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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Jordan's and five other Applications [2014] NIQB 71

IN THE MATTER OF APPLICATIONS FOR JUDICIAL REVIEW BY HUGH JORDAN, KATHLEEN RYAN, CHRISTINA McCUSKER, COLETTE McCONVILLE, ANNE McMENAMIN AND JORDAN BROWN (A MINOR) ACTING BY CARRIE BROWN HIS MOTHER AND NEXT FRIEND FOR JUDICIAL REVIEW

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STEPHENS J

Introduction to the five applications for judicial review

[1] Kathleen Ryan, Christina McCusker, Colette McConville, Anne McMenamin and Jordan Brown have commenced five separate judicial review applications seeking declarations that there has been delay in commencing inquests into the deaths of their close relatives and that the delay is incompatible with Article 2 of the European Convention on Human Rights and in breach of Section 6 of the Human Rights Act 1998. Each of the applications identified different State bodies which it was suggested were responsible for the delays in each inquest. Those State bodies included the Ministry of Defence, the Police Service of Northern Ireland ("the PSNI"), the Police Ombudsman for Northern Ireland, and the Coroners' Service. By section 1(1) of the Police (Northern Ireland) Act 2000 the body of constables known as the Royal Ulster Constabulary, ("the RUC") continues in being as the PSNI (incorporating the RUC).

[2] The different State bodies which were alleged to be responsible for the delays in the different inquests were made respondents but upon it becoming apparent to the applicants that the Coroners' Service was raising issues as to a lack of resources they applied to join the Department of Justice as a notice party on the basis that the Department is responsible for funding the Coroners' Service. Accordingly the Department of Justice was joined as a notice party in all five applications for judicial review. After proceedings had been commenced and by a position paper dated 7 February 2014 just before the judicial review applications were to be heard the PSNI,

the Coroners' Service, the Office of the Police Ombudsman for Northern Ireland (as respondents) and the Department of Justice (as the notice party) invited the court in each of the five cases to make a declaration in the following terms:

> "The delay in commencing the inquest touching the death of (A.B.) is incompatible with the applicant's rights pursuant to Article 2 of the European Convention on Human Rights and in breach of Section 6 of the Human Rights Act 1998."

Those respondents and the notice party stated that the declaration should be made

> "in general form against the State as a whole, rather than specifically against any particular respondent."

The Department of Justice does not represent the State. The position of the Department was further explained in its position paper dated 14 May 2014 in which it was stated that the Department

> "is responsible for the funding of all the bodies which were the original respondents to the five applications"

and it was submitted that

> "the appropriate relief in any and all of the cases should issue against all parties which are respondents (unless it enjoys judicial immunity)."

In fact the Department is not responsible for the funding of all the respondents. It is responsible for funding the Police Ombudsman for Northern Ireland, and the Coroners' Service. It is partially responsible for funding the PSNI. It is not responsible for funding the MOD. At a hearing on 16 May 2014 it was agreed that the declaration should issue against the particular respondents in each of the judicial review applications except against the MOD. Kathleen Ryan, the applicant in the judicial review in which the MOD was a respondent did not seek to obtain a declaration against the MOD given that relief was being obtained against the other respondents.

[3] Declarations were made in those terms in each of the five applications against the particular respondents in each of the judicial review applications except the MOD. That did not conclude the proceedings as each of the five applicants seeks an award of damages to afford just satisfaction for feelings of frustration, distress and anxiety. Those respondents and the Department of Justice denied that any of the applicants were entitled to damages contending that in the circumstances an award of damages is not necessary to achieve just satisfaction and that in any event the juridical basis for a claim for damages had not been established. After the making of

the declarations, it was submitted that the notice party should be joined as a respondent to each of the five applications for judicial review as it was suggested that it was the *legitimus contradictor* to the damages claim. I acceded to that application. It was also stated by those respondents and the notice party that the court would not be invited to consider the question of apportionment of damages or contribution amongst the various respondents given that the Department of Justice had agreed that it would be responsible for any award of damages irrespective as to whether the delay occurred before or after the devolution of justice in April 2010 and irrespective as to which State body was responsible for the delay. It was also submitted and I hold, that if a Coroner is responsible for delay then there is no basis in law for a claim for damages against that Coroner or the Coroners' Service, see section 9(3) of the Human Rights Act 1998. It was not suggested by the Department of Justice that the court should apportion a period of delay in any of the inquests to a Coroner or the Coroners' Service and then reduce the overall amount of damages on the basis that any element of delay attributable to a Coroner or to the Coroners' Service could not be subject to an award.

