Judicial Communications Office

18 January 2019

COURT ALLOWS APPEAL BY RAYMOND McCORD

Summary of Judgment

The Court of Appeal today set out its reasons for allowing an appeal by Raymond McCord against a case management decision not to remove a stay on the hearing of his application to issue judicial review proceedings against the Police Service of Northern Ireland ("PSNI"), the Department of Justice ("DoJ") and the Coroner's Service ("CSNI") seeking a declaration that the delay in conducting an inquest into the death of his son violated his rights under Article 2 of the ECHR.

Background

The background into the investigation of the applicant's son's murder on 9 November 1997 is set out in paragraphs [2] – [6] of the judgment. There have been a number of preliminary hearings before the coroner since 2001 but these had been adjourned as a result of an investigation by the Police Ombudsman for Northern Ireland ("PONI"), a Police Service of Northern Ireland ("PSNI") investigation and by the Public Prosecution Service ("PPS").

On 6 June 2017 an application for leave to issue judicial review proceedings was made by the applicant seeking an order requiring the Chief Constable to provide disclosure to the coroner of the non-sensitive investigation materials touching upon the death of his son and a declaration that the failure to provide prompt disclosure of the information to the coroner had occasioned delay which violated his rights under Article 2 of the Convention. On 7 November 2017 the applicant amended his Order 53 statement to add claims for delay against the coroner and the DoJ.

On 8 February 2018, the trial judge gave directions requiring the parties to set out their proposals for progressing the case. On 13 March 2018 he made a case management direction ordering a stay of the proceedings noting that at preliminary hearings in 2012 the applicant had adopted the position that the inquest should not proceed until the police activities had been completed. The trial judge referred to a number of pending cases dealing with legacy[1]

[1] The first was the case of Jordan [2015] NICA 66 dealing with the circumstances in which as a matter of case management the Court of Appeal was entitled to postpone the award of damages for delay in the conduct of an inquest where the inquest proceedings had not been finalised. There were three cases, McQuillan, Barnard and McGuigan and McKenna, dealing with the circumstances in which the Article 2 obligation could be revived on the basis of the principles set out in Brecknell v UK (2008) 46 EHRR 42. The case of Finucane was a further case dealing with retrospectivity. The judge referred to the case of Bell being an Article 2 case on funding of the PONI although the judgment of the Court of Appeal indicates that Article 2 was not relied upon in that appeal. The final case referred to was Hughes which dealt with the issue of funding of the Coroner Service which was completed on 8 February 2018 and in respect of which judgement was in fact given on 8 March 2018. The learned trial judge had noted the judgement as being reserved.

and concluded that "it would be pointless and disproportionate to adopt a course which would involve any further investment of finite public resources at this stage" (underlining that of judge). He said that a stay was the obvious appropriate course.

The applicant applied for leave to appeal to the Court of Appeal and in the course of refusing leave the trial judge commented:

> "The court made a considered order on 13 March 2018 in which it referred to the broader panorama of other cases proceeding in superior courts which will result in decisions, by well-established principle, binding on this court. Because of that nexus and taking into account all of the ingredients of the overriding objective I just cannot see that anything of any merit or substance will be achieved by investing limited court resources in progressing this case further at this stage. I ruled in March that it would be pointless and disproportionate to adopt a course involving any further investment of the finite public resources by this court or the court administration or any of the proposed public authority respondents. Three months later nothing has changed to alter that assessment."

Consideration

The parties agreed that the Orders made by the trial judge were case management decisions staying the proceedings and that such decisions are rarely challenged and even more rarely reversed on appeal. An appellate court will only interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree.

The Court of Appeal commented that the reasoning of the trial judge was based on the proposition that the appellate decisions in respect of the retrospectivity cases and the Jordan case would be material to the arguments advanced in the application for leave in this case. The applicant's son died in 1997 before the Human Rights Act 1998 ("the 1998 Act") came into force on 2 October 2000 and that raised an element of retrospectivity. The retrospectivity principle was established in Re McKerr [2014] 1 WLR 807 but moderated by the Supreme Court as a result of subsequent decisions of the European Court of Human Rights in Re McCaughey and Another [2012] 1 AC 725. The effect of that decision is that where a coroner has decided to hold an inquest prior to 2 October 2000 but the inquest has not yet been heard before that date the obligation to conduct the inquest in accordance with Article 2 of the Convention is enforceable in domestic law under the 1998 Act. It was agreed that this case fell squarely within the McCaughey principle.

