investigations have been disclosed to counsel for the applicant but on strict undertakings as to the use that they can make of the contents of the reports.

[8] The 1982 deaths occurred in three different incidents all of which involved the Headquarters Mobile Support Unit, the same unit as was involved in the death of the deceased. Members of the Headquarters Mobile Support Unit in 1982 were also involved in the Unit in 1992. The applicant states that officer V was the officer in charge in 1982 and that in 1992 he was on leave at the time of the shooting of the deceased but came back from leave to conduct a debrief of Sergeant A who shot and killed the deceased and other officers who witnessed the shooting of the deceased. That the debrief in 1992 occurred before any of those officers were interviewed by CID. Sergeant A, who was the officer who shot and killed the deceased had been a radio operator and log keeper in 1982. Officer M had been involved in for instance the incident at Ballyneery hayshed during which Michael Tighe was shot and killed and Martin McAuley was shot. In 1982 and in relation to the Ballyneery hayshed incident Officer M was debriefed prior to interview by CID officers. He states that he was instructed by senior officers within HMSU to invent a story about seeing an armed man approaching the hayshed in order to explain the presence of the unit at the hayshed. The explanation which he proffered for being instructed to provide a false story to CID officers was in order to protect the life of a source.

[9] During the course of this inquest the coroner had to determine the amount of evidence relating to the 1982 deaths that was relevant to the inquiry into the death of the deceased in 1992. The applicant was permitted to use some of the underlying source material in relation to the Stalker Sampson Reports to undermine the credibility of, for instance, Officer M. However it is the applicant's contention, for instance, that the coroner should have permitted the deployment of the Stalker/Sampson narrative and analysis reports in the cross examination of Officers M & V.

The inquest

[10] The evidence at the inquest was heard before the Coroner, Mr Sherrard with a jury between 24 September 2012 and 20 October 2012 (FS1/1). The Coroner posed six questions for the jury (FS1/432). The jury could not reach unanimous findings in

relation to question 2 apart from question 2a) and also could not reach unanimous findings in relation to questions 4, 5 and 6. Accordingly the jury were unable to answer questions 2 b) –g) and questions 4, 5 and 6. I set out the questions in relation to which the jury did arrive at unanimous verdicts together with their findings in relation to those questions.

[11] Question 1 asked:

> "Summarise the scenario in which the death occurred, so that if I were a newcomer to the case with no knowledge of it, I could understand the broad background and the circumstances."

The jury found as follows:

> "On 25/11/1992 based on intelligence (surveillance) of a Ford Orion being present at a site of a possible munitions movement, the RUC were to stop this car. After a forcible/controlled stop of the red Orion on the Falls Road, and the driver exited the car, and was shot by an RUC officer resulting in the death of the driver, Patrick Pearse Jordan, at 5.25 pm in RVH. A post mortem examination confirmed Mr Jordan died of a bullet wound of chest."

[12] Question 2 asked:

> "What role, if any, did the Royal Ulster Constabulary have in the death of Mr Jordan?"

Question 2(a) was as follows:

> "In particular a) what was the nature and purpose of the operation in which the RUC was involved 25 November 1992?"

The jury found as follows:

> "The nature and purpose of the RUC in the death of Mr Jordan was based on ongoing military surveillance of 2-4 Arizona Street, and intelligence on 25/11/1992 of a possible movement of munitions in West Belfast by PIRA. T.C.G. directed HMSU to deploy personnel to the area to monitor movements of vehicles observed in the Arizona Street area."

[13] Question 3 was as follows:

> "Please specify the wound or wounds sustained by Mr Jordan. Please specify, if you consider it possible to do so, what wound or wounds caused Mr Jordan's death? Is it possible to say in what order any wounds sustained by Mr Jordan occurred? If so, in what order was the fatal wound, or were the fatal wounds sustained?"

The reply was:

> "Mr Jordan sustained three wounds, a bullet wound to the back of his left arm, a wound to the left shoulder and the fatal wound to the chest. It is not possible to determine the order in which the wounds were sustained."