[4] In relation to the five judicial review applications the issue for determination is whether each of the applicants is entitled to an award of damages and if so the amount of the award in each case.

Introduction in relation to the outstanding issues in Hugh Jordan's application for judicial review

[5] This is also a judgment in relation to a claim by Hugh Jordan for an award of damages to afford just satisfaction for feelings of frustration, distress and anxiety in respect of further delay in commencing an inquest. Hugh Jordan is the father and next of kin of Patrick Pearse Jordan who on 25 November 1992 was shot and killed at Falls Road, Belfast by an officer of the RUC. On 4 May 2001 the European Court of Human Rights in its judgment in *Jordan v United Kingdom* [2003] 37 EHRR 2 established that a violation of Article 2 of the Convention had taken place, *inter alia*, by reason of the delay in the holding of an inquest prior to that date. The court granted a declaration and awarded damages of the sum of £10,000 as just satisfaction for feelings of frustration, distress and anxiety. Despite that finding the inquest into the death did not commence until 24 September 2012 and concluded on 26 October 2012. At the conclusion of the inquest Hugh Jordan commenced three judicial review applications, (13/002996/1), (13/002223/1) (13/037869/1). In the third application, (13/037869/1), he sought a declaration that the further delay between 4 May 2001, the date of the judgment of the European Court of Human Rights and 24 September 2012, the date upon which the inquest hearing commenced, was incompatible with Article 2 of the Convention and that the two Coroners who had conduct of the inquest and/or the PSNI were responsible for the delays which had occurred. The Department of Justice was not a respondent or a notice party to that application. I heard and determined that third application for judicial review giving judgment on 31 January 2014 under citation [2014] NIQB 11. In Part 11 of that judgment and at paragraphs [341]-[359] I dismissed the application

in respect of the two Coroners but held that the PSNI had created obstacles and difficulties which prevented progress of the inquest. I stated that I would hear further submissions in relation to the question of damages and the form of the declaration. The parties made submissions to me on 9 May 2014 as to the exact form of the declaration and I determine that it should be in the following terms:

> "The Police Service of Northern Ireland 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"

[6] The question as to whether Hugh Jordan was entitled to an award of damages and if so the amount of that award was also adjourned following the judgment of 31 January 2014. I heard Hugh Jordan's application for an award of damages at the same time as the applications by the five other applicants. It was contended on behalf of the PSNI that the applicant, Hugh Jordan was not entitled to damages. That in the circumstances an award of damages was not necessary to achieve just satisfaction and in any event, that the juridical basis for a claim for damages had not been established. In addition it was contended on behalf of the PSNI that a key factor in the "equitable" approach adopted by the Strasbourg Court is that, where it awards damages, it does so against the State as a whole. That the Strasbourg Court would never make an award of damages solely against a specific public authority and that the scheme of the Convention requires the Court to encourage compliance at State level with the international norms that underpin the Convention. It was accepted on behalf of the PSNI that this may, on occasion, lead to an award of damages against the State but it was contended that it would never result in a single public authority being singled out as a "mark" for damages. It was contended that a specific finding had been made against the PSNI but not against the State and in that context that it would be inequitable to make an award of damages against one State entity for the period of delay from 2001 to 2012 when other parties (including the Applicant) may also have been responsible for delay in the same period. Accordingly it was submitted that if the Court was minded to award any damages in this case it would be inequitable and contrary to Strasbourg jurisprudence to approach the assessment of damages as if the PSNI represented the entirety of the State interest.

[7] Those representing the two Coroners had not contended that there was a resource issue in this judicial review application and accordingly the applicant had not applied for an order that the Department of Justice be joined as a notice party. The Department of Justice was not a respondent or a notice party in the case of Hugh Jordan. It did not make any submissions in relation to the question of damages in that application. The question as to whether it ought to be a party was raised by the court after judgment had been given on 31 January 2014 and after submissions had been heard in relation to the issue of damages. The response of the Department was not to adopt the position of accepting on behalf of the PSNI, a body for whose funding it was partially responsible, that there had been unlawful delay and that it

