Neutral Citation No. [2015] NICA 66 | *Ref:* **MOR9751**

Judgment: approved by the Court for handing down | *Delivered:* **22/09/2015**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF THREE APPLICATIONS BY HUGH JORDAN FOR JUDICIAL REVIEW

JORDAN'S APPLICATIONS 13/002996/1; 13/002223/1; 13/037869/1

DELAY AND DAMAGES

Before: Morgan LCJ, Girvan LJ and Gillen LJ

MORGAN LCJ (delivering the judgment of the court)

[1] On 17 November 2004 we gave judgment in two related judicial reviews by Hugh Jordan concerning the inquest into the death of his son, Patrick Pearse Jordan (the deceased), on 25 November 1992, which was conducted in September and October 2012. We dismissed the appeals against the quashing of the inquest verdict and directed that a fresh inquest should proceed before a different coroner. These are related appeals from decisions of Stephens J in which he determined that the coroner was not responsible for the delays which have occurred in the conclusion of the inquest but that the Police Service of Northern Ireland (PSNI) delayed progress of the inquest in breach of Article 2 of the European Convention on Human Rights. He made an award of damages of £7500 in respect of that breach. The PSNI have appealed the award of damages and Mr Jordan appeals the finding in respect of the coroner.

[2] In this appeal Mr Jordan was represented by Ms Quinlivan QC and Ms Doherty QC, the PSNI by Mr McGleenan QC and Mr Wolfe QC, the Coroner by Mr Doran QC and the Department of Justice by Mr Coll QC. We are grateful to all counsel for their helpful written and oral submissions.

Background

[3] It is not necessary to rehearse the factual background to the death of the deceased which we have set out in our earlier judgment. The issue of delay has, however, been addressed in a number of earlier proceedings. On 4 May 2001 the European Court of Human Rights issued its judgment in Jordan v UK (2003) 37 EHRR 2. It noted that there had been a delay at that stage of eight years and four months. The Court recorded that there had been a series of adjournments in relation to procedural matters. It observed that if long adjournments were regarded as justified in the interests of procedural fairness to the victim's family it 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. The Court concluded that the time taken was not compatible with the Convention requirement to ensure that investigations into suspicious deaths were carried out promptly and with reasonable expedition. It made an award of £10,000 damages by way of just satisfaction in relation to a number of deficiencies in the process for the investigation of the use of lethal force, including delay.

[4] The second relevant decision was that of Hart J in an application by Mr Jordan in which he sought the removal of the Senior Coroner from the hearing of the inquest into the death of the deceased on the grounds of actual and apparent bias. As part of that application it was contended that the Senior Coroner had been responsible for lengthy periods of delay. Hart J conducted a review of the progress of the inquest from January 1995. He concluded that the periods from then until the judgment of the House of Lords in 28 March 2007 had been caused by deficiencies in the Coroners Rules, inaction on the part of the government in making changes in the Rules, the non-availability at the early stages of legal aid for inquests, the steadfast resistance of the Chief Constable to making available to the applicant various categories of documents which the applicant sought and frequent, complex and protracted litigation over those issues. He concluded that none of those matters could properly be considered to be the responsibility of the Senior Coroner.

[5] He then looked in particular detail at the period between March 2007 and June 2009. He was satisfied 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 the documents that they sought. The Senior Coroner had made every effort to ensure, so far as within his power, that the inquest was heard. Hart J dismissed the application for the Senior Coroner to recuse himself on this and other grounds. An appeal was lodged with the Court of Appeal. On appeal a question was raised as to whether it would be in the best interests of the inquest for a differently constituted coroner to hear the inquest quite apart from the allegations of apparent bias which were strongly refuted and rejected by the trial judge. The Senior Coroner then indicated his desire to stand down and an alternative coroner was appointed. The appeal had become academic and was dismissed.

