Neutral Citation No. [2013] NIQB 75

Ref:	**STE8941**

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered:	**04/07/2013**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Jordan (Hugh)'s Application (Leave stage) (13/002223/1) [2013] NIQB 75

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 in relation to a decision of the Police Service of Northern Ireland refusing to provide the applicant with disclosure of all documentation provided to the Coroner 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. The applicant also seeks leave to apply for a declaration that the involvement of Royal Ulster Constabulary ("RUC") Special Branch officers and a former RUC intelligence officer in the process of complying with the Chief Constable's obligations under Section 8 of the Coroner's Act (Northern Ireland) 1959, compromised the independence of the disclosure process and meant that the inquest was not compliant with Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[2] Mr Macdonald, QC, SC and Ms Quinlivan QC appeared on behalf of the applicant. Mr Montague QC and Mr McGleenan QC appeared on behalf of the PSNI, 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.

Previous judicial review proceedings

[6] In previous judicial review proceedings which I heard and determined in 2008 the applicant sought an order of mandamus to compel the Chief Constable to disclose to the applicant all documents disclosed by the Chief Constable to the coroner, whether relevant or irrelevant to the issues in the inquest, except for any document which is subject to legal professional privilege or to a valid public interest immunity claim. The applicant sought that relief on the basis of a contention that, irrespective of the position in other cases, he had a legitimate expectation that "all documents" (subject to privilege and immunity) should be disclosed to him irrespective of whether relevant or irrelevant to the issues expected to emerge on the hearing of the inquest. The contention that the applicant had such a legitimate expectation depended on an analysis of a considerable volume of documents dating

back to 1999. In my judgment in *Jordan's Application* [2008] NIQB 148 I held that the applicant did have such a legitimate expectation, I quashed the decision of the Chief Constable and made an order of mandamus.

Further documents made available by the Chief Constable to the Coroner and the issue as to legitimate expectation

[7] The deceased died on 25 November 1992. It is the applicant's case that events surrounding the death of Neil McConville on 29 April 2003 were relevant to the inquest into the death of the deceased in 1992. The Police Ombudsman for Northern Ireland, Mrs Nuala O'Loan, had investigated the death of Neil McConville and her report was available to the applicant. The Chief Constable made available to the coroner documents obtained from the Police Ombudsman relating to the investigation into the death of Neil McConville so that the coroner could rule on the relevance of those documents to the inquest into the death of the deceased. The Chief Constable did not make those documents available to the applicant. The applicant understands that the documentation included various statements made by Officer AA to the Police Ombudsman for Northern Ireland although the precise nature of the documentation is unknown because the applicant was neither provided with disclosure of the documents nor was he provided with a description of the nature of the documents. The applicant asserts that in fulfilment of his legitimate expectation these documents ought to have been made available to him quite irrespective as to subsequent ruling of the coroner that the documents were irrelevant to the inquest into the death of the deceased.

[8] The proposed respondent contends that the legitimate expectation could only relate to documents disclosed to the coroner prior to the inquest commencing. That the role of the coroner during the inquest is to keep the proceedings focussed and that requests for documents held by the coroner to be irrelevant leads to the inquest procedure spiralling out of control with the potential for endless inquests being held within the inquest into the death of the deceased. In particular the proposed respondent contends that

(i) the issue of disclosure that arose during the course of the inquest was appropriately managed by the Coroner who had conduct of the case;

(ii) the Applicant's reliance on earlier statements, affidavits and judicial dicta in respect of *pre-inquest* disclosure is not applicable in the context of discovery issues that arose during the course of an inquest and which were subject to case management by the Coroner;

(iii) …;

(iv) In any event, the Chief Constable disputed (and continues to dispute) that his section 8 duty was engaged in respect of the McConville materials but

nonetheless provided them to the Coroner who ruled they were not relevant to the scope of the inquest.

[9] The proposed respondent also traces back to the origin of the applicant's legitimate expectation which relies in part on what occurred in 2000. The proposed respondent contends that the Applicant's reliance upon the undertaking given by Mr Mercier in 2000 is misplaced. It is submitted that when the undertaking was given in 2000 it related to documents *then in existence* touching upon the death of Mr Jordan in 1992. It was also submitted that it is absolutely clear that Mr Mercier could not have had within his contemplation materials relating to an investigation into a fatal shooting in 2003 that resulted in an Ombudsman's report in 2005 when he swore his affidavit in 2000.

Section 8 of the Coroners Act (Northern Ireland) 1959 and the issue as to the involvement of RUC Special Branch officers and an RUC intelligence officer.

[10] Section 8 of the Coroners Act (Northern Ireland) 1959 imposes an obligation on the Chief Constable to provide the coroner with such information … in writing as he is able to obtain concerning the finding of the body or concerning the death. The applicant contends that the involvement of former RUC Special Branch officers, the very unit under investigation in the inquest, in the disclosure process compromises the independence of that process and the independence of the inquest. The applicant also contends that the manner in which these officers exercised their functions appears prima facie to have amounted to a failure to comply with section 8 and a failure to take steps to ensure that the Coroner had access to all relevant information for the purposes of the inquest.

[11] The proposed respondent contends that factually the former Special Branch officers and the former RUC intelligence officer have not been delegated the responsibility of complying with Section 8 of the Coroner's Act (Northern Ireland) 1957. That the Chief Constable has at all times retained that responsibility. It is also submitted factually that disclosure in the Jordan inquest took place over a period of two decades and that the vast bulk of disclosure was made prior to 2008. That since 2008 and since the involvement of the former Special Branch officers and the involvement of the former RUC intelligence officer the additional materials which have been provided have been limited to:

a. A small number of Ministry of Defence statements;

b. Some pages from the Investigating Officers report;

c. Statements made by Officers A, M and V in relation to the Stalker/Sampson Inquiry

The proposed respondent also submits that:

(i) The Legacy Support Unit was not established until 2009. Almost all discovery materials had been furnished to the next of kin by the end of 2008.

(ii) The Legacy Support Unit has a team of nine researchers and one supervisor who prepare sensitive intelligence materials for PII redaction;

(iii) Only two of those ten members of the Legacy Support Unit have had any involvement with materials relating to the Jordan inquest. One is the supervisor who was not a member of Special Branch and who worked on the preparation of the A, M and V statements. The second, now deceased, was a former Special Branch officer (who also served in HMSU) who had a minor role in respect of the Jordan materials.

[12] It is also submitted by the proposed respondent that there was no actual bias and that there were sufficient safeguards in place to deal with any appearance of bias.

The leave test

[13] 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.

[14] 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 as it does a point of principle in relation to the discharge of the Chief Constable's obligations under section 8 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 and to summarise the issues both factually and legally. 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 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.

[15] 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.

[16] 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.

Conclusion

[17] The function of the court at this stage is limited. As I have indicated if leave is granted the court should not give preliminary views nor analyse the issues in such a way that a preliminary view could be discerned. On the material presently available and given the limited nature of the submissions I consider that the applicant has established an arguable case with a reasonable prospect of success. I grant leave to apply for judicial review.