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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY HUGH JORDAN FOR

JUDICIAL REVIEW

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KERR J

Introduction

[1] This is an application by Hugh Jordan for judicial review of the decision of the Director of Public Prosecutions for Northern Ireland refusing to give reasons for his decision not to prosecute the police officer who caused the death of the applicant's son Pearse Jordan.

Background

[2] Pearse Jordan was shot dead by a member of the Royal Ulster Constabulary on 25 November 1992. The circumstances of the shooting are highly controversial and have been the subject of much litigation.

[3] On 16 November 1993 Alan G T White, acting on behalf of the Director of Public Prosecutions, directed that there should not be a prosecution of the officer who shot Pearse Jordan.

[4] At the beginning of January 1995, a coroner's inquest into the death of Mr Jordan began. In the same month the police reported further to the DPP and the inquest was adjourned. On 10 February 1995 Mr White wrote to the applicant's solicitors as follows: -

> "A supplementary report into the fatal shooting of Patrick Pearse Jordan on 25 November 1992 has been received from the Chief Constable. The facts and information reported have been considered. The Director has informed the Chief Constable

> that the direction which issued on 16 November 1993 stands. The Director has asked that any further evidence which is adduced at the inquest into the death of Patrick Pearse Jordan and which is relevant to the Director's statutory functions under the Prosecution of Offences (Northern Ireland) Order 1972 should be reported"

The applicant's solicitors replied to this letter on 21 March 1995 asking that Mr White provide reasons for the decision communicated by his letter of 10 February and seeking clarification of the further information received from the Chief Constable. On 27 March 1995 Mr White replied stating,

> "Following careful consideration of the facts and information reported in the supplementary [police] report, it was concluded that the evidence remained insufficient to warrant the prosecution of any person in relation to the death of Mr Jordan."

5. On 10 September 2001 the applicant's solicitors again wrote to the DPP and referred to the decision of ECtHR in *Jordan v UK* and asked to be provided with information relating to the decisions not to prosecute the police officer who killed Pearse Jordan. After some further correspondence on 1 February 2002 Mr Raymond Kitson on behalf of the DPP replied. He stated: -

> "As you will be aware from your involvement in *Jordan v United Kingdom* the operative decision in this matter constituted a direction of no prosecution, issued on 16 November 1993. You will further be aware that, arising out of the uncompleted inquest into the death of the deceased, a further report from the police was commissioned, culminating in a letter dated 10 February 1995 from this Department affirming the direction of no prosecution dated 16 November 1993.
>
> As your most recent letter observes, the Director has obtained senior counsel's advices. The Director has been advised in relation to the relevant provisions of the Human Rights Act 1998 – in particular, section 6 (1), section 7 (1), section 7 (5) and section 22 (4). All of these provisions must be considered in the context of the operative date of the Human Rights Act 1998 – 2 October 2000 (with certain very limited exceptions). The

> Director has also been advised of the import and implications of the decisions of the House of Lords in *Regina v Lambert* and *Regina v Kansal.*
>
> As appears from the above, the only "decisions" known to the Director which could conceivably correspond to the "decisions not to prosecute" specified in the first paragraph of your letter of 24 January are those which were made on 16 November 1993 and 10 February 1995 respectively. Each of these decisions predates the effective date of the Human Rights Act 1998.
>
> Your letter contends that the Director has infringed section 6 of the Human Rights Act 1998. On the grounds outlined above this contention is rejected. While conscious of the duty to which he is subjected under section 6 in appropriate cases, the Director considers that section 6 does not oblige him to accede to the request enshrined in the first paragraph of your letter."

The case for the applicant

[6] The applicant contends that the policy of the DPP as revealed in a response by the Attorney General to a written question in the House of Lords was not to give reasons other than in the most general terms but that each request for reasons would be dealt with by considering whether the general practice should be followed. It is suggested that the DPP should therefore have examined the propriety of applying the general practice on receipt of the request for reasons in September 2001.

[7] The applicant submits that rather than reviewing and examining the propriety of a refusal to give reasons in this case, the DPP misdirected himself by focusing on the date of the coming into force of the Human Rights Act. Effectively, therefore, the DPP failed to apply his own policy of considering whether each request for reasons merited a departure from the general practice.