[6] Mr Jordan revisited his complaint of delay caused by the coroner before Stephens J. The judge largely adopted the conclusions of Hart J and found that the obstacles and difficulties that impacted on the coroner arose from the state of coronial law. Stephens J noted that the PSNI were a notice party to the proceedings before Hart J. Hart J had found culpable delay on the part of the PSNI and Stephens J had noted in particular the over-redaction of documents by the PSNI after the House of Lords decision on 28 March 2007 and the failure to put in place a memorandum of understanding with the Security Service in relation to threat assessments as a result of which further adjournments were required.

[7] Prior to the determination of the remedies hearing in respect of the breaches found by Stephens J Mr Jordan applied to join the Department of Justice (the Department) as a notice party to the proceedings. This was against a background where the Department had been joined in a number of other applications for damages arising out of delays in inquests and agreed that it would be responsible for any award of damages irrespective as to whether the delay occurred before or after devolution of justice in April 2010 and irrespective as to which state body was responsible for the delay. Stephens J determined that since neither Mr Jordan nor the PSNI had applied to join the Department in respect of the substantive delay case it would be inappropriate for the court to then do so of its own motion since the Department opposed being joined.

The award of damages under the Human Rights Act 1998 (the 1998 Act)

[8] By virtue of section 7 (1) of the 1998 Act a person who claims that a public authority has acted in a way which is incompatible with a Convention right may bring proceedings against the authority for that unlawful conduct. There is, therefore, an important distinction between the domestic system and the international system in which any award of damages is made against the state. Where different periods of delay are caused by different public authorities each responsible authority must be joined. Where a number of public bodies are responsible for the same delay section 8(5) of the 1998 Act provides a mechanism for contribution between them. There is an obvious advantage in ensuring that a victim's claim for damages as a result of the acts of a number of public authorities should be heard together.

[9] Section 7(5) provides that such proceedings must be brought before the end of the period of one year beginning with the date on which the act complained of took place or such longer period as the court tribunal considers equitable having regard to all the circumstances. Section 8 (1) enables the court to grant such relief or remedy as it considers just and appropriate for any established unlawful conduct. Section 8 (3) provides that no award of damages is to be made unless the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made. 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.

[10] Section 9 (3) provides that other than in circumstances not relevant here damages may not be awarded in respect of a judicial act done in good faith. It is accepted that there is no evidence of bad faith on the part of the coroner in this case and that accordingly no award of damages can be made against him.

[11] The House of Lords considered the application of these principles in R (Greenfield) v Secretary Of State for the Home Department [2005] 1 WLR 673 and Stephens J set out at paragraph 25 of his remedies judgment in Jordan and others [2014] NIQB 71 the guidance given by Lord Bingham at paragraph 19 of that case. The issue of damages for delay was considered in a slightly different context by the Supreme Court in R (Sturnham) v Parole Board [2013] UKSC 23. That was a case in which the issue concerned delays in the consideration of the cases of prisoners who had served the tariff period so that their further detention could only be justified on the basis of an assessment of the risk which they continued to present. The Supreme Court held that even in cases where it was not established that an earlier hearing would have resulted in earlier release there was nevertheless a strong, but not irrebuttable, presumption that delay had caused the prisoners to suffer feelings of frustration and anxiety.

[12] There was no medical evidence or personal statement from Mr Jordan dealing with the impact of the delay. Stephens J dealt with the disputed question as to whether feelings of frustration, anxiety and distress had been established at paragraph 27 of his remedies judgment:

> "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."

We can see no error in that approach.

The cross appeal by Mr Jordan against the Coroner

[13] In support of the cross-appeal Ms Quinlivan inevitably traversed much of the ground that had been debated before Hart J. His consideration of the issues was detailed and lengthy and his judgment was described as compelling by the Court of Appeal in October 2009 when dismissing the appeal on the basis that the issue had become academic. He analysed the issue of delay up to the House of Lords judgment in March 2007 between paragraphs 83 and 88 and thereafter carefully examined the progress of the inquest until June 2009. For the reasons given by him he was satisfied that it was apparent that the repeated delays in implementing the inquest during that period were entirely due to the continuing efforts of the PSNI to avoid providing the next of kin with the documents that they sought. We find no error in his approach and like the learned trial judge we see no reason to depart from those conclusions.