would be responsible for an award of damages if such an award was appropriate. The Department in its position paper dated 14 May 2014 stated that whilst the court had power, pursuant to order 15, rule 6 of the Rules of the Court of Judicature (NI) 1980, to join a party to the proceedings at any stage, that it was now inappropriate to do so. It sought to distinguish its position in the five judicial review applications and this application by contending that it was the correct government department to be sued under section 17(3) of the Crown Proceedings Act 1947 with respect to what it termed "macro-level claims" as opposed to micro-level management which was the responsibility of the particular State body. That the findings made on 31 January 2014 were at a micro-level against the PSNI. However the PSNI, though it had not sought to join the Department in the proceedings, had contended that a significant part of the delay was due to the inappropriate state of coronial law, which is a consideration at a macro-level and the responsibility of the Department of Justice. There are obvious concerns about the distinction which the Department seeks to apply between micro and macro-level on the particular facts of this case given the extensive further delay of over a decade between May 2001 and September 2012 which almost inevitably must be of concern at the macro-level. The applicant by its position paper dated 19 May 2014 indicated that it wished to join the Department as a respondent. However given the stage at which the question as to the joinder of the Department arose, the lack of any application by either the applicant or the PSNI to join the Department, the stage at which the applicant has indicated that it wished to make an application to join the Department and the fact that the Department not only did not seek to be joined but also opposed being joined, I considered that it was inappropriate for the court to do so of its own motion. However if there are any further judicial review applications in relation to delays in inquests then consideration should be given to the Department being joined in those proceedings.

[8] The issue for determination in Hugh Jordan's judicial review application is whether the applicant is entitled to an award of damages *against the PSNI* and if so, the amount of the award in his case.

Appearances in the five judicial review applications

[9] Ms Quinlivan QC and Ms Doherty appeared on behalf of the five applicants and Mr Humphreys QC and Ms Murnaghan appeared on behalf of the Department of Justice for Northern Ireland. Dr McGleenan QC and Mr Coll appeared on behalf of the Ministry of Defence in the judicial review application brought by Kathleen Ryan but, given the attitude of the Department of Justice that it would pay any award of damages and given that the applicant did not seek a specific award against the Ministry of Defence, it was agreed that there was no need for any submissions on behalf of that respondent. At the earlier stage in relation to these five applications when the issue as to whether there had been delay incompatible with Article 2 of the Convention was outstanding Mr Doran appeared on behalf of the Coroners Mr Scoffield QC and Mr McQuitty appeared on behalf of the Police Ombudsman for Northern Ireland and Dr McGleenan QC and Mr Coll appeared on behalf of the PSNI.

Appearances in Hugh Jordan's judicial review application

[10] Ms Quinlivan QC and Ms Doherty appeared on behalf of the applicant, Mr Doran appeard on behalf of the two Coroners and Dr McGleenan QC and Mr Coll appeared on behalf of the PSNI.

[11] I am grateful to all Counsel in all these proceedings for their industry and for their assistance.

Factual background

[12] There was very little evidence in these judicial review applications as to:-

(a) the personal circumstances of each of the five applicants.

(b) the personal circumstances of each of the deceased in the five inquests.

(c) the detailed nature of the relationship between each of the deceased and each of the five applicants.

There were no medical reports as to the effect on any of the five applicants of the delay in holding the inquest. There was no affidavit from any of the five applicants setting out their feelings as a result of the delay. There were a number of affidavits from the applicants' solicitors setting out the delays that had occurred and exhibiting a considerable volume of exhibits for the same purpose. Co-incidentally those exhibits might contain the personal details of the deceased or of the applicants but I was not referred to any of those exhibits for the purposes of this application. The lack of information can be illustrated by reference to the application by Jordan Brown. In relation to his application there was no evidence as to his date of birth, the nature of his relationship with his father, Stephen Craig Colwell, where and with whom he lived prior to his father's death, whether his father resided in the same house as he did, his age at the date of his father's death and the impact on him of the delay in commencing the inquest into his father's death. The attachment or the degree of attachment of a child to a parent is a function of numerous factors including the nature and degree of the love that is lavished on a child, the daily contacts and routines that are put in place by a parent, the prioritisation of the child's interests and the daily support afforded to the child by his parent. There was no evidence as to any of these factors and accordingly there was no evidence as to the degree of attachment that the applicant had formed to his father and how and over what period of time that attachment had been formed. That judicial review application is brought by Jordan Brown acting by Carrie Brown his mother and next friend. There is no explanation as to why the application was not brought by the applicant's mother who was a former partner of the deceased. There is no evidence as to the length of that partnership or how or in what circumstances it came to an end.

[13] Insofar as background information was presented on behalf of the five applicants it was contained at page 4 paragraphs 5-9 of the applicant's skeleton argument dated 23 December 2013. There was no objection by the Department of Justice to this information being admitted in evidence. At the hearing I was informed by Ms Quinlivan as to the relationship between each of the five applicants and each of the deceased. This was done without objection by the respondents. There was also limited evidence in relation to Hugh Jordan. I set out the information in relation to each of the five applicants and in relation to Hugh Jordan. I also incorporate the background information in relation to the death of Sean McConville which was part of the evidence in the judicial review proceedings brought by Hugh Jordan.

