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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

TERESA JORDAN

Applicant/Respondent;

-v-

THE POLICE SERVICE OF NORTHERN IRELAND

Respondent/Appellant.

Before: Morgan LCJ, Girvan LJ and Gillen LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal by the Police Service of Northern Ireland ("PSNI") from an award of damages made by Stephens J in the sum of £7500 against it as a result of his finding that the PSNI delayed the progress of the Pearse Jordan inquest in breach of Article 2 of the European Convention on Human Rights and contrary to section 6 of the Human Rights Act 1998 ("HRA"). Dr McGleenan QC and Mr Wolfe QC appeared for the PSNI and Miss Quinlivan QC and Miss Doherty QC for Ms Jordan. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The background to this appeal has been helpfully set out in a judgment of the Supreme Court given on 6 March 2019. The respondent's son, Pearse Jordan, was shot and killed by a member of the Royal Ulster Constabulary on 25 November 1992. In 1994 the respondent's husband, Hugh Jordan, made an application to the European Court of Human Rights ("ECtHR"), complaining that the failure to carry out a prompt and effective investigation into his son's death was a violation of Article 2. An inquest commenced on 4 January 1995 but was adjourned shortly afterwards. On 4 May 2001 the ECtHR upheld Mr Jordan's complaint and awarded him £10,000 in respect of non-pecuniary damage, together with costs and expenses: Jordan v United Kingdom (2003) 37 EHRR 2.

[3] A fresh inquest into Pearse Jordan's death commenced on 24 September 2012, and a verdict was delivered on 26 October 2012. Hugh Jordan then brought proceedings for judicial review of the conduct of the inquest, which resulted in the

verdict being quashed: In re Jordan's application for Judicial Review [2014] NIQB 11. A subsequent appeal against that decision was dismissed: [2014] NICA 76.

[4] In 2013 Hugh Jordan brought proceedings for judicial review, in which he sought declarations that the Coroner and the PSNI had been responsible for delay in the commencement of the inquest in violation of his rights under Article 2, together with awards of damages under section 8 of the HRA in respect of the delay from 4 May 2001 until 24 September 2012. Stephens J upheld the claim against the PSNI, finding that there had been a series of failures to disclose relevant information until compelled to do so, and also a delay in commencing a process of risk assessment relating to the anonymity of witnesses: [2014] NIQB 11, paras [350]-[359]. Following a further hearing in that case and five other similar cases, he made a declaration that the PSNI "delayed progress of the Pearse Jordan inquest in breach of Article 2 of the European Convention on Human Rights and contrary to section 6 of the Human Rights Act 1998", and awarded damages of £7,500: [2014] NIQB 71.

[5] The Chief Constable of the PSNI appealed against the declaration and award of damages, contending that although the PSNI might have been responsible for part of the delay, they should not have orders made against them where other state authorities had also been responsible for the delay but were not party to the proceedings. Hugh Jordan cross-appealed against the dismissal of his claim against the Coroner but the cross appeal was dismissed by the Court of Appeal. The Department of Justice was joined as a respondent to the proceedings.

[6] Judgment was handed down on 22 September 2015: [2015] NICA 66. That judgment was subsequently withdrawn and a revised judgment, also dated 22 September 2015, was issued on 12 May 2017. The resultant orders, also dated 22 September 2015, were made on 10 June 2017. The immediate result of the orders was a stay of proceedings.

[7] A further inquest into Pearse Jordan's death commenced on 22 February 2016 and a verdict was delivered on 9 November 2016. That verdict was challenged in judicial review proceedings brought by Pearse Jordan's mother, the present respondent, but without success: In re Jordan's application for Judicial Review [2018] NICA 34. She also took over the conduct of the present proceedings from her husband as his health had deteriorated so as to prevent him from taking part.

[8] On 23 October 2017, following a hearing which it had convened of its own motion in the exercise of its case management functions, the Court of Appeal lifted the stay on the present proceedings. It had been in place for a period of two years and one month. The appeal on the damages issue was heard on 31 May 2018. At that time there was an outstanding appeal to the Supreme Court from the Order staying the proceedings which was heard on 23 October 2018. Judgment was delivered on 6 March 2019. The Supreme Court allowed the appeal on the basis that this court had not taken into account the question of proportionality and if it had done so might not have reached the same conclusion. No further submissions were made by either party following the Supreme Court judgment.