[8] It is further submitted by the applicant that if the DPP had reconsidered his decision not to give reasons he would have concluded that this was an exceptional case justifying departure from his normal practice. As a public authority he would have been bound to recognise that the applicant's article 2 rights would be violated if reasons were not given. The applicant relies in particular on the decision of ECtHR in *Jordan v UK* [2001] ECHR 24746 in which the court said that the death of Pearse Jordan "cries out for an

explanation". It is suggested that the DPP should contribute to that explanation by revealing why it has been decided that the person who caused the death of Mr Jordan should not be prosecuted.

The case for the respondent

[9] The respondent submits that the decision of ECtHR in *Jordan v UK* should not be followed. It is suggested that this decision neglected to take account of relevant international law and practice, particularly in relation to the need for prosecutors to keep matters confidential in the interests of justice. It is further suggested that the court failed to have regard to the fact that the inquest had not been completed and that he had requested that any further evidence adduced at the inquest be reported to him.

[10] The respondent argues that the Human Rights Act is designed to be prospective in effect. All material acts in this case occurred before February 1995. The non-retrospectivity of HRA could not be circumvented by events occurring after 2 October such as correspondence with the DPP and the publication of the decision in *Jordan v UK.*

Jordan v United Kingdom

[11] This was one of a series of cases that recognised again the need for procedural safeguards to underpin the substantive right to life guaranteed by article 2 of ECHR. An aspect of those procedural safeguards is an explanation of the circumstances in which the deceased died. This is particularly required when the deceased was killed by an agent of the state. The court envisaged that the DPP could have a critical role to play in this. It dealt with that role in the following paragraphs of its judgment: -

> "122. The Court recalls that the DPP is an independent legal officer charged with the responsibility to decide whether to bring prosecutions in respect of any possible criminal offences committed by a police officer. He is not required to give reasons for any decision not to prosecute and in this case he did not do so. No challenge by way of judicial review exists to require him to give reasons in Northern Ireland, though it may be noted that in England and Wales, where the inquest jury may still reach verdicts of unlawful death, the courts have required the DPP to reconsider a decision not to prosecute in the light of such a verdict, and will review whether those reasons are sufficient. This possibility does not exist in Northern Ireland where the inquest

> jury is no longer permitted to issue verdicts concerning the lawfulness or otherwise of a death.
>
> 123. The Court does not doubt the independence of the DPP. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.
>
> 124. In this case, Pearse Jordan was shot and killed while unarmed. It is a situation which, to borrow the words of the domestic courts, cries out for an explanation. The applicant was however not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however is not the case."

[12] This passage from the court's judgment contains a number of important observations. Firstly, the independence of the DPP is expressly acknowledged. It is therefore not because of any perceived lack of impartiality on his part that the duty to give reasons may arise. Secondly, it is clearly implicit in the court's decision that the DPP will not be required to give reasons for deciding not to prosecute in every case. The conclusion that such an explanation was required to satisfy the requirements of article 2 in the *Jordan* case arose because of several factors that pertain in this case. They are (i) doubts about the lack of independence of the police investigation; (ii) the absence of the opportunity for public scrutiny; (iii) there was no other forum in which the reasons that the death occurred were to be examined; (iv) there was therefore "no reasoned decision available to reassure a concerned public that the rule of law had been respected".

[13] The challenge by the respondent to the correctness of this decision focused principally on the asserted failure of ECtHR to have regard to the need for confidentiality in decisions whether to prosecute. I cannot accept that the court failed to have regard to this factor. At paragraph 82 of the decision the court set out the observations of the government on the practice of the DPP in relation to the giving of reasons as follows: -