[14] The coroner accepted the verdict of the jury.

A sequence in relation to these judicial review proceedings

[15] On 9 January 2013 the applicant applied for judicial review seeking orders quashing various decisions of the Coroner and seeking declarations, for instance a declaration that the Coroner ought not to have accepted a "verdict" from a jury which was hopelessly divided in circumstances where the verdict could not and did not determine any issue in contention, rather the Coroner should have discharged the jury and his failure to discharge the jury was a breach of Section 31 of the Coroner's (Northern Ireland) Act 1959 (A/6/P). The applicant also seeks an order of mandamus directing the holding of a fresh inquest (A/6/U).

[16] The applicant's Order 53 statement contains some 38 grounds of challenge. The first affidavit of Ferghal Shiels, the solicitor for the applicant, runs to 190 paragraphs over 55 pages. The first exhibit to that affidavit is contained in two lever arch files and extends to 680 pages. The second exhibit is also contained in two further lever arch files. Mr Shiels has sworn three further affidavits on respectively 23 January 2013, 12 April 2013 and 14 June 2013. The exhibits to those three further affidavits, brings the total number of pages of exhibits to 1,537.

[17] On 22 January 2013 the applicant served a 59 page skeleton argument. The applicant also lodged a lever arch file containing some 20 authorities and extracts from the Coroners (Northern Ireland) Act 1959, the Coroners (Practice and Procedure) Rules 1963 and the Justice and Security Act (Northern Ireland) 2007. There was a further file of authorities containing some 7 further authorities.

[18] On 15 February 2013 counsel on behalf of coroner, the proposed respondent, served a 20 page skeleton argument and attached to that skeleton argument two documents by way of evidence. The first document was the affidavit sworn by the coroner on 17 September 2012 in relation to an earlier judicial review application and the second document was the transcript of the ruling of the coroner on "Relevance of AA's involvement in the death of Neill McConville" dated 20 October 2012. At paragraph [19] of the proposed respondent's skeleton argument reference was made to a four "so-called legacy inquests that have been held to date in this jurisdiction." The purpose of referring to these inquests was to establish as a fact that the summoning of a jury to deal with historical cases of this kind is not unusual and therefore to support the exercise of the coroners discretion to convene a jury in this inquest. A skeleton argument is not a vehicle for establishing facts which is done by way of affidavit evidence. The disadvantages of seeking to introduce evidence in this way in this case was demonstrated by the fact that subsequently six verdicts on inquest were handed into court with accounts being given orally to the court as to the details of those inquests and as to whether they did or did not demonstrate particular outcomes dependent on the particular area in which the inquests were held.

[19] During the leave hearing the proposed respondent lodged in court transcripts of the evidence of the inquest for Thursday 4 October 2012 (the evidence of officer M), Friday 5 October 2012 (again the evidence of officer M), Monday 8 October 2012 (the evidence of officer V), Tuesday 16 October 2012, Thursday 25 October 2012 (the coroner's summation to the jury) and Friday 26 October 2012 (the coroner's summation to the jury, various legal submissions and the jury's verdict). The introduction of this further evidence for the purposes of the leave hearing was without objection from the applicant. I was referred to limited parts of these transcripts and invited to read all of them as the proposed respondent contended that all of the transcripts were relevant.

Adjournment of the application for leave

[20] On 26 February 2013 the matter was listed before me for a leave hearing which hearing I had to adjourn due to other judicial business. I asked counsel for the parties to agree a number of potential dates for the adjourned leave hearing for my consideration. The only suggested dates put forward by counsel for all the parties were Monday, Tuesday and Wednesday 24 to 26 June 2013. It was explained to me by Ms Quinlivan QC that separate issues were being dealt with by different counsel on behalf of both the applicant, the coroner and the PSNI so that it was not just a question of coordinating dates amongst three counsel but coordinating dates amongst all the counsel dealing with all of the issues. I made it clear that I was available to hear the leave application at a much earlier stage and was prepared to do so and that the only reason for not doing so was the agreement between counsel that the leave hearing be fixed for the end of June 2013. No application was made to me that I should compel any party to change counsel in order to facilitate an earlier

hearing or to compel counsel to deal with issues with which they had not previously dealt.