(a) Kathleen Ryan is the mother of Michael Ryan who, some 22 years ago, on 3 June 1991, was shot and killed by members of the SAS with two others at Coagh, County Tyrone.

(b) Hugh Jordan, is the father of Patrick Pearse Jordan who, some 21 years ago, on 25 November 1992, was shot and killed by an officer of the RUC at Falls Road, Belfast.

(c) Christina McCusker is the mother of Fergal McCusker who, some 16 years ago on 18 January 1998, was shot and killed in Maghera, County Londonderry. The McCusker family have raised concerns about collusion between Loyalist paramilitaries and agents of the State in his death.

(d) Colette McConville is the mother of Neil McConville who, some 11 years ago on 29 April 2003, was shot and killed by an officer of the PSNI on the Aghalee Road, near Ballinderry, County Antrim. I have set out the factual background to the death of Neil McConvill at paragraphs [59]-[63] of my judgment dated 31 January 2014 and I incorporate those paragraphs into this judgment.

(e) Anne McMenamin is the mother of James Daniel McMenamin who, some 8 years ago on 4 June 2005, died as a result of being knocked down by a PSNI land rover on the Springfield Road, Belfast as the police were on their way to deal with an emergency call.

(f) Jordan Brown, is the son of Stephen Craig Colwell who, some 8 years ago on 16 April 2006, was shot and killed by a PSNI officer outside Ballynahinch Police Station, County Down. Stephen Colwell was driving a stolen car and a police checkpoint was in operation at that location.

The legislative framework

[14] Section 8 of the Human Rights Act 1998 provides that in relation to any act of a public authority which the court finds is unlawful it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. The Department of Justice has conceded in the five applications that the delay was unlawful being incompatible with the procedural aspect of Article 2 of the Convention to have a prompt investigation into each of the deaths. I have found that the PSNI have created obstacles and difficulties which prevented progress of the inquest in the case of Hugh Jordan. Accordingly in all six cases the court is required to consider granting such relief or remedy or making such order, within its powers as it considers just and appropriate. It has been agreed in five of the cases that the applicants are entitled to a declaration and I have granted a declaration in the case of Hugh Jordan. In relation to the question of damages Section 8(3) and (4) of the Human Rights Act 1998 provides that:-

> "(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –
>
> (a) any other relief or remedy granted, or order made, in relation to the Act in question (by that or any other court), and
>
> (b) the consequences of any decision (of that or any other court) in respect of that Act,
>
> 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:-
>
> (a) Whether to award damages, or
>
> (b) The amount of an award,
>
> 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."

[15] Accordingly in this case the pre-conditions to an award of damages under section 8 are

(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.

However in addition in determining whether to award damages or the amount of the award 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. In relation to that last factor I have been referred to a number of decisions of the European Court of Human Rights. The applicants and the respondents differ as to the principles which are to be taken from those decisions. The applicants contend that these cases show that the European Court of Human Rights has consistently awarded damages in cases where there has been a finding of a violation of the promptness requirement, that the award of the damages has been in the general bracket of €5,000 - £10,000, that the award has been made on the basis that there must have been feelings of frustration, distress and anxiety. That it is sufficient to rely on an inference that the next of kin have suffered feelings of frustration, distress and anxiety and that those feelings have been caused by the delay. Accordingly that it is not necessary for the personal details of the applicant to be made available to the court nor is it necessary for any medical evidence or affidavit evidence to be provided to the court. The respondents contend that it is not sufficient to suggest that harm to the applicants must have been occasioned. They suggest that the European Court of Human Rights may be prepared to assume that harm has occurred and has been caused by the violation but, it is contended, that is a reflection of the fact that the European Court is not equipped to enter into the fact finding arena. They submit that a domestic court is not restricted in its fact finding capabilities and absent any evidence from the applicants of any feelings of frustration, distress and anxiety allegedly occasioned by the delays the claim for damages should be dismissed.

The decisions of the European Court

[16] In *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673 at paragraph 7 Lord Bingham stated that there is a risk of error if Strasbourg decisions given in relation to one article of the Convention are read across as applicable to another. I have accordingly restricted the consideration to Strasbourg decisions in respect of violations of the Article 2 procedural obligation of promptness.

