

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **27/11/2006**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

APPLICATION BY JULIA MONGAN FOR JUDICIAL REVIEW

WEATHERUP J

[1] The applicant is the widow of Patrick Mongan who died on 19 October 2003 while a prisoner in HMP Magilligan. This is an application for judicial review of the decisions of the Coroner for Londonderry, the Northern Ireland Prison Service, the Police Service of Northern Ireland and the Public Prosecution Service in relation to the investigation into the death of Patrick Mongan. Mr Lavery QC and Ms Doherty appeared for the applicant, Ms Elliott for the Coroner, Mr McAllister for the Prison Service and the Police Service and Mr McCloskey QC and Ms Murnaghan for the Public Prosecution Service.

[2] The deceased committed suicide in HMP Magilligan in October 2003. The Prison Service launched an internal review which was completed on 13 February 2004. The applicant provided a statement to police on 5 March 2004 which raised issues about the treatment of the deceased in the prison. As summarised in her grounding affidavit her concerns were that the deceased was the subject of harassment from prison staff and a particular warden was described although he could not be identified by the applicant; the applicant had been threatened that he would be arrested and extradited to the Republic of Ireland upon his release from prison which was due in February 2004; the deceased's anti-depressant medication had been removed when he was transferred from HMP Maghaberry to HMP Magilligan and the deceased's mental health had not been monitored adequately. The Police Service launched a criminal investigation and a file was passed to the Public Prosecution Service in May 2005. A direction of no prosecution was issued in September 2005. The Coroner proceeded with the Inquest which was concluded on 17 February 2006. The applicant was satisfied with the outcome

of the investigation save for the two issues that arise on this application for judicial review in relation to the promptness of the investigation and the delayed disclosure to the applicant of the Prison Service review.

[3] The application for judicial review commenced in February 2005. By reason of the developments that occurred thereafter the applicant's outstanding grounds for judicial review are as follows -

(a) The respondents and/or the State have acted in a manner that is incompatible with the applicant's rights under Articles 2 and 3 of the European Convention on Human Rights in that the investigation into the death -

(i) has not been sufficiently prompt, and

(ii) has not been sufficiently accessible.

(b) The Prison Service erred in law in refusing to provide the applicant with a copy of the Prison Service internal review of the death in -

(i) failing to appreciate that the internal review was an "official investigation" forming part of the State's response to the death.

(ii) failing to take into account a relevant consideration in responding to the request for disclosure of the review papers, namely that Article 2 requires that investigations into deaths in prison must be concluded promptly and must be accessible, and

(iii) failing to appreciate that Article 2 required disclosure of the review papers to the applicant.

The procedural aspects of the right to life.

[4] Article 2 of the European Convention provides that everyone's right to life shall be protected by law. Article 3 of the European Convention provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. Article 2 provides substantive protection for the right to life and also requires procedural protection by a form of effective official investigation where death has occurred when an individual is in the custody of the State. The procedural requirements apply where death has occurred, whether deliberately or not, at the hands of State agents, and where the deceased was in the custody of the State.

[5] The procedural requirements have been set out by the European Court of Human Rights in, for example, Jordan v UK (2001) 11 BHRC 1 and Edwards v UK (2002) 12 BHRC 190. The essential purpose of the investigation is 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. The ingredients of the effective official investigation are that the authorities must act of their own motion and cannot leave matters to the initiative of the next of kin; to be an effective investigation it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent of those implicated in the events; investigation must be capable of leading to a determination of whether the force used was or was not justified and to the identification and punishment of those responsible; a requirement of promptness and reasonable expedition is implicit in this context; there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory; the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard their legitimate interests. (Jordan v UK paragraphs 105 to 109 and Edwards v UK paragraphs 69 to 73).

