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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Jordan's Application [2008] NIQB 148

AN APPLICATION FOR JUDICIAL REVIEW BY HUGH JORDAN

STEPHENS J

Introduction

[1] Patrick Pearse Jordan was shot dead at Falls Road, Belfast on 25 November 1992 as a result of a bullet apparently fired by a police officer. An inquest into his death was opened in 1995. Evidence was given on 4, 5, 6, 9 and 10 January 1995. The inquest was then adjourned and subsequently a decision was made that it should recommence from the start. There have been numerous legal challenges in connection with holding the inquest which is now fixed for hearing on 14 January 2009.

[2] This is an application by Hugh Jordan, the father and next of kin of Patrick Pearse Jordan, for judicial review in respect of a decision by the Chief Constable not to disclose to the applicant all documents disclosed by the Chief Constable to the coroner except for any document which is subject to legal professional privilege or to a valid public interest immunity claim. The Chief Constable has an obligation to furnish to the coroner such documents as he then has or is thereafter able to obtain (subject to any relevant privilege or immunity) concerning the finding of the body or concerning the death of Patrick Pearse Jordan. Thereafter the coroner decides on the relevance of any document to the issues which can be expected to emerge on the hearing of the inquest. The coroner then makes available to the next of kin only the relevant documents. The applicant bases these judicial review proceedings on the contention that, irrespective of the position in other cases, he has 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. It could be said that this judicial review application relates to "non sensitive" documents which are

"perceived" to be irrelevant as the "non sensitive" relevant documents will be made available to the applicant in any event by the coroner. The applicant seeks an order of mandamus and if such an order is granted then the Chief Constable would be required to disclose to the next of kin all such documents irrespective as to whether they were relevant or irrelevant to the issues which can be expected to emerge on the hearing of the inquest.

[3] Ms Karen Quinlivan appeared on behalf of the applicant, Mr McGleenan appeared on behalf of the respondent. Mr Daly appeared on behalf of the coroner. I am grateful to counsel for their succinct written and oral submissions.

[4] I heard and granted the application for leave on Friday 5 December 2008. Thereafter I gave directions and in view of the impending date for the hearing of the inquest I expedited the substantive hearing which was held on Friday 12 December 2008.

[5] There was no disagreement in relation to any of the applicable legal principles.

The factual background

[6] Home Office circular dated 28 April 1999 and numbered 20/1999 ("the circular") provided guidance to Chief Officers of Police (England and Wales). The circular advised Chief Officers, where there has been a death in police custody, to make arrangements, with immediate effect, for the pre inquest disclosure of documentary evidence to interested persons. I set out some of that guidance as follows:-

> "4. . . . disclosure of information held by the authorities in advance of the hearing should help to provide reassurance to the family of the deceased and other interested persons that a full and open police investigation has been conducted, and that they and their legal representatives will not be disadvantaged at the inquest . . .
>
> 5. Chief Officers are advised, therefore, that there should be as great a degree of openness as possible, and that disclosure of documentary material to interested persons before the inquest hearing should be normal practice in the cases described in paragraph 6 below. In all cases Chief Officers will want to consider whether there are compelling reasons why certain documents, or parts of documents, may not be

> disclosed. But there should always be a presumption in favour of openness.
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> . . .
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> 8. All the material which is supplied to the coroner should normally be made available to all those whom the coroner considers to be interested persons.
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> . . .
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> 11. Disclosure of the investigating officer's report will not normally be expected to form part of the pre inquest disclosure. That does not mean, however, that it is impossible for such a report to be disclosed where a Chief Officer considers that it would be right to do so . . .
>
> 12. Pre inquest disclosure to interested persons should be on a confidential basis, solely for the purpose of enabling interested persons to prepare for the inquest. That should be clearly understood by all interested persons at the relevant time. Chief Officers may want to ask interested persons receiving pre inquest disclosure, or the representatives, to give an appropriate undertaking of confidentiality when material is disclosed . . ."

[7] The guidance contained in the Home Office circular was restricted to England and Wales. However with effect from August 1999 the Chief Constable of the RUC voluntarily decided to apply this circular as an instrument of guidance and advice to inquests in Northern Ireland. Furthermore, and contrary to the practice in some English forces, the Chief Constable also decided voluntarily to apply the circular to all inquests and not just those post-dating the circular. Subsequently on 12 October 1999 equivalent guidance to that contained in the circular was issued to police officers in Northern Ireland by Force Order 73/1999. This was superseded by Force Order 61/2000 dated 9 August 2000. Paragraph 3(2) of both of those Force Orders contained guidance that:-

> "All material which is supplied to the coroner should normally be made available to all those whom the coroner considers to be interested parties."