The claim for damages

[9] After the delivery of the judgment of the ECtHR in May 2001 there was further litigation in relation to various aspects of the procedure which should apply in the Coroner's Court. Those issues included the need for the provision of legal aid for families of the deceased and changes to the Coroners Rules to provide for the attendance of witnesses. The most significant dispute, however, related to the obligation on the PSNI to provide disclosure to the coroner on an ongoing basis of all relevant material. This was eventually dealt with in a judgment delivered by the House of Lords on 28 March 2007 in which it was established that the police were under an obligation to provide all relevant information to the Coroner as Mr Jordan had contended.

[10] The respondent subsequently instituted proceedings against the Senior Coroner contending that he should be removed from the hearing of the inquest on the grounds of both apparent and substantive bias. That application was dismissed by Hart J [2009] NIQB 76 but it is of some relevance to these proceedings because the court examined carefully the nature of the delays which had occurred in the period up to the delivery of the judgment in 2009 and the reasons for that. After a detailed review of the circumstances giving rise to delay in the period between 1995 and 2007 Hart J concluded at [86] that virtually all of the delay which occurred during that period was occasioned by –

> "(1) deficiencies in the Coroners Rules;
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> (2) inaction on the part of the government in making changes in the Rules;
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> (3) the non-availability at the early stages of legal aid for inquests;
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> (4) the steadfast resistance of the Chief Constable to making available to the applicant various categories of documents which the applicant sought; and
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> (5) frequent, complex and protracted litigation over many issues arising out of (1) to (4)."

[11] Hart J then carefully considered the period after the delivery of the judgment of the House of Lords in March 2007 through to the summer of 2009. He examined transcripts of the preliminary hearings and the voluminous correspondence between the parties. At [94] he said that he was satisfied that it was apparent that the repeated delays in commencing the inquest during that period were entirely due to the continuing efforts of the PSNI to avoid providing to the next of kin documents that they sought, (a) in respect of the withheld portions of the investigating officer's report and (b) documents promised by the Chief Constable to the next of kin as far back as 2000, together with claims for PII brought by the Chief Constable and the judicial review that generated.

[12] In his consideration of delay at [343], Stephens J noted that Hart J in his lengthy and detailed judgment which had been described by the Court of Appeal as compelling had carefully analysed all the periods of delay. He noted that Hart J attributed delay to amongst other matters deficiencies in the Coroners Rules and to the PSNI. He recognised that those deficiencies had previously been recognised by the Court of Appeal. He indicated at [349] that he was content that the PSNI had both created obstacles and difficulties which prevented progress in the inquest and had also not reacted appropriately to other obstacles and difficulties. He looked in particular at issues over redacted documents which remained unresolved until May 2008 and the failure of the PSNI to devise a process of risk assessment for anonymity applications which was responsible for the further adjournment of the inquest.

[13] Stephens J noted the criticisms which had been made of coronial law in the following passages:

> "[345] Deficiencies in coronial law have been recognised on a number of occasions. The Court of Appeal on 6 October 2009 stated:-
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> > 'The current state of coronial law is extremely unsatisfactory. It is developing by means of piecemeal incremental case law. It is marked by an absence of clearly drafted and easily enforceable procedural rules. Its complexity, confusion and inadequacies make the function of a coroner extremely difficult and is called on to apply case law which does not always speak with one voice or consistently. One must sympathise with any coroner called on to deal with a contentious inquest of this nature which has become by its nature and background extremely adversarial. The problems are compounded by the fact that the Police Service which would normally be expected to assist a coroner in non-contentious cases is itself a party which stands accused of wrong-doing. It is not apparent that entirely satisfactory arrangements exist to enable the PSNI to dispassionately perform its functions of assisting the coroner when it has its own interests to further and protect. If nothing else, it is clear from this matter that Northern Ireland coronial law and

> practice requires a focused and clear review to ensure the avoidance of the procedural difficulties that have arisen in this inquest. What is also clear is that the proliferation of satellite litigation is extremely unsatisfactory and diverts attention from the main issues to be decided and contributes to delay.'