[6] Jordan v UK involved deliberate killing by agents of the State. Edwards v UK involved death occasioned by a third party while the deceased was in the custody of the State and the responsibility of the State, if any, could only rest on negligent failure to protect the life of the person in custody. R (Amin) v Secretary of State for the Home Department (2003) 4 All ER 1264. also involved a prisoner serving a sentence in a young offenders centre who had been killed by his cell mate. The procedural requirements have also been applied to suicide in custody as in Keenan v United Kingdom [2001] EHRR 38 and to death in custody arising from allegedly inadequate medical treatment as in R(Wright) v Secretary of State for the Home Department [2001]UKHRR 1399. In Amin Lord Bingham noted that the European Court of Human Rights had applied essentially the same principles to cases of deliberate killing by agents of the State and to other cases of death in the custody of the States and at paragraph 21 commented -

"In my respectful opinion the European Court was fully justified in doing so, for while any deliberate killing by State agents is bound to arise very grave disquiet, such an event is likely to be rare and the State's main task is to establish the facts and prosecute the culprit; a systemic failure to protect the lives of persons detained may well call for even more anxious consideration and raise even more attractable problems."

Promptness and reasonable expedition.

[7] The reference to promptness and reasonable expedition was expressed in the following terms in Jordan v UK (paragraph 108) and Edwards v UK (paragraph 72) -

"A requirement of promptness and reasonable expedition is implicit in this context It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."

[8] The respondents contend that promptness is not a freestanding requirement of the procedural aspect but is generally linked to the central requirement of the efficacy of the investigation. The respondents contend that any issue about promptness should concern whether the time expended by the relevant State agency and the investigative process has impeded or frustrated fulfilment of the overriding objective of the Article 2 procedural duty, namely an effective investigation. The respondents seek to advance their contentions by reference to the treatment of promptness by the House of Lords in Amin. Lord Bingham reviewed the recent European cases and stated at paragraph 20 what he described as "a number of important propositions", which I summarise as follows -

- (1) There should be an effective official investigation.
- (2) A killing by the State should be subject to open and objective oversight of the inquiry.
- (3) Where facts are largely or wholly within the knowledge of the State there is an onus on the State to provide a satisfactory and convincing explanation of the death or injury.
- (4) The obligation is not confined to cases where it is apparent that the death was caused by an agent of the State.
- (5) The essential purpose was to ensure accountability for deaths occurring under the responsibility of the State, with the authorities acting of their own motion rather than leaving matters to the initiative of the next of kin.

(6) An effective investigation must be capable of determining whether the force used was justified and to the identification and punishment of those responsible.

(7) Investigation must be independent from those implicated in the events.

(8) There must be a sufficient element of public scrutiny of the investigation or its results.

(9) The next of kin of the victim must be involved.

(10) There must be proper procedures for ensuring the accountability of the agents of the State so as to maintain public confidence and allay legitimate concerns that arise from the use of lethal force.

[9] The respondents draw attention to the inclusion in the list of important propositions of many of the factors set out in Jordan v UK and Edwards v UK but also draw attention to the exclusion from the list of any requirement for promptness and reasonable expedition in the investigation. However in his judgment in Amin Lord Bingham proceeded to refer to the requirement for promptness and reasonable expedition and quoted the passage set out at paragraph [6] above, which includes the words -

"A requirement of promptness and reasonable expedition is implicit a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential ..."

[10] Promptness and reasonable expedition serve the purpose of maintaining public confidence in adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. In a case of suicide in State custody, with allegations of harassment by State officials and allegations of inadequate medical care and allegations of inadequate supervision of vulnerable persons, there remains a requirement of promptness and reasonable expedition to maintain public confidence and to prevent any appearance of collusion between individuals or agencies and to prevent any appearance of tolerance of unlawful acts. The respondents contend that, as the applicant accepts that the official investigation through the Prison Service, the Police Service, the Prosecution Service and the Coroner was eventually effective in resolving the issues that arose from the death, and that any delay that occurred in the process has not impeded or frustrated the fulfilment of that outcome, there can thus be no undermining of what otherwise was an effective investigation. I do not accept that impeding or frustrating the fulfilment of the appropriate outcome is the proper approach

to the issue of promptness. Promptness is one ingredient of an effective investigation. I do not accept that the treatment of promptness and reasonable expedition by Lord Bingham in Amin indicates that it is not a requirement of an effective investigation. Accordingly an investigation with a satisfactory outcome in relation to the substantive grounds of inquiry may not be an effective investigation if it does not reach that conclusion with promptness and reasonable expedition.