The Court noted that the Brecknell principle is different. In Brecknell v UK the European Court of Human Rights held that the Article 2 obligation as a matter of international law could be revived by the discovery of a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing. The Brecknell retrospectivity cases therefore will have no bearing on the entitlement of the applicant in these proceedings to rely on his Article 2 rights. Consideration of the Finucane case leads to the same conclusion. It is not concerned with the McCaughey principle and has no bearing on the issues in this application. The Court further concluded that the Bell and Hughes cases do not provide any basis upon which to delay the applicant's leave proceedings.

The Court of Appeal considered, therefore, that the only basis supporting the decision of the trial judge to stay the proceedings arose from the decision of the Court of Appeal in Hugh Jordan's Application [2015] NICA 66. That was a case in which the court upheld a decision to quash the inquest verdict and direct that a fresh inquest should proceed before a different coroner. An issue arose in respect of the award of damages and the Court commented that in light of the very long delays occurring in legacy cases, those who wish to avoid being captured by the primary limitation period under the 1998 Act may well feel obliged to issue proceedings separately in relation to each and every incident of delay. It noted that this may involve separate proceedings against different public authorities allegedly contributing to periods of delay which may or may not overlap: "If each case had to be pursued within one year of the end of each particular element of delay that would have introduced a proliferation of litigation in respect of which periods of delay justified an award of damages against which public authorities. Practicality and good case management point towards ensuring that all of those claims against each public authority should be heard at the same time."

The Court in Jordan further noted that the fresh inquest should take place within a reasonable timeframe and any failure to do so would constitute a fresh breach of the Convention for which a remedy, including damages, may be available but it was also noted that it was when the inquest had been completed that it would be possible to examine all of the circumstances surrounding any claim for delay in the assessment of adequate redress. The Court concluded that in legacy cases the issue of damages against any public authority for breach of the adjectival obligation in Article 2 ECHR ought to be dealt with once the inquest had finally been determined. It went on to look at the circumstances surrounding exceptions to this approach:

> "[27] These cases have been characterised by multiple reviews, skeleton arguments, rulings and recordings. All of this material will assist in the determination of any disputed issues of fact. That will moderate considerably any prejudice. We find it difficult to envisage any circumstances in which there should be an exception to the approach set out in the preceding paragraph in such cases. The available materials and the involvement of legal assistance in the preparation of

> the inquest should ensure an ample basis for consideration at the end of the inquest of the responsibility of each public authority for any breaches alleged."

The Court of Appeal in these proceedings accepted that this passage created the impression that in every legacy case any application to pursue a remedy by way of damages for delay could only be dealt with at the end of the inquest. It said it was clear that that was the common understanding of the parties before the trial judge as a result of which the applicant decided to abandon the determination of his claim for damages in the proceedings and rely solely upon the claim for a declaration. That gave rise to an issue about the proliferation of proceedings and was a proper matter of concern for the trial judge.

The Court of Appeal considered, however, that this passage of the Jordan judgment ought to be interpreted in a rather more qualified manner. First, it had to be borne in mind that the Court, having given the judgment in September 2015, decided of its own motion to relist the case for the determination of the damages claim in June 2017 having regard to the fact that the inquest had not yet concluded. Secondly, it needed to be borne in mind that this was a case management decision and was not intended to set forth any rule of law about the entitlement to damages in legacy cases. Thirdly, the case was concerned with circumstances in which there were active and ongoing inquest proceedings but where issues of delay in the course of those active proceedings arose: "It was such cases that were being discussed in this passage of the judgment and we consider that the interpretation of paragraph [27] should be confined to cases in which those circumstances are present."

The Court of Appeal commented that this case is different:

> "The death occurred more than 20 years ago. The obligation deriving from Article 2 of the Convention is that the authorities should act of their own motion and that the investigation should be prompt and proceed with reasonable expedition. The inquest in this case has not taken place. No coroner has been allocated to hear it and no materials have been provided to the Coroner's Service by the police. It is impossible to estimate how many years it might take before the inquest might proceed, as was accepted by the parties at the hearing."

Conclusion

The Court of Appeal recognised how the relevant passages in the Jordan decision led the parties and the trial judge to the view that they were material to this application and thereby caused the judge to approach the matter in the manner in which he did. Having taken the opportunity to explain those passages the Court said it was clear that there is now no impediment to the hearing of this leave application and no reason why the matter cannot proceed in respect of both the claim for a declaration and the claim for damages.

In explaining its analysis of the Jordan decision in the course of the hearing, the Court of Appeal asked the parties to consider whether they felt able to seek instructions to remove the stay by consent. Counsel for the PSNI indicated that he could not seek such instructions. The Court of Appeal commented:

> "If that indicates an intention to pursue every legal point in these cases to the bitter end the onus on the court to proactively case manage these matters to a conclusion will unfortunately increase. In our view these difficult cases benefit from the most consensual approach possible by the parties."

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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