[17] On 4 May 2001 in *Hugh Jordan v United Kingdom* [2001] ECHR 327 the European Court of Human Rights made a number of procedural findings adverse to the United Kingdom including that the inquest proceedings in relation to the death of Pearse Jordan who died on 25 November 1992 did not commence promptly and were not pursued with reasonable expedition. The court held that there had been a failure to comply with a procedural obligation imposed by Article 2 of the Convention on that ground as well as on a number of other grounds. In addition to finding a violation of Article 2 the European Court of Human Rights relying on Article 41 of the Convention awarded the applicant, Hugh Jordan, the sum of £10,000 Sterling. At paragraphs 170-171 it was stated that:

> "170. … The court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. *The applicant must thereby have suffered feelings of frustration, distress and anxiety.* The court considers that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention.
>
> 171. Making an assessment on an equitable basis, the court awards the sum of £10,000 Sterling (GBP)." (*emphasis added*)

No direct evidence was adduced before the European Court of Human Rights as to the feelings of frustration, distress and anxiety on the part of the applicant. There was no affidavit from the applicant nor was there any medical evidence. Rather the court inferred feelings of frustration, distress and anxiety from the facts of the case. Those facts included that the applicant was the father of Pearse Jordan and that there had been delay which was incompatible with the State's obligations under Article 2. There was no correlation between the amount of the award and the period of delay. The violation of Article 2 was not only a violation in relation to the requirement of promptness and reasonable expedition but also a violation in relation to the requirement to carry out an effective investigation. The award did not distinguish between the various breaches of the procedural obligation. It was not suggested that the feelings of frustration, distress and anxiety were in part attributable to the failure to carry out an effective investigation as opposed to the failure to carry out a prompt investigation. The amount awarded was on the basis of an equitable assessment.

[18] Also on 4 May 2001 in *Shanaghan v The United Kingdom* the European Court of Human Rights found that there had been a violation by the United Kingdom of the requirement to carry out a prompt and effective investigation into the circumstances of the death in that case. Seven shortcomings were identified by the court at paragraph 122 of its judgment including for instance:-

> "A lack of independence of the police officers investigating the incident from the security force personnel alleged to have been implicated in collusion with the Loyalist paramilitaries who carried out the shooting;"

Another of the seven shortcomings was that:-

> "The inquest proceedings did not commence promptly."

At paragraph 144-145 of its judgment it was stated:-

> "144. … The court has found that the authorities failed in their obligation under Article 2 of the Convention to carry out a prompt and effective investigation into the circumstances of the death. *The applicant must thereby have suffered feelings of frustration, distress and anxiety.* The court considers that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention. …
>
> 145. Making an assessment on an equitable basis, the court awards the applicant the sum of GBP £10,000." (*emphasis added*)

It can be seen that:-

(a) The award was for a number of breaches of Article 2 including but not confined to the requirement of promptness.

(b) There was no affidavit evidence or medical evidence as to the feelings of frustration, distress and anxiety. Those feelings were inferred by the court from the breaches and the relationship of the applicant to the deceased.

(c) The award was to the applicant rather than to the applicant on behalf of the family.

(d) The amount of damages were not determined or influenced by the particular circumstances of the applicant.

(e) The amount of damages were not determined or influenced by the period of delay.

[19] Also on 4 May 2001 in *McKerr v The United Kingdom* [2002] 34 EHRR 20, the European Court of Human Rights found that there had been a violation by the United Kingdom of Article 2 under its procedural aspect by reason of a failure to carry out a prompt and effective investigation into the circumstances of the death. Again the court held that *the applicant must thereby have suffered feelings of frustration, distress and anxiety* and considered that the applicant had sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention. Making an assessment on an equitable basis the court awarded the sum of £10,000.

[20] On 28 May 2002 in the case of *McShane v The United Kingdom* [2002] ECHR 469 the European Court of Human Rights found that there had been a violation by the United Kingdom of the requirement to carry out a prompt and effective investigation into the circumstances of a death which had occurred on 13 July 1996. Six shortcomings were identified by the court at paragraph 126 of its judgment including for instance:-

> "The non-disclosure of witness statements and other relevant documents contributed to long adjournments in the proceedings;"

One of the six shortcomings was that:-

> "The inquest proceedings have not commenced promptly."