[8] Upon becoming aware of the circular the applicant contended that he had a legitimate expectation that he would receive all the material made available by the Chief Constable to the coroner. However on 3 February 2000 the Chief

Constable wrote to the applicant's solicitors stating that only copies of the statements of witnesses who are to appear at the inquest should be supplied to the applicant and also copies of any statements which the coroner proposes to read out will also be supplied. That other documents provided to the coroner would not be disclosed. Not content with this degree of disclosure and on 28 February 2000 the applicant commenced judicial review proceedings. In those proceedings the applicant sought an order of mandamus to compel the Chief Constable to provide to the applicant pre inquest disclosure comprising "all materials supplied to the coroner" in the inquest into the death of Pearse Jordan. The hearing of that application commenced on 3 October 2000. The Human Rights Act 1998 came into force on 2 October 2000. At the hearing on 3 October 2000 the applicant sought and obtained leave to add an additional ground to his Order 53 statement as follows:-

> "That the Chief Constable's decision refusing to provide the applicant with "all the material supplied to the coroner" is unlawful by virtue of Section 6 of the Human Rights Act 1998 in that the decision is incompatible with Article 2 of the European Convention on Human Rights, whether read alone or read in conjunction with Article 13 of the Convention."

The hearing was adjourned to 12 October 2000.

[9] On 11 October 2000 a further affidavit was sworn by David Mercier, the then legal adviser of the Chief Constable of the RUC. At paragraph 8 he deposed:-

> "8. The Chief Constable has, in any event, reconsidered his initial decision in the Jordan case in the light of the Human Rights Act 1998 and has made a fresh one. In doing so, he has had regard to the arguments which were addressed to the court at the uncompleted hearing of this matter and the ruling made by the court on 3 October 2000. He also had particular regard to the proposed amended ground of challenge. In the particular circumstances of this case, which he considers to be unique in many ways, the Chief Constable has now determined that the materials which are the subject matter of this application for judicial review will, subject to any issues of public interest immunity, be disclosed to the applicant. In order to give full and careful consideration to the potential public interest immunity issues, disclosure of these additional materials cannot be effected forthwith. However, on behalf of the Chief Constable, I would

> aspire to do so within six weeks of the date of swearing this affidavit."

[10] Accordingly the Chief Constable had decided that in respect of *this inquest* he would disclose to the applicant "all materials supplied to the coroner" subject only to the issue of public interest immunity. An issue arises in these proceedings as to whether this commitment was limited to those documents that had at that stage been disclosed by the Chief Constable to the Coroner or as to whether it extended to further documents that were subsequently disclosed by the Chief Constable to the coroner. However it is clear that the commitment extended to both relevant and irrelevant non sensitive documents. Indeed the coroner had at that stage ruled that what were termed "category 2" documents were irrelevant and these were the documents which on any reading the Chief Constable agreed to disclose to the applicant. Accordingly the Chief Constable's commitment on 11 October 2000 clearly encompassed irrelevant documents.

[11] At the adjourned hearing on 12 October 2000 counsel for the Chief Constable informed the court that the Chief Constable had decided to provide pre inquest disclosure to the applicant. In view of that decision the applicant did not proceed with his application for judicial review.

[12] On 28 March 2007 judgment was given by the House of Lords in *Jordan v. Lord Chancellor & Others* and in *McCaughey v. Chief Constable of the PSNI* [2007] NI 214. In respect of the inquest into the death of Martin McGaughey the Chief Constable had been withholding certain documents from the coroner. He had withheld those documents on the basis that he was only obliged under Section 8 of the Coroners Act (Northern Ireland) 1959 to disclose documents to the coroner that were in existence and in his possession when the police notified the coroner of the death. The limitation argued for by the Chief Constable was a limitation in respect of the time at which the documents came into the possession of the police as opposed to a limitation in respect of there relevance in relation to the issues which were expected to emerge on the hearing of the inquest. The disclosure issue in that case turned on the correct construction of Section 8 of the Coroners Act (Northern Ireland) 1959. It was held that Section 8 requires the Police Service of Northern Ireland to furnish to a coroner to whom notice under Section 8 is given such information as it then has or is thereafter able to obtain (subject to any relevant privilege or immunity) concerning the finding of the body or concerning the death.