The promptness and reasonable expedition of the investigation into the death.

[11] It is proposed to consider the investigation in the present case in five stages. The first stage was between the death of the deceased on 19 October 2003 and the completion of the Prison Service review on 13 February 2004. That review was then forwarded to Prison Service Headquarters. There is no criticism of the first stage.

[12] The second stage began on 5 March 2004, when the applicant made a statement to police, and concluded in August 2004 with the commencement of a criminal investigation. The applicant's police statement raised her concerns about the treatment of the deceased in the prison by prison staff and medical staff. This led to a police request for disclosure of the deceased's medical notes. The deceased's medical notes were in the possession of the Prison Service but, by mistake, the Prison Service thought that the medical notes were not available as they were believed to have been forwarded to a consultant psychiatrist and that they were required for the purposes of judicial review. Eventually the mistakes were discovered and the medical notes became available in August 2004. There was a delay in the process between March and August 2004 as the medical notes ought to have been produced by the Prison Service in March 2004. Had that occurred the criminal investigation undertaken by police would have begun at that time.

[13] The third stage was from August 2004, when the police criminal investigation began, to 18 May 2005 when the police file was forwarded to the Public Prosecution Service. There is a general complaint about the length of the investigation but no specific failing has been identified.

[14] The fourth stage was from 18 May 2005, when the PPS received the police file, to 30 September 2005 when the PPS issued a direction of no prosecution. The file was with the PPS for 134 days and the applicant refers to PPS targets for issuing directions of no prosecution which provide that 50% of such directions will issue within 40 days and 95% will issue within 120 days. The police file was forwarded to a senior public prosecutor who dictated to audio tape a first draft of file note which, on transcription around 29 June 2005, the tape was found to be faulty. Because of leave and other

work commitments the senior public prosecutor did not replace the first draft of the file note until the end of August 2005. Thereafter the file note progressed in the usual manner leading to the direction of no prosecution on 30 September 2005. There was a delay of some two months by PPS in the issue of the direction of no prosecution by reason of a faulty audio tape.

[15] The fifth stage was from 30 September 2005, when the PPS issued the direction of no prosecution, to 17 February 2006 when the Inquest was concluded. The Coroner held his first preliminary hearing on 21 October 2005 a second preliminary hearing on 14 November 2005 a third preliminary hearing on 24 January 2006 a fourth preliminary hearing on 26 January 2006, the Inquest commenced on 1 February 2006 and concluded on 17 February 2006. The applicant does not complain about the progress of the Inquest from October 2005 to February 2006 but rather about the failure of the Coroner in relation to oversight of the Prison Service, the Police Service and the Prosecution Service in the period from the death in October 2003 to the direction of no prosecution in September 2005. The applicant refers to the statutory duty of the Coroner to hold an inquest "as soon as practicable" after notice of the death, which obligation was said to require the opening of the Inquest, review by the Coroner of the steps being taken by other agencies and the imposition of a timetable on those involved in the investigative process. Ms Elliott for the Coroner contends that the Inquest must await the conclusion of the police inquiry and the prospect of criminal proceedings. The Coroner informed the applicant in correspondence that he was awaiting the outcome of a police investigation. The Coroner did enquire into the progress of the police investigation and on 19 August 2004 and on 24 February 2005 attended meetings with police in relation to the progress of the investigation. On 21 March 2005, on an inquiry by the Coroner's secretary to police, the Coroner was informed that the investigation was continuing. I am not satisfied that there are any steps that the Coroner ought to have taken that were not taken. There may well be times when a Coroner believes that an agency involved in the investigation into a death has not proceeded with reasonable expedition and may take steps to inquire into the causes of any lack of progress. However there are limits on a Coroner who cannot undertake the investigation, either by himself or through his staff, and who may be handicapped in proceeding with an Inquest when, for whatever reason, an investigating agency has not completed its inquiries.

[16] In assessing promptness and reasonable expedition it would not be appropriate to undertake an inquiry into every detail of an investigation. Any significant period of delay by any investigating agency will require explanation. There can be no standard period within which investigations should be completed. Each case depends on the character of the investigation required by the circumstances of that case. There will be a lack of promptness and reasonable expedition if there is such delay as is of significance to the overall period of the investigation.