At paragraphs 156-157 of its judgment it was stated:-

> "156. … the court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. *The applicant must thereby have suffered feelings of frustration, distress and anxiety*. The court considers that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention (see also *Hugh Jordan v The United Kingdom*, cited above, at paragraph 170).
>
> 157. Making an assessment on an equitable basis the court awards the sum of GBP £8,000." (*emphasis added*)

Again in this case there was no affidavit evidence or medical evidence as to the feelings of the applicant. The court inferred feelings of frustration, distress and anxiety from the relationship and from the violation of the requirement to carry out a prompt and effective investigation into the circumstances of the death. The award of £8,000 in this case was less than the award of £10,000 in the case of *Hugh Jordan*

and the award of £10,000 in the case of *Shanighan*. No reason was given by the court for the lower award though it was recorded that

> "the Government disputed that any award of damages would be appropriate in the present case, in particular due to its character of a tragic accident. Even if a breach of a procedural obligation was found in this case, it was far less serious than those found in the previous Northern Ireland cases and the amount of damages should be significantly lower."

The court awarded damages and therefore did not accept the Government's contention that the circumstances in which the death had occurred should mean that no award should be made. However it is possible that this was a factor that led to a lesser award than the case of Jordan. Alternatively it might be that the court viewed the breaches of the procedural obligation as being less serious than the breaches in the previous Northern Ireland cases.

[21] On 28 February 2008 in the case of *Brecknell v The United Kingdom* the European Court of Human Rights found that there had been a violation by the United Kingdom of Article 2 under its procedural aspect by reason of a lack of independence in the investigation, see paragraphs 76 and 82. The applicant claimed non-pecuniary damage for the suffering and distress caused by the State's failure to conduct an effective official investigation into the circumstances of her husband's death. The court found that the national authorities failed in their obligation to provide a properly independent investigative response following the allegations made by John Weir concerning the death of the applicant's husband. Accordingly in the circumstances it considered that the applicant sustained some non-pecuniary damage which was not sufficiently compensated by the finding of a violation of the Convention. Making an assessment on an equitable basis the court awarded the sum of EUR €5,000. Again in this case there was no affidavit evidence or medical evidence before the court as to the feelings of the applicant. The court did not state why it awarded €5,000 as opposed to awards in other cases of €10,000 or £8,000 or £10,000.

[22] On 16 July 2013 in the case of *McCaughey & Ors v UK* [2013] ECHR 682 the European Court of Human Rights found that there had been a violation by the United Kingdom of Article 2 under its procedural aspect by reason of excessive investigative delays. In so doing, it considered that the inquest process itself was not structurally capable throughout the relevant period of time of providing the applicants with access to an investigation which would commence promptly and be conducted with due expedition. The court whilst holding that there had been a violation of the procedural requirements of Article 2 of the Convention did not make an award of damages to the applicants. The reason for this is recorded at paragraph 147 of the judgment being that

> "the applicants did not submit a claim for pecuniary or non-pecuniary damages. Accordingly, the court considers that there is no call to award them any sums on that account."

[23] Also on 16 July 2013 in the case of *Collette and Michael Hemsworth v The United Kingdom* the European Court of Human Rights found that there had been a violation by the United Kingdom of Article 2 under its procedural aspect by reason of excessive delay following the death of the deceased on 1 January 1998. At paragraph 70 it was stated:-

> "The Court considers it striking that Mr Hemsworth died in January 1998 and that the inquest hearing proper did not begin until May 2011, more than 13 years thereafter and that further important procedural steps are outstanding."

The two applicants in that case were the father and the wife of the deceased. The applicants sought damages and submitted psychiatric reports which underlined the impact on them of the death of Mr Hemsworth and which, in the case of Mrs Hemsworth, attested to the fact that the inquest delay in particular was a significant factor in the persistence of her problems of depression and anxiety. The court awarded the applicants EUR €20,000 in total plus any tax that may be chargeable to the applicants in respect of non-pecuniary damage, to be converted into Pounds Sterling at the rate applicable on the date of settlement. I did not have any evidence as to the conversion rate applicable either at the date of the judgment or at the date of the settlement but I have proceeded on the basis that this was an award of approximately £16,500. It is not clear whether this was one award somewhat larger than other awards to give recognition to the fact that greater damage had occurred or whether it was viewed by the court as comprising the total of two awards each in the amount of £8,250. If it was the latter then the amount of the award did not increase despite medical evidence being submitted to the court.