[14] These proceedings were issued in September 2012 so there were additional issues raised by way of complaint against the coroner. The first issue concerned the failure to proceed with the inquest in January 2010. It has to be remembered that during 2009 the applicant had proceeded with the recusal judicial review in which Hart J gave judgment in July 2009 and then appealed that decision which was eventually resolved before the Court of Appeal in October 2009. Mr Sherrard then took over as coroner. At a preliminary hearing on 20 November 2009 it emerged that three previous shooting incidents concerning Sgt A had come to light and that further enquiries were being made. Some of the material was made available by way of a schedule to the interested parties on 6 January 2010 and the coroner decided that thereafter he should view all the personnel files of the other police witnesses. There was nothing at that time to alert him to the fact that there may be relevant further material in the Stalker Sampson files and it was only in late 2011 that he became so aware.

[15] In April 2010 the coroner ruled that a search of the Stevens database was necessary. The applicant had objected. Although the Coroner's Service had been aware of the existence of the database since May 2009 it is important to bear in mind that during this period the participation of the Senior Coroner was subject to judicial review and appeal. Mr Sherrard was brought into the case in late 2009. His decision not to proceed with the inquest in the absence of a search of the database was based

on the real possibility that the database contained material which was potentially relevant to the inquest and the submission of the PSNI that it was not in a position to confirm that its duty of disclosure had been discharged without such a search. The database became available to be searched in January 2011.

[16] Although the inquest was listed to proceed in October 2011 there was further late disclosure concerning two police witnesses, M and V, in September 2011 and a further delay because of the failure of the Security Services to produce risk assessments necessary for the determination of anonymity and screening applications. We do not accept that any of this shows any lack of expedition on the part of the coroner. It does however support the view of both Hart J and Stephens J that there had been considerable delays as a result of obstacles and difficulties created by the PSNI.

[17] We do not consider that there is any basis upon which to interfere with the conclusion of Stephens J in respect of the coroner and we dismiss the cross-appeal.

The PSNI appeal on damages

[18] The starting point in this appeal was the proper interpretation and application of the limitation period prescribed by section 7 (5) of the 1998 Act. It was submitted by Mr McGleenan that there was no finding by the learned trial judge of delay within the period of one year prior to the commencement of these proceedings in September 2012. Accordingly the applicant was outside the primary limitation period and could only succeed if the court considered it equitable having regard to all the circumstances to extend time. The applicant had instituted proceedings, including proceedings for delay, in 2009 and could have presented the damages claim at that time. There was no explanation as to why this had not occurred. In those circumstances the applicant could not persuade the court that it was equitable to extend the time.

[19] Ms Quinlivan submitted that it would not have been open to the applicant to make a claim for damages in 2009 because at that time the law was that the adjectival obligation in Article 2 of the Convention did not arise in domestic law in respect of deaths occurring prior to the commencement of the Human Rights Act 1998 (see Re McKerr's Application [2004] UKHL 12). That position did not change until the Supreme Court gave its decision in May 2011 in Re McCaughey's Application [2011] UKSC 20. In any event there has been a catalogue of continuing failures of disclosure by the PSNI including in particular the failure to provide documentation in relation to Officers M and V. The time limit in relation to a failure to act does not start running until the failure is corrected. It is artificial to separate each failure in this case as a separate cause of action giving rise to a potential claim for damages. This approach is consistent with that of the ECHR which has consistently entertained claims for delay as long as they are lodged within six months of the inquest verdict.

[20] The application of the time-limit provisions in section 7 (5) was considered by the House of Lords in Somerville v Scottish Ministers [2007] 1 WLR 2734. That was a case in which a number of prisoners sought judicial review of decisions to segregate them and claimed damages as just satisfaction for breaches of their rights under Article 8 of the ECHR. In each case the decision to segregate was made by the prison governor and he was empowered to continue the segregation for a period of up to one month so long as he obtained an authorisation from the Scottish Ministers. The majority held that the claim by the prisoners was properly made under the Scotland Act 1998 against the governor and that the time-limit prescribed by the Human Rights Act 1998 did not, therefore, apply.