> "82. According to the Government's observations submitted on 18 June 1998, it had been the practice of successive DPPs to refrain from giving reasons for decisions not to institute or proceed with criminal prosecutions other than in the most general terms. This practice was based upon the consideration that:
>
> (1) if reason were given in one or more cases, they would be required to be given in all. Otherwise, erroneous conclusions might be drawn in relation to those cases where reasons were refused, involving either unjust implications regarding the guilt of some individuals or suspicions of malpractice;
>
> (2) the reason not to prosecute might often be the unavailability of a particular item of evidence essential to establish the case (eg sudden death or flight of a witness or intimidation). To indicate such a factor as the sole reason for not prosecuting might lead to assumptions of guilt in the public estimation;
>
> (3) the publication of the reasons might cause pain or damage to persons other than the suspect (eg. the assessment of the credibility or mental condition of the victim or other witnesses);
>
> (4) in a substantial category of cases decisions not to prosecute were based on the DPP's assessment of the public interest. Where the sole reason not to prosecute was the age, mental or physical health of the suspect, publication would not be appropriate and could lead to unjust implications;
>
> (5) there might be considerations of national security which affected the safety of individuals

> (eg where no prosecution could safely or fairly be brought without disclosing information which would be of assistance to terrorist organisations, would impair the effectiveness of the counter-terrorist operations of the security forces or endanger the lives of such personnel and their families or informants)."

[14] Most, if not all, of these factors are concerned with why it was said to be necessary to keep confidential the reasoning underlying a decision not to prosecute. It is inconceivable that the court, having set out the arguments advanced on behalf of the DPP, would have ignored them in reaching its conclusion on this aspect of the case. In this context it is noteworthy that it was not submitted to the court that there were particular reasons that confidentiality was required in this case.

[15] The respondent submitted, however, that ECtHR had failed to refer in its decision to the judgment of the Court of Appeal in this jurisdiction in *Re Adams' Application for Judicial Review* [2001] NI 1 and that of the House of Lords in *Taylor v Serious Fraud Office* [1998] 4 All ER 801. It was suggested that if the European Court had considered these authorities it might well have reached a different conclusion and that since this court was by virtue of section 2 (1) (a) of the Human Rights Act 1998 only to take into account a judgment of ECtHR, I should prefer the reasoning of the domestic courts on this matter. The applicant's riposte was that ECtHR had considered the decision in *Re Adams' Application for Judicial Review* at first instance and this had referred to *Taylor v Serious Fraud Office*; furthermore, the decision of the Court of Appeal in *Re Adams' Application for Judicial Review* had been included in written submissions made to the court after the oral hearing. Rather than attempt to resolve the dispute as to whether these materials were before ECtHR, it appears to me to be preferable to examine both decisions to see whether they would have made a difference to the reasoning of the court in *Jordan v UK.*

Taylor v Serious Fraud Office

[16] In this case two documents generated during an investigation by the Serious Fraud Office were revealed to the plaintiffs by solicitors acting for defendants in criminal proceedings. The plaintiffs issued proceedings for libel against the Serious Fraud Office and others. On an application by the defendants, the action was struck out on the ground that the two documents were subject to an implied undertaking, analogous to that in relation to material produced on discovery in civil proceedings, that they would not be used for any purpose other than the defence in the criminal proceedings. On an eventual appeal to the House of Lords it was held that there was such an implied undertaking and its purpose was to prevent abuse of process by

restricting the damage which might be caused by the publication or dissemination of defamatory statements contained in disclosed documents. It was also held to be necessary in the interests of the administration of justice that potential witnesses in criminal proceedings and those investigating a crime or possible crime or assisting a criminal inquiry were protected by absolute immunity from suit, since the public interest required that all persons involved in a criminal investigation should be able to communicate freely without being inhibited by the threat of defamation proceedings.

[17] In my view, nothing in the decision in *Taylor v Serious Fraud Office* detracts from the conclusions of the ECtHR in *Jordan v UK. Taylor* was concerned with the need for immunity from suit to attach to communications made in the course of a criminal investigation. It was not concerned with the need to reveal or withhold information about the reasons for taking or deciding not to pursue a prosecution. Indeed, in *Taylor* the information provided to the investigators was revealed.