[13] In this case the Chief Constable asserts that prior to the decision in *McCaughey v. Chief Constable of the PSNI* the practice had been for the RUC or the PSNI to decide what documents were relevant to the issues which were expected to emerge on the hearing of the inquest and only make those documents available to the coroner. That since that decision the practice is that all documents falling within the scope of the inquest are made available to the coroner regardless as to whether the Chief Constable considers them to be

relevant or irrelevant. That thereafter the coroner determines what, if any, of those documents are relevant to the discharge of his coronial function. That an opportunity is afforded to the PSNI to consider a public interest immunity certificate in relation to any document which the coroner rules as relevant. The relevant documents, subject to any public interest immunity exclusion, are made available to the next of kin by the coroner. The irrelevant documents are not made available. Accordingly the Chief Constable contends that the commitment contained in the affidavit of Mr Mercier sworn on 11 October 2000 was limited to documents which would in 2000 have been made available by the RUC to the coroner. That those are documents which the RUC in their sole discretion considered to be relevant to the issues likely to emerge and which they had passed to the coroner. The applicant contends that it would be incorrect to limit the commitment given by Mr Mercier in this way.

Two central factual issues in relation to the commitment given on 11 October 2000

[14] Two central factual issues emerged as to the extent of the commitment given by Mr Mercier on behalf of the Chief Constable on 11 October 2000. The first was whether that commitment was limited to those documents which had at that stage been given by the RUC to the coroner and did not extend to documents which were subsequently disclosed by the RUC or the PSNI to the coroner. The second arises if the commitment did extend to subsequently disclosed documents. The question was whether the commitment should be limited by the perception in October 2000 by the Chief Constable that he was only obliged to disclose to the coroner those documents which the Chief Constable considered to be relevant. That is that the commitment should be limited to relevant documents. Alternatively whether the Chief Constable should not be required to fulfil any legitimate expectation on the basis of a change in his perception as to the extent of the commitment.

[15] However quite irrespective of the contentions in relation to the commitment given in the affidavit sworn on 11 October 2000 the applicant relies on a commitment given in a letter dated 9 May 2008 on behalf of the Chief Constable. Mr McGleenan, on behalf of the Chief Constable accepts that the letter of 9 May 2008 gives rise to a legitimate expectation on the part of the applicant.

Conclusions in relation to the commitment contained in the affidavit sworn on 11 October 2000

[16] By letter dated 22 January 2001, the Crown Solicitor, on behalf of the Chief Constable, made it clear that his reconsideration of his earlier decision was not confined to the impact of the Human Rights Act 1998 but was carried out in the light of the Force Order. The Force Order, at paragraph 3(2), states that:

> "All material which is supplied to the Coroner should normally be made available" (in this case, to the applicant.)

There is no limitation in the Force Order to only those documents which had at that stage been made available. I do not consider that the commitment contained in the affidavit dated 11 October 2000, seen in the context of the Force Order, should be limited only to those documents which historically had at that stage been made available to the Coroner. Indeed in October 2000, the applicant had no way of knowing what documents had been made available to the coroner. Subsequent events in relation to disclosure of documents, in effect to the applicant, by the Chief Constable over the years has borne out that the commitment was not limited only to the documents then made available to the coroner. I reject the contention that the commitment contained in the affidavit sworn on 11 October 2000 should be limited to the documents which were then historically in the possession of the coroner.

[17] In respect of the Chief Constable's second contention I do not have any evidence as to the basis upon which he selected documents for disclosure to the coroner prior to 11 October 2000. Paragraph 10 of the affidavit of Mr Mercier sworn on 2 May 2000 does not aver that the Chief Constable only disclosed to the coroner documents which the Chief Constable considered to be relevant. It appears that at that stage the Chief Constable considered that a determination of relevance was for the coroner not for the RUC. I do not consider that it has been established that, as far as this case is concerned, there has been a change in the Chief Constable's perception of his role and the role of the coroner in determining relevance. I reject the suggestion that there is any factual basis for finding a limitation on the commitment of the Chief Constable by virtue of his perception in October 2000. I also reject the contention that there is any factual basis for not obliging the Chief Constable to fulfil the legitimate expectation based on the commitment contained in paragraph 8 of the affidavit of Mr Mercier sworn on 11 October 2000.

Letter of 9 May 2008

[18] On 9 May 2008, over a year after the decision in *McGaughey v. Chief Constable of the PSNI* the Crown Solicitor, acting on behalf of the Chief Constable, wrote to the applicant's solicitor. In that letter the Crown Solicitor confirmed that new PSNI inquest hearing bundles of non sensitive materials were virtually complete and would be available by 16 May 2008. It was envisaged that two identical sets of documents would be prepared by the PSNI and sent to the coroner. One for use by the coroner and the other an additional set which could be forwarded by the coroner to the applicant's solicitor if he so decided. However there was no request by the PSNI to the coroner that in arriving at that decision he extract out of the set of documents to be made available to the family

those documents which he considered to be irrelevant. Instead the letter dated 9 May 2008 stated:-

> "For the record I wish to make it clear that the new PSNI inquest bundles contain substantial quantities of what we consider to be irrelevant documents. If this inquest were being prepared today then the bundles would have a different composition. However, as previously acknowledged in view of the fragmented history of these proceedings, my client is prepared to treat this as a unique case and make the additional material available."