Grounds of challenge

[21] The application is based on 38 grounds specified in the amended Order 53 statement. The grounds encompass the following issues:

> "(i) Non-disclosure of the Stalker Sampson Reports.
>
> (ii) Non-disclosure of underlying material from a Police Ombudsman investigation into the death of Neil McConville in 2003.
>
> (iii) The decision to sit with a jury.
>
> (iv) The decision not to discharge a particular juror.
>
> (v) Alleged shortcomings in the questions furnished to the jury.
>
> (vi) Alleged shortcomings in the Coroner's directions to the jury.
>
> (vii) The verdict.
>
> (viii) Decisions on anonymity and screening.
>
> (ix) Involvement of former Special Branch officers in the disclosure process.

[22] In relation to the challenge to decisions on anonymity and screening of witnesses which are contained in paragraphs (xxiv) to (xxxvii) of the applicant's proposed amended Order 53 statement it was conceded by Ms Quinlivan that this court was bound to find against the applicant in relation to grounds (xxiv) and (xxv) by virtue of the decision of the Court of Appeal in In the matter of an application by Officers C, D, H & R [2012] NICA 47. However she informed the court that in relation to that decision a petition has been lodged by the applicant for leave to appeal to the Supreme Court. She anticipated that there would be a decision from the Supreme Court in relation to the grant or refusal of leave to appeal before the end of July 2013. She informed the court that all counsel had agreed and all counsel suggested that the decision before me as to whether to grant leave in respect of the coroner's decision on anonymity and screening would be informed by the decision of the Supreme Court as to whether to grant or refuse leave to appeal and if to grant leave to appeal then upon what grounds. If leave to appeal was refused by the

Supreme Court she submitted that this would not be determinative of all the issues in relation to screening and anonymity but would bring the issues into greater focus. Accordingly Ms Quinlivan applied on behalf of the applicant to adjourn consideration of the leave application in so far as it related to any issue of anonymity or screening. The proposed respondent supported that application. I permitted an adjournment provided that the leave hearing could be dealt with in September 2013 and the substantive hearing as soon as possible thereafter.

Scope of judicial review of the coroner's rulings

[23] Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms applied to the inquest. The inquest must satisfy the procedural requirements of Article 2. At paragraph [15] of his judgment In the matter of an application by Officers C, D, H & R [2012] NICA 47 Girvan LJ stated that:

> "[15] The next-of-kin of the deceased have an entitlement to participate in an inquest and where the inquest is one which must satisfy the procedural requirements of Article 2 they have a legitimate interest in seeking to ensure that the inquest is Article 2 compliant. Before the court can intervene at the suit of next-of-kin to quash a coroner's procedural ruling the court must conclude that the ruling will result in the inquest being one which will not be Article 2 compliant. The applicant must establish that the conduct of the inquest following the procedural ruling will deprive him of an opportunity to properly participate in the inquest and that, unless restrained, the coroner will be proceeding to carry out an inquest that is in breach of Article 2. In considering the question the court must take into account the following matters:
>
> (a) the next-of-kin is entitled to be involved in the inquest proceedings to the extent necessary to safeguard his legitimate interest;
> (b) in an inquisitorial inquest no party has a right to demand that evidence be presented in a particular way. It is for the coroner to ensure that the inquest as a whole ensures a proper inquisition into the issues arising and that the evidence is presented in such a way as to enable the coroner and the jury after a searching inquiry to reach fair and balanced conclusions to which the verdict gives effect;

(c) the coroner's rulings on anonymity and screening are subject to review and alteration in the course of the inquest and must be kept under review;

(d) the adequacy of the inquest process and its overall compliance with the requirements of article 2 can only fairly be assessed at the conclusion of the inquest. It is not possible to make an assessment of any real or apparent prejudice suffered by the next-of-kin until the inquest is underway and it can be seen what the real issues are, how they are developing and the way in which the next-of-kin are affected or prejudiced in their ability to deal with the evidence and the witnesses."