[346] *In the matter of an application by Officers C, D, H & R* [2012] NICA 47 Girvan LJ stated:

> '… the law of inquests and coroners has developed in an unstructured and piecemeal way, particularly following the incorporation of the European Convention of Human Rights and the need to ensure that inquests comply with the state's Article 2 obligation to ensure proper investigation into deaths involving state agencies. The underlying statutory provisions and rules governing inquests are outdated and were clearly not drafted with the Convention in mind and they have not been properly updated to be made fit for purpose in the new Convention world. The state authorities have effectively allowed costly litigation to take the place of sensible, rational and structured reform of coronial law'."

[14] Those passages also reflected findings of the Strasbourg court that "the inquest process itself was not structurally capable at the relevant time of providing the applicants with access to an effective investigation which will commence promptly and be conducted with due expedition" (McCaughey v UK [2013] ECHR 43098/09 [138], Hemsworth v UK (16 July 2013 at [73]) and McDonnell v UK (9 December 2014 at [89])). After delivery of his judgment on 31 January 2014 Stephens J raised the issue of whether the Department of Justice should be added as a notice party in relation to the damages issue. He noted that in five other claims in which the PSNI and other public authorities were joined and in which a declaration accepting delay in breach of Article 2 was made, the Department of Justice had taken responsibility for the periods of delay and the awards of damages of £7,500 in each case without any requirement to analyse the individual responsibility for delay of any particular public authority. In this case, however, the Department objected to being joined to the proceedings and having regard to the stage which had been reached Stephens J considered it inappropriate to join it as a notice party.

[15] He set out the preconditions to an award of damages under section 8 of the HRA in this and the five other cases that he was considering at [15]:

(a) "a finding of unlawfulness by a public authority of a Convention right. In the five judicial review applications this has been conceded and I have made such a finding in relation to Hugh Jordan's application;

(b) that the court should have power to award damages, or order the payment of compensation, in civil proceedings. It has been accepted that the court does have power to award damages;

(c) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made; and

(d) that the court should consider an award of damages to be just and appropriate."

[16] He reviewed the relevant authorities and concluded that following a finding of a violation of the procedural obligation of promptness the Strasbourg court has consistently found that applicants must thereby have suffered feelings of frustration, distress and anxiety. He set out his finding that such feelings had been suffered in the cases before him. That Court had also consistently found that the non-pecuniary damage was not sufficiently compensated by the finding of a violation and awards of up to £10,000 were common. He concluded that an award of damages was necessary to afford just satisfaction to the applicants before him and that such an award was just and appropriate. In this case he examined in particular whether it was appropriate to make a further award bearing in mind that Mr Jordan had already benefited from an award in 2001. He considered, however, that over a decade had passed between the date of the judgment of the ECtHR and the commencement of the inquest and considered that represented quite exceptional circumstances justifying a further award of damages.

[17] At [31] of his damages judgment Stephens J repeated the principle that he had set forth in his main judgment that where one public authority before the court had not complied with any aspect of the requirement of promptness and reasonable expedition and another public authority not before the court had also been responsible for delay, the award of damages should not be reduced as it was for the state body before the court to seek a contribution if it wished from the other state authority. Although he did not expressly say so it is implicit in his analysis of the issues that this proposition can only apply where the periods of delay are the same. A public authority cannot be responsible for a different period of culpable delay caused by another public body. The learned trial judge then made an award of £7,500 in this case and in each of the other five cases before him.

Legislative Background

[18] Section 8 of the HRA provides that where the court finds that a public authority has acted unlawfully it may grant such relief or remedy or make such order as it considers just and appropriate. Damages may be awarded by a court which has power to award damages in civil proceedings. The rules governing the award of damages set out in section 8(3) and (4):

> "(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –
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> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and
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> (b) the consequences of any decision (of that or any other court) in respect of that act,
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> the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.
>
> (4) In determining:-
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> (a) whether to award damages, or
>
> (b) the amount of an award,
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> the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention."