[17] Overall I was satisfied that there was a delay of seven months in the investigation, being the period from March to August 2004 when the Prison Service failed to produce the deceased's medical notes and the period from June to August 2005 when the Prosecution Service failed to transcribe the first draft of the file note. This is a significant period in an investigation which in total lasted two years four months. This amounts to an absence of reasonable expedition in the progress of the official investigation.

The disclosure of the internal Prison Service review.

[18] The second issue concerns disclosure to the applicant of the Prison Service review. The procedural requirements set out in Jordan v UK (paragraph 109) and Edwards v UK (paragraph 73) state that the next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests, referring to Gulec v Turkey where the father of the victims was not informed of the decisions not to prosecute and Ogur v Turkey where the family of the victim has no access to the investigation and court documents.

[19] The Prison Service review was completed and forwarded to Prison Service Headquarters on 13 February 2004. The applicant's solicitors wrote to the Coroner's Office on 13 August 2004 requesting a copy of the report. On 9 March 2005 the Prison Service forwarded the report to the Coroner and it was released to the applicant. In correspondence between the Prison Service and the applicant's solicitor, the Prison Service took the position that the Prison Service review was an internal matter, but that it would be released to the applicant if the Coroner so directed. The Prison Service indicated to the applicant's solicitors that it was open to the applicant to apply to the Coroner for documents in the Inquest proceedings.

[20] In England and Wales the Prison Service has issued Prison Service Order No. 1301 as amended on 4 February 2003 on "Investigating Deaths in Custody". Annex J of the order contains a protocol on disclosure which at paragraph 5 states in relation to disclosure of material before the Inquest -

"The Prison Service will offer the report of its internal investigation into a death, subject to the restrictions outlined below, to those persons ruled as having a proper interest in the Inquest by the Coroner and who, therefore, are eligible for the disclosure of the report. This will generally include the family of the deceased."

The limitations on disclosure set out in Order 1301 state that while reports on the internal investigation into a death in prison custody are the property of the Prison Service, the Prison Service should take account of and respect the views of the Coroner on the disclosure of such material. Some kinds of material require particular consideration and are referred to in paragraph 23

of Order 1301, being those that involve prejudice to other processes, sensitive or personal information, irrelevant material and security or other public interest information.

[21] There is no Northern Ireland Prison Service equivalent to Order 1301. Nevertheless it sets out a protocol that might usefully regulate papers generated by a Prison Service investigation into a death in custody. It is appropriate that the Prison Service should recognise the role of the Coroner in relation to disclosure of any internal review of a death in prison. It is appropriate that the Coroner should make any decision on disclosure of any internal review, taking account of the various interests involved so as to determine whether, to what extent, when and to whom there should be such disclosure.

[22] The applicant requested a copy of the internal review from the Prison Service and was referred to the Coroner. The applicant's request to the Coroner for production of the internal review was the occasion for arrangements to be made between the applicant, the Prison Service, the Coroner and any other interested parties for the Coroner to determine what, if any, disclosure to the applicant was appropriate and at what stage. When the internal review was eventually received by the Coroner it appears to have been the position at that stage that there were no competing interests that required either the whole or any part of the internal review to be withheld from the applicant. It has not been established at what date the internal review would have been disclosed to the applicant had arrangements been made for the Coroner to make a decision further to the applicants request to the Coroner. However it is assumed that such a process would have led to the earlier disclosure to the applicant of the internal review.

Remedy.

[23] The applicant seeks declarations in relation to the issue of promptness and the issue of disclosure of the internal Prison Service review. A declaration may be appropriate if an investigation into a death has not been concluded or a supposedly concluded investigation is liable to be reopened, where such a declaration may impact on the further investigation. Further a declaration may be appropriate where it may impact on investigations into other deaths. In the present case the investigation by the State into the death has been completed and there is no claim that any issue requires further investigation. It is not considered necessary to make a declaration either for the purposes of the investigation in the present case or for the effect it may have on the investigation into other deaths. It is sufficient that findings have been made in the present case that the investigation did not proceed with promptness and reasonable expedition and that there was delay in the disclosure to the applicant of the internal Prison Service review.