Discussion

[24] In *Al Skeini v UK* (2011) 53 EHRR 18 at paragraph 182 the European Court of Human Rights has described its function in considering an award of damages in the following terms:

> "As regards the claim for monetary compensation, the Court recalls that it is not its role under art.41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is equity, which above all involves flexibility and an objective consideration of what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred. *Its non-pecuniary awards serve to give recognition to the*

> *fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest of terms the severity of the damage…"* (*emphasis added*)

This court is not strictly bound by the principles applied by the European Court in awarding compensation under art 41 of the Convention, but it must take those principles into account. Accordingly one of the principles applied by the European Court of Human Rights which under section 8(4) of the Human Rights Act 1998 I must take into account is that non-pecuniary awards serve to give recognition to the fact that moral damage occurred as a result of a breach of a fundamental human right and reflect in the broadest terms the severity of the damage.

[25] The award of damages in the context of the Human Rights Act 1998 was considered by Lord Bingham in *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673. At paragraph 19 he stated

> "[19] … the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily 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, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. Secondly, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg. This intention was clearly expressed in the White Paper "Rights Brought Home: The Human Rights Bill" (Cm 3782, 1 October 1997), para 2.6:
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> > "The Bill provides that, in considering an award of damages on Convention grounds, the courts are to take into account the principles applied by the European Court of Human Rights in awarding compensation, so that people will be able to receive compensation from a domestic court equivalent to what they would have received in Strasbourg."
>
> Thirdly, s 8(4) requires a domestic court to take into account the principles applied by the European Court under art 41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that *courts in this country should look to Strasbourg and not to domestic precedents.* The

> Appellant contended that the levels of Strasbourg awards are not "principles" applied by the Court, but this is a legalistic distinction which is contradicted by the White Paper and the language of s 8 and has no place in a decision on the quantum of an award, to which principle has little application. The Court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the Court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them. *They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the Court might be expected to be, in a case where it was willing to make an award at all.*" (*emphasis added*)

[26] I consider 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. Also I consider that the Strasbourg Court has consistently found that the non-pecuniary damage is not sufficiently compensated by a finding of a violation. The applicants could recover an award in Strasbourg and to adapt the words of Lord Bingham the purpose of incorporating the Convention in domestic law is to enable the applicants to obtain the same remedies without the delay or expense of resort to Strasbourg. Taking into account the principles applied by the Strasbourg Court, and subject to the further points that arise in relation to Hugh Jordan's application, I consider that an award of damages is necessary to afford just satisfaction to each applicant and I consider that an award of damages to be just and appropriate.

[27] In addition to the principles applied by the Strasbourg Court and independently of those principles, but subject to the further points that arise in relation to Hugh Jordan's application, I consider that an award of damages is necessary to afford just satisfaction and is just and appropriate. The Department recognised that feelings of frustration, anxiety and distress can be suffered at any age and that such feelings would be an anticipated response to these unlawful delays. However Mr Humphreys stated that having seen no evidence the Department was not in a position to admit or deny that harm has been occasioned to any of the applicants and accordingly I proceed on the basis that the Department has put in issue the question as to whether any of the applicants had been caused to suffer feelings of frustration, anxiety or distress. He also stated that it was not necessary for medical evidence to be produced but that it would be sufficient if there were affidavits from each of the applicants giving particulars of their feelings and addressing the issue of causation. Accordingly I proceed on the basis that the stance taken by the Department created a factual dispute as to whether feelings of frustration, anxiety and distress were caused, see paragraph 13(5) of *R (Sturnham) v Parole Board (Nos 1 and 2)* [2013] 2 AC 254 at 286. I resolve that factual dispute in favour of the applicants. The investigation into the death of a close relative, impacts on the next of kin at a fundamental level of human dignity. It is obvious that if unlawful delays occur in an investigation into the death of a close relative that this

will cause feelings of frustration, distress and anxiety to the next of kin. The primary facts lead on the balance of probabilities to the inference of feelings of frustration, distress and anxiety. It would be remarkable if any applicant was emotionally indifferent as to whether there was a dilatory investigation into the death of their close relative and such emotional indifference would be entirely inconsistent with an applicant who seeks to obtain relief by way of judicial review proceedings. As a matter of domestic law it would be lamentable if a premium was placed on protestations of misery. At this level of respect for human existence and for the human dignity of the next of kin of those who have died there should be no call for a parade of personal unhappiness, see *H West & Son Limited v Shephard* [1964] AC 326. In short I infer that each of the applicants, regardless as to their age, must have been caused to suffer feelings of frustration, distress and anxiety by the unlawful delays that have occurred.

[28] The applicant in each case is a single applicant and accordingly it is not necessary for this court to consider the question as to whether it is appropriate to make awards to more than one applicant and if so as to where one draws the line. However applying the principle of what is equitable I would suggest that ordinarily one award is generally sufficient in relation to each inquest.