Section 8(5) provides that a public authority against which damages are awarded is to be treated for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made. That effectively enables a public authority subject to an award of damages to claim contribution in respect of the same damage from another public authority.

[19] The application of the principles on the award of damages for breach of Convention rights was considered by the House of Lords in R (Greenfield) v Secretary of State for the Home Department [2005] UKHL 14. That was a case where the issue arose in the context of Article 6 breaches but the House was able to give general guidance:

(i) Domestic courts when exercising their power to award damages under section 8 should not apply domestic scales of damages.

(ii) Damages did not need ordinarily to be awarded to encourage high standards of compliance by member states since they are already

bound in international law to perform their duties under the Convention in good faith.

(iii) The court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is made and it follows that an award of damages should be just and appropriate.

(iv) Section 8(4) of the HRA required a domestic court to take into account the principles applied by the ECHR under Article 41 not only in determining whether to award damages but also in determining the amount of the award.

[20] Greenfield was considered in R (Faulkner and Sturnham) v Secretary Of State for Justice and Another [2013] UKSC 23 which was a case concerned with breaches of Article 5. Lord Reed, giving the majority judgment, provided some further guidance at [39]:

> "39. Three conclusions can be drawn from this discussion. First, at the present stage of the development of the remedy of damages under section 8 of the 1998 Act, courts should be guided, following *Greenfield*, primarily by any clear and consistent practice of the European court. Secondly, it should be borne in mind that awards by the European court reflect the real value of money in the country in question. The most reliable guidance as to the quantum of awards under section 8 will therefore be awards made by the European court in comparable cases brought by applicants from the UK or other countries with a similar cost of living. Thirdly, courts should resolve disputed issues of fact in the usual way even if the European court, in similar circumstances, would not do so."

Consideration

[21] There is an important structural difference between a claim for damages pursued in the ECtHR and such a claim arising in domestic law. Whereas under the Convention liability rests upon the state, the HRA has devised a procedure broadly similar to that in tort claims where liability falls directly upon the public authority which the court finds has acted unlawfully. In a claim based on delay that can lead to a circumstance where two public authorities are each responsible for the same period of delay or alternatively each is responsible for separate periods of delay.

[22] The difficulties that may arise in the circumstances were explored to some extent in submissions in this case. What is clear, however, is that in a delay case it is necessary to make a finding of the unlawful acts of the relevant public authority and any period of delay for which those unlawful acts bear any responsibility.

[23] The period of delay in respect of which the claim was made ran from 2001 until the inquest commenced in 2012. In the period from 2002 until 2007 there was ongoing litigation concerning the obligation of the PSNI under section 8 of the Coroners Act (Northern Ireland) 1959 ("the 1959 Act") to supply to the coroner such information as they had at the time of notifying him of the death or were thereafter able to obtain. The PSNI had been successful before the Court of Appeal in limiting that obligation. There was nothing in the papers to indicate any suggestion or finding that the PSNI's conduct of the litigation had been in any way improper or unlawful. The fact that the issue was entertained by the House of Lords is in any event a considerable indicator that this was a matter of some considerable substance. Although, therefore, it can be said that the PSNI resisted disclosure of documentation during this period and that its position was subsequently established as being unlawful in breach of section 8 of the 1959 Act it does not follow that the PSNI have been responsible for delay in breach of the procedural obligation under Article 2.

[24] The relevance of prolonged legal proceedings was considered in Jordan v UK (2003) 37 EHRR 2 at [138]. The Court noted that the applicant had contributed significantly to the delays as a result of pursuing legal proceedings but stated:

> "While it is therefore the case that the applicant has contributed significantly to the delays, this has to some extent resulted from the difficulties facing relatives in participating in inquest procedures. It cannot be regarded as unreasonable that the applicant has made use of the legal remedies available to him to challenge these aspects of the inquest procedure. The Court observes that the Coroner, who is responsible for the conduct of the proceedings, acceded to these adjournments. The fact that they were requested by the applicant does not dispense the authorities from ensuring compliance with the requirement for reasonable expedition. If long adjournments are regarded as justified in the interests of procedural fairness to the victim's family, it calls into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family."