[18] It is true that the House of Lords recognised that there was a need for confidentiality in dealing with information received by prosecutors in the course of a criminal investigation but it was not suggested that this was an absolute right. On the contrary, it was expressly acknowledged that there would be circumstances in which the information provided would have to be disclosed. At pages 810/811 Lord Hoffmann said: -

> "Many people give assistance to the police and other investigatory agencies, either voluntarily or under compulsion, without coming within the category of informers whose identity can be concealed on grounds of public interest. They will be moved or obliged to give the information because they or the law consider that the interests of justice so require. *They must naturally accept that the interests of justice may in the end require the publication of the information*, or at any rate its disclosure to the accused for the purposes of enabling him to conduct his defence. But there seems to me no reason why the law should not encourage their assistance by offering them the assurance that, subject to these overriding requirements, their privacy and confidentiality will be respected." [italics added]

[19] I am satisfied, therefore, that *Taylor v Serious Fraud Office* does not impel a different conclusion from that reached by the Strasbourg court in *Jordan*. As I have said, *Taylor* is concerned with the need to protect witnesses (in that case by ensuring their immunity from suit in libel proceedings)

whereas the present case involves the question of whether the reasons for a decision not to prosecute should be disclosed. It will often be possible to reveal the reasons not to prosecute without compromising the confidentiality of information supplied by witnesses. Where that is not possible, a judgment will have to be made as to whether the need to maintain confidentiality must yield to the need to protect article 2 procedural rights. Where such a need arises, confidentiality of the decision making process (although desirable in many circumstances) cannot prevail against it.

Re Adams' application

[20] In this case the appellant was arrested by police in 1994 and was subsequently convicted of terrorist offences. He alleged that police officers had assaulted him at various stages in his arrest and initial detention and brought proceedings in the High Court against the Chief Constable for damages. He was awarded compensation in February 1998. Police had carried out an investigation in 1994 into the appellant's complaints and reported to the DPP. A further report was submitted after the completion of criminal proceedings against him. Thereafter DPP issued a direction of no prosecution in respect of any police officer involved in the arrest. After the 1998 judgment in the appellant's favour, the police referred the case to the Independent Commission for Police Complaints for Northern Ireland (ICPC) and appointed an investigating officer from another force with the ICPC's approval. That officer's report was delivered to the DPP's department in December 1998, as was a certificate from the ICPC stating that the investigation had been conducted to its satisfaction. The DPP was advised that there was insufficient evidence to afford a reasonable prospect of obtaining a conviction of any police officer involved in A's arrest, and in August 1999 he accordingly issued a direction of no prosecution. This decision was reiterated in a letter to A's solicitors in September 1999, which also refused publication of the investigating officer's report.

[21] The appellant issued proceedings for judicial review challenging the DPP's decision not to prosecute any of the police officers who were alleged to have assaulted him and the refusal to give reasons for that decision. The application was dismissed and the appellant appealed. Dealing with the claim that the DPP should have given reasons, Carswell LCJ, delivering the judgment of the court, said at page 18: -

> "We consider that … the DPP is not subject to the rules known as procedural fairness, because he is not adjudicating in the same way as an administrator."

[22] The conclusion that the DPP is not subject to the rules of procedural fairness does not sound, in my opinion, on the question whether he is under

an obligation to provide reasons in order to comply with the requirements of article 2 of the convention. The latter obligation (if it is found to exist) arises in a completely different context. It could not be avoided because of the status of the DPP or the nature of his role in deciding whether to institute a prosecution.

[23] The Court of Appeal, although it decided that the appellant could not rely on the European Convention because of the non-retrospective nature of the Human Rights Act, did consider arguments advanced under article 3. It held that in the particular circumstances of that case the appellant could not rely on article 3. It should be noted, however, that the appellant had sought to argue merely that the obligation imposed upon states by article 3 included the duty to carry out a prompt, impartial and effective investigation into allegations of breaches of the article, which extended to giving victims access to investigation files and other materials.

[24] After considering a number of decisions of ECtHR, Carswell LCJ said at page 22: -

> "… the ECtHR does not lay down any ruling that for an investigation to be regarded as effective the claimant must have access to the investigation papers. It is merely one element among others which may demonstrate the inadequacy of an investigation. It does not follow that a thoroughly conducted investigation is to be regarded as deficient if the complainant has not been given access to the investigators' documents. We would observe, moreover, that in referring to access to the case file in *Ogur v Turkey* the Court may have had in mind inspection of a document of the nature of the examining magistrate's dossier in an inquisitorial system, and that quite different considerations may apply to the investigation files of the RUC and DPP under our criminal law system. The principle with which the Court was concerned in each case was that the state's investigation of the conduct of its representatives be effective and independent. The steps which are required to achieve this will depend on the facts of the case and may vary enormously."