[19] On the basis of the understanding of the PSNI that Section 8 requires them to make all material available to the coroner whether relevant or irrelevant then the bundles to be sent to the coroner would not have had a different composition. It would only have been the bundles to be made available to the family that would have had a different composition post *McGaughey v. Chief Constable of the PSNI*. Accordingly the Chief Constable's preparedness to make the additional material available is a preparedness to make it available not to the coroner but to the next of kin given the unique circumstances of this particular case. The additional material which he was prepared to make available were documents which were irrelevant to issues which could be expected to emerge on the hearing of the inquest. The relevant material being made available in any event. As I have indicated during the course of the hearing before me Mr McGleenan on behalf of the Chief Constable accepted that this was a clear and unambiguous representation by the Chief Constable that "irrelevant" documents would be made available to the applicant subject only to public interest immunity. That there were all the ingredients of a legitimate expectation.

[20] I consider that Mr McGleenan was correct to make the concession that the letter of 9 May 2008 gave rise to a legitimate expectation on behalf of the applicant. The letter is to be construed in the context of the circular, the Force Orders, the previous judicial review proceedings, and the disclosure by the RUC and the PSNI of documents to the applicant's legal representatives over the years since 11 October 2000. For instance the letter of 9 May 2008 states that though the Force Order has fallen into disuse since the decision in *McGaughey v. PSNI* that there has been and continues to be compliance with the Force Order in the context of this particular case. The Force Order at paragraph 3(2) states that all material which is supplied to the coroner should normally be made available to all those whom the coroner considers to be interested parties. In short, the commitment in the letter dated 9 May 2008 extended not only to the six lever arch files that were subsequently sent on 16 May 2008 but also to all documents whether relevant or irrelevant which the PSNI send in future to the coroner subject to public interest immunity and legal professional privilege.

[21] Mr McGleenan, having recognised that there were all the ingredients of a legitimate expectation as a result of the letter dated 9 May 2008 stated that the only reason that he could advance as to why that expectation should not be fulfilled was a procedural one in relation to a claim for public interest immunity. The difficulty that he envisaged is that it is a prerequisite to a public interest immunity claim that the Minister first considers whether the documents are relevant. If they are not then they are not disclosable and therefore not subject to a public interest immunity claim. I did not receive detailed argument in relation to this proposition as Ms Quinlivan, on behalf of the applicant, submitted that a public interest immunity claim could be made in these judicial review proceedings irrespective as to whether they could or could not be made in the coronial investigation. That if I ordered the disclosure of the documents subject to public interest immunity those documents will relate to these judicial review proceedings. Furthermore that in addition to any order for mandamus to disclose documents I could give liberty to apply in relation to any claim for public interest immunity. Mr McGleenan on behalf of the Chief Constable accepted that this would resolve any difficulties that might be faced in relation to a public interest immunity claim in relation to the documents.

[22] Mr McGleenan stated that apart from the issue as to how to make a valid public interest immunity claim there was no basis which he could advance as to why the Chief Constable should not fulfil the legitimate expectation that he accepted was created by the terms of the letter dated 9 May 2008.

Conclusion

[23] I issue an order of certiorari quashing the decision of the PSNI in relation to the disclosure of documents to the applicant.

[24] I also issue an order of mandamus. The form of the order being informed by the confusion that has been created by the fragmented production of documents over the years. There has been duplication of some documents and a failure to produce certain documents on some occasions and then there production on other occasions. It has been acknowledged that the level of redactions have on occasions been excessive. In view of this confusion, demonstrated by the applicant's solicitor's letter dated 13 October 2008, I will frame the order of mandamus around the obligation in Section 8 of the Coroners Act (Northern Ireland) 1959. The PSNI accept an obligation to furnish to the coroner such information as it then has or is thereafter able to obtain (subject to any relevant privilege or immunity) concerning the finding of the body or concerning the death of Patrick Pearse Jordan ("the documents"). I require the applicant to give an undertaking to the court that the disclosure of the documents is on a confidential basis solely for use in relation to the inquest.

I order the Chief Constable to disclose the documents to the applicant within 14 days and that this should be by way of a comprehensive list of documents. I give the Chief Constable liberty to apply in relation to any claim for privilege or immunity.

[25] In view of the fact, acknowledged by Ms Quinlivan, that the circular and the force orders treat the investigating officer's reports as subject to separate consideration I will exclude any such reports from this order. It is then a matter for the coroner to consider relevance and disclosure of these reports to the applicant.