[24] In the matter of an application by Officers C, D, H & R [2012] NICA 47 involved a challenge to the coroner's decisions in relation to anonymity and screening of witnesses. Girvan LJ giving one of the judgments of the Court of Appeal stated

> "If, after the conclusion of the inquest, there is a challenge to the verdict the High Court will be able to evaluate the extent to which the continued anonymity and/or screening has led to a verdict which should not stand. When inquest proceedings are viewed in their overall context an inquest verdict may stand even if some procedural mistake occurred in the course of the inquest. For the verdict to be quashed the court must be persuaded that the process was flawed to such an extent that the verdict should not be allowed to stand and should be quashed."

Accordingly it is not every procedural mistake that leads to the verdict being quashed. Furthermore in deciding whether there has been a procedural mistake the High Court should accord to the coroner a wide margin of appreciation given the generous width of discretion which is vested in him. I set out what Girvan LJ stated at paragraph [8] (excluding his comments in that paragraph about satellite litigation):

> "[8] In his conduct of the inquest the coroner will be called on from time to time to make procedural rulings. Unless it is apparent that a procedural ruling should not have been made the High Court exercising its supervisory jurisdiction should not intervene. It is not the function of the High Court to micromanage an

> inquest or to act as a forum for a de facto appeal on the merits against a coroner's procedural ruling. A coroner will have only acted unlawfully if he has exceeded the generous width of the discretion vested in him to regulate the inquest in the interest of what he considers to be a full, fair and fearless inquiry. The coroner will have much greater awareness of the issues involved and the evidence likely to emerge in the course of the inquest. He must, accordingly, be accorded a wide margin of appreciation … As experience shows in relation to any disputed procedural ruling it is frequently possible to produce plausible arguments to support a complaint that the coroner has got it wrong. Different coroners might decide the same procedural question differently, each one acting within the parameters of his powers and discretions. This applies equally in the course of procedural rulings in the course of civil and criminal trials. …"

The leave test

[25] In IRC v National Federation of Self-Employed and Small Businesses Limited [1982] AC 617 at 643 H to 644 B Lord Diplock stated that:

> "The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application."

Accordingly the test is that leave to apply for judicial review should be granted if, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed.

[26] The whole purpose of requiring that leave should first be obtained to make the application for judicial review would also be defeated if, for instance, by the volume of papers and the multiplicity of issues the court was not in a position to determine whether on the papers there was a clear case for refusing to the applicant the relief claimed. Accordingly in some cases in order to deal with the question of leave there needs to be consideration in some greater depth than would ordinarily be the case. Not every case is one which is suitable to a quick perusal on the papers. I do not consider the need for greater depth to be confined to cases involving a considerable volume of papers or a multiplicity of issues. For instance a greater degree of consideration could be required if the grant of leave could amount to satellite litigation. Other cases could arise where the grant of leave could affect a wider public interest or could in itself cause harm. In a case such as this involving a significant volume of material and a multiplicity of issues I considered that it was necessary to have a leave hearing and that it was necessary to require counsel on behalf of the applicant at that hearing to identify the relevant documents, to summarise the issues both factually and legally, to briefly explain the specific reasons given by the coroner for the rulings he made, and to open the rulings that were in issue. In view of the fact that I was inviting submissions from the applicant I considered that it was also necessary to afford to the proposed respondent and notice party the opportunity to make submissions as to whether there was a clear case either factually on the papers before me or legally for refusing to the applicant the relief claimed or any part of it. The nature of this case means that that exercise would inevitably involve a fairly substantial amount of court time.