[25] I do not consider that this passage has any bearing on the duty of the DPP to provide reasons for his decision not to prosecute. I have concluded therefore that nothing in either *Taylor* or *Adams* impinges on the reasoning of ECtHR in *Jordan*. But for the question of retrospectivity (to which I shall turn

presently) I can find no reason not to follow the decision of the European Court, finding myself in complete agreement with the reasoning that underlies it. In particular, I do not consider that the fact that the inquest has not been completed is a reason that the DPP should be absolved of the need to give reasons. The possibility that the inquest may, at some unspecified future time, supply an answer to the unresolved questions surrounding the death of Pearse Jordan cannot relieve the DPP of his duty to explain the reasons for deciding not to prosecute if that will "reassure a concerned public that the rule of law had been respected".

Retrospectivity

[26] The decisions of the DPP not to prosecute in this case were taken in November 1993 and February 1995. The refusal to give reasons is a continuing one, however, the applicant says. It is argued that the DPP when faced with the request for reasons in September 2001 was obliged to confront a number of new considerations. ECtHR had decided that he was under an obligation to provide reasons in this case; his own policy was evolving as illustrated by the Attorney General's statement in Parliament; as a public authority he was under an obligation not to act incompatibly with the applicant's convention rights (section 6 of HRA) – the continuing refusal to provide those reasons constituted a fresh violation of article 2.

[27] The Court of Appeal in *Adams* dealt with the issue of retrospectivity in the following passage at pages 19/20 of its judgment: -

> "When the DPP made the decision or decisions not to prosecute the police officers, the Human Rights Act 1998 had not yet come into operation. He is now, as a public authority, bound by the terms of s 6 not to act in a way which is incompatible with a Convention right, but he was not then so bound. It follows in our opinion that he was not under a legal obligation to have regard to the provisions of the Convention when reaching his decision not to prosecute. By s 22(4) of the Act, s 7(1)(b)—which enables a person who claims that a public authority has acted in a way made unlawful by s 6(1) to rely on the Convention right or rights concerned in any legal proceedings—does not apply to an act which took place before the coming into force of s 7. Accordingly, if the DPP's decision was in breach of a Convention right, it is not made retrospectively unlawful. We are unable to agree with the appellant's submission that the decision not to prosecute and not to give reasons for that

> decision are continuing acts which now come within the 1998 Act.
>
> It was also submitted on behalf of the appellant that since the court, as a public authority, may not act in a way which is incompatible with a Convention right, it must afford him the appropriate relief if the decision of the DPP, assuming that it were made now, would be in breach of any such Convention right. We are unable to accept this proposition, for to do so would stultify s 22(4) of the 1998 Act. Section 7(1)(b) is to apply to allow a victim to rely on a Convention right in proceedings brought by or at the instigation of a public authority, whenever the act complained of was committed. But the victim may not invoke s 7(1)(b) to rely on a Convention right in respect of an act taking place before the subsection came into force. Nor do we see how the court could be said to be acting in a way which is incompatible with a Convention right if it holds that a decision was lawful at the time when it was made and declines to set it aside because it would be unlawful if made now. The appellant did not have a Convention right when the decision was made; and he is not entitled to rely on any Convention right in respect of decisions of the DPP made before 2 October 2000. For these reasons, accordingly, we would not be prepared to hold that the DPP's decision is subject to attack on any grounds based on the Convention."

[28] The conclusions expressed in this passage are binding on this court. I consider that the decisions of the DPP taken before the Convention had been incorporated into domestic law cannot be transformed into decisions that are subject to the Convention simply because the DPP has been asked to review those earlier decisions. In two recent decisions the House of Lords has held that the Human Rights Act was not retrospective: see *R v Lambert* [2001] 3 WLR 206 and *R v Kansal* (*No 2*) [2002] 2 AC 69. To require the DPP to give reasons for his decisions in 1993 and 1995 would inevitably involve giving retrospective effect to the 1998 Act and this is simply not possible.

[29] The application for judicial review must be dismissed.