There is no finding by Stephens J that the PSNI was responsible for delay in breach of section 6 of the HRA in the period between 2002 and 2007. Throughout that period the PSNI was legitimately pursuing legal proceedings in order to establish clarity about its obligations. We accept that the family of the deceased will have experienced frustration as a result of the delay during the period from 2002 to 2007 but we do not consider that the PSNI can be made responsible for culpable delay arising from the prolongation of proceedings in which the PSNI appear to have engaged appropriately.

[25] Although no express finding was made by the learned trial judge that the lack of clarity on the duty on the PSNI under section 8 of the 1959 Act called into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family there is considerable evidence to support that contention some of which is set out at [13] and [14] above. If such a finding was made it would have highlighted the need for revising legislation. It is not clear in domestic law whether such a failure would have constituted a breach of section 6 of the HRA since section 6(6) provides that a failure to act does not include a failure to introduce in, or lay before, Parliament a proposal for legislation or a failure to make any primary legislation. At the relevant time justice was not a devolved matter and any change was a matter for Westminster.

[26] We are satisfied, therefore, that the only period in respect of which there was unlawful delay in breach of Article 2 for which the PSNI was responsible was the period from March 2007 until May 2008 when the relevant documents were provided. The first issue, therefore, is whether the learned trial judge made his award in respect of that period only and secondly, was he correct in finding it necessary to afford just satisfaction to the respondent and just and appropriate to make the award of damages against the PSNI.

[27] This was a case in which the period of delay alleged by the respondent was from 2001 until September 2012. At [32] of his damages judgment the learned trial judge considered it "appropriate to make the entire award against the PSNI". The passage in the damages judgment to which we have referred at [17] above did not expressly state that the principle therein set out only applied where the relevant state authorities were responsible for the same period of delay. The learned trial judge did not differentiate between those periods where there was culpable delay by the PSNI and those where other factors contributed to the delay. We conclude, therefore, that the learned trial judge imposed liability on the PSNI for the entirety of the period from 2001 until 2012 rather than for the period of culpable delay which we have found.

[28] In his consideration of relevant principles at [125](j) of his main judgment Stephens J said:

> "It was contended on behalf of the applicant that as a result of the decision in *Hemsworth* that a breach of Article 2 can be found *not only* where there are periods of unjustified delay but also where the overall delay in holding the inquest is such that it "cannot be regarded as compatible with the State's obligation under Article 2". If by that contention it is asserted that justified delay can lead to a finding of a breach of Article 2 then I do not consider that to be the basis of the decision in *Hemsworth*."

In that passage the learned trial judge has correctly recognised the need for culpable delay before any finding can be made against a public authority. The only culpable delay that arises in this case is that between March 2007 and May 2008.

[29] Delays of that duration can give rise to an award of damages pursuant to Article 41 of the Convention. In Jordan v UK the ECtHR found culpable two separate periods of eight months delay in proceeding with the inquest. We accept that the respondent would have suffered feelings of frustration, anxiety and distress as a result of the ongoing litigation up to March 2007 and that the persisting failure of the PSNI to honour its legal obligations in the period up to May 2008 would have exacerbated those feelings. The persistent conduct consisting of culpable delay in this instance was a continuation of a failure to provide the required information in face of a decision of the House of Lords in the respondent's favour.

[30] In our view the frustration and distress caused by such conduct against a background of very lengthy delay made it just and appropriate to afford just satisfaction by way of damages. The level of damages had to take into account the relatively short period for which the PSNI was responsible and the fact that the family of the deceased had already received an earlier pecuniary award. We consider that an award of £5,000 is consistent with awards for failure to act with promptitude in other cases from this jurisdiction and we substitute that figure for the sum allowed by the judge.

Conclusion

[31] For the reasons given the appeal is allowed to the extent set out in the preceding paragraph.