[27] If in the exercise of discretion the court examines the matter in somewhat greater depth than would otherwise be the case then the test set out by Lord Diplock should be adapted to take into account that more detailed consideration. Accordingly if for one reason or another further consideration has been given at the leave stage of the material then available then if the applicant has been unable to persuade the court that further consideration will disclose what might be an arguable case in favour of granting to the applicant the relief claimed, the court ought, in the exercise of a judicial discretion, to refuse him leave to apply for that relief. In short the formulation "what might on further consideration turn out to be an arguable case" is in practice no different from "the demonstration of an arguable case with a reasonable prospect of success" see paragraph [9] of the judgment of Morgan J in Chief Constable PSNI's application [2008] NIQB 100 and paragraphs [5] and [43] of the judgment of Nicholson LJ giving the judgment of the Court of Appeal in Re Omagh District Council's Application [2004] NICA 10.

[28] However because a court has in exercise of discretion examined the matter in somewhat greater depth does not alter the essential nature of the leave application. It should not be changed into a full hearing unless the parties agree and/or the court decides to hold a rolled up leave and substantive hearing. A judgment granting leave should not be changed into the pre cursor of a full judgment. The decision of the court, *if leave is granted*, should not give preliminary views as to the outcome of the application or anything that could be construed as the court's preliminary views.

A judgment giving leave should not be construed as any public endorsement by the court of the relative strengths or weaknesses of any of the arguments beyond the low threshold of the demonstration by the applicant of an arguable case with a reasonable prospect of success on the materials then available to the court and given the limited nature of the submissions received by the court. In short a judgment giving leave is no indication of the ultimate outcome which must await all the evidence and the full arguments at the hearing of the application.

[29] As I have indicated the applicant seeks leave to challenge a considerable number of the rulings of the Coroner. Prior to the evidence being given at the inquest the applicant had sought leave to challenge rulings of the Coroner in relation to anonymity and screening of witnesses and the disclosure of the Stalker/Sampson Reports. At this stage, after the hearing, the applicant renews those applications for leave. A decision at an earlier stage not to grant leave is not determinative of the application for the grant of leave at this stage for two reasons. The first reason is that at the earlier stage the applicant faces the rule against satellite litigation see paragraphs [18]-[19] of the judgment of Morgan LCJ in C, D, H and R [2012] NICA 47 and paragraph [16] of the judgment of Girvan LJ together with the judgment of Higgins LJ. The second reason is that the factual basis for this application includes what actually occurred during the hearing of the inquest. Deeny J in the course of his judgment in Jordan's (Hugh) Application [2012] NIQB 64 at paragraphs [18] expressed the matter prospectively as to what a continental judge might do in the following terms:

> "Here is the problem – what is the solution? Wholesale disclosure or, at most, a few relevant questions permitted?"

At that stage the application for leave was prospective. At this stage the application for leave is against the factual background of knowing what the Coroner did in fact do during the course of the inquest in relation to all the diverse issues that arose for his determination. Accordingly at this stage the court takes into account all the material including what actually occurred at the inquest.

Conclusion

[30] There is a considerable amount of detail involved in all the issues contained in the applicant's Order 53 statement as to what occurred prior to and during the course of the inquest. The applicant has demonstrated an arguable case at this stage the ultimate outcome of which will depend, in part on detailed resolution as to precisely what occurred. The legal issues in relation to the issues are complex and it cannot be said that the legal propositions are not arguable. In addition, for instance, the issue as to whether the coroner's decision to convene a jury is amenable to challenge and the factors exercising the discretion of the coroner as to whether to convene a jury have considerable public significance. The applicant at this leave stage has only to establish an arguable case with a reasonable prospect of success on

the material presently available to the court given the limited nature of the legal submissions to date. I consider that he has discharged that burden and I grant leave in relation to all the grounds of challenge except in relation to anonymity and screening. I will hear and determine the leave application in relation to that ground of challenge in September.