[29] The question that does arise in Hugh Jordan's application is whether it is appropriate to make a further award of damages given that one award has already been made. The fact that an award of damages has already been made is a factor to be taken into account and ordinarily I consider that it would mean that a further declaration would be sufficient to afford just satisfaction without any further award of damages. However over a decade passed between the date of the judgment of the European Court of Human Rights and before the inquest commenced. I consider that to be quite an exceptional circumstance and accordingly in the particular circumstances, and again subject to a consideration of some further issues, I consider that the applicant is entitled to a further award of damages. The fact that a previous award has been made is a factor that I consider should be taken into account in determining the amount of any further award so that the award is less than the award previously made by the European Court of Human Rights in May 2001.

[30] The next question is whether a particular State body can be responsible for an award of damages. The Department of Justice in the five judicial review applications is a particular State body and it has accepted that it is responsible for an award of damages. I consider that it was correct to do so. There is no reason why a State body that acts unlawfully should not be responsible.

[31] A further question that arises in relation to Hugh Jordan's application is whether the PSNI should be responsible for the entirety of the award given that it is not responsible for the entirety of the unlawful delay. In the judgment dated 31 January 2014 at page 60 paragraph [125] (p) I stated that

> "If it is found that a particular State authority, which is a notice party, has not complied with any aspect of the requirement of promptness and reasonable expedition, but there is another State authority or other State authorities who have also not complied who are not notice parties, then the particular State authority who is a notice party, may have orders made against it involving a declaration and/or all of the damages. The court will not seek to reduce the award to the applicant on the basis that only a proportion is attributable to the State authority which is a notice party. It is for that State authority, if it so wishes, to seek a contribution from the other State authority."

[32] In Hugh Jordan's application it was accepted by the PSNI that there was unlawful delay in the commencement of the inquest but it was suggested that this was not the responsibility of the PSNI. In the event I found that the PSNI were responsible. I note that the PSNI had the opportunity to, but did not seek to establish that any other State body was also responsible. Applying the principles which I have set out I consider that it is appropriate to make the entire award against the PSNI.

Conclusion in relation to the award of damages

[33] In each application and to each applicant I award £7,500. In relation to the award to Jordan Brown I direct that the amount of £7,500 is lodged in court and is invested in accordance with the recommendation of the Accountant General. I also appoint Carrie Brown as guardian.

The Ministry of Defence

[34] I was not invited to and I have made no determination in relation to the Ministry of Defence. The application in so far as it relates to the Ministry of Defence is dismissed but this is not a bar if any issue of delay in this inquest arises in the future to a further application being brought against the Ministry of Defence.

Costs

[35] The applicant is entitled to and I make an order for costs against the PSNI. Article 11 of the Legal Aid, Advice and Assistance (NI) Order 1981 provides that any sums recovered by virtue of an order … for costs made in his favour with respect to the proceedings shall be paid to the legal aid fund.

[36] The applicant is legally aided and accordingly I make an order for taxation of the applicant's costs under schedule 2 of the Legal Aid, Advice and Assistance (NI) Order 1981. Article 13 of the Legal Aid, Advice and Assistance (NI) Order 1981 provides that the solicitors for the applicant shall be paid for so acting out of the legal aid fund.

[37] I make no order for costs in relation to the Ministry of Defence.

[38] I dismissed the judicial review proceedings in so far as they related to the two Coroners. Costs ordinarily follow the event and the respondent Coroners are entitled to an order for costs against the applicant or against the PSNI. In the circumstances of this case I decline to order the PSNI either directly or indirectly to pay the costs of the two Coroners. If there is an order for costs against the applicant then given that the applicant is legally aided the enforcement of such an order is usually stayed pending further order of the court. Article 11 of the 1981 Order requires that the applicant's liability by virtue of an order for costs made against him with respect to the proceedings shall not exceed the amount, if any, which is a reasonable one for him to pay having regard to all the circumstances, including

(i) the means of all the parties; and .

(ii) the conduct of all the parties in connection with the dispute.

Substantial costs are being paid by the Coroner to the applicant in relation to the other two judicial review applications in relation to which I gave judgment on 31 January 2014. I have given consideration to the question as to whether it is appropriate to set off the costs in this judicial review application against the costs in the two related applications. I do not consider that such an order can be made. An order for costs is against the applicant. It is the applicant's means, amongst others, that have to be considered. It is the legal aid fund that is the beneficiary of the order for costs that I made in the two related judicial review applications. The means of the applicant have not increased as a result of those orders. Accordingly I make an order for costs in favour of the respondent Coroners but that order is not to be enforced without further order of this court.