[21] Lord Hope, however, addressed the application of the time-limit at paragraph 51 of his opinion. He concluded that in the case of a continuing act of alleged incompatibility time runs from the date when the continuing act ceased, not when it began. If it were otherwise a person who was the victim of a continuing act would not be able to bring proceedings without relying on the equitable grounds if the failure was still continuing after the expiry of one year after its commencement. He was also of the view that damages may be awarded as just satisfaction for the whole of the period over which the continuing act extends including any part of the failure to act which commenced before the period of one year prior to the date when the proceedings were brought.

[22] Lord Scott recognised that in this instance there were acts consisting of the orders directing and extending segregation and failures to act arising from the failure to exercise the power to cancel the segregation. If the order making the segregation was unlawful the failure to cancel it constituted a day by day breach of the applicant's convention rights. Lord Scott considered that time should be calculated back from the date on which the proceedings were commenced. If such calculation fell somewhere within a period of allegedly unlawful segregation that would be a clear case for the court to exercise its power under section 7 (5) (b) to extend the one year limitation period so as to permit the action to cover the whole of the segregation period. Lord Mance, in effect, took a similar view at paragraph 197 of his opinion.

[23] These provisions were briefly considered by Baroness Hale in A v Essex County Council [2011] 1 AC 280 where she interpreted the judgment of the court as supporting the proposition that in the case of a continuing breach time runs from the end of the period rather than from the beginning. That does not necessarily, however, make the exercise in this case straightforward. As is apparent from the history of this case and indeed other legacy cases, delay as a result of failures of disclosure has been a recurring problem. Where there have been a series of failures of disclosure is it necessary for the applicant to issue proceedings within one year of the end of the particular failure to disclose, or is the applicant entitled to include earlier distinct periods of failure of disclosure where proceedings are issued in respect of the latest failure? May the answer to that question depend upon whether

there is a finding that all of the earlier failures of disclosure are part of a policy or practice to create delay?

[24] In light of these issues and 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. That may involve separate proceedings against different public authorities allegedly contributing to periods of delay which may or may not overlap. By way of example in respect of this inquest there have been more than 25 judicial review applications. Many of those applications raised issues of delay directly or indirectly. The public authorities allegedly responsible for the delay varied. 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 each public authority. Practicality and good case management point towards ensuring that all of those claims against each public authority should be heard at the same time.

[25] We are satisfied, however, that the same conclusion is reached by reference to principle. It is common case that delay in the hearing of inquest proceedings can constitute a breach of the convention and thus entitle an aggrieved party to bring proceedings for breach of that convention right. The appropriate remedy for such a breach will depend on the circumstances of what constitutes just satisfaction but may include an award of damages. Declaratory relief or mandamus may be enough to secure the right. We have ordered in this case that the inquest should now proceed before a different coroner. If that inquest does not take place within a reasonable timeframe that would constitute a fresh breach of the convention for which a remedy, including damages, may be available. It is when the inquest has been completed that it will be possible to examine all of the circumstances surrounding any claim for delay and the court will then be in a position to determine whether adequate redress requires an award of damages and if so against which public authority in which amount.

[26] We consider, therefore, 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 has finally been determined. Each public authority against whom an award is sought should be joined. In order to achieve this it may be necessary to rely upon section 7 (5) (b) of the 1998 Act. The principle that the court should be aware of all the circumstances and the prevention of even further litigation in legacy cases are compelling arguments in favour of it being equitable in the circumstances to extend time if required. Where the proceedings have been issued within 12 months of the conclusion of the inquest, time should be extended.

[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.

Conclusion

[28] For the reasons given we consider that the claim for damages for delay should be assessed after the completion of the inquest but should be made within one year of the completion. Since we have ordered a fresh inquest in this case that period has not yet commenced. We will hear the parties on whether the appeal on the award of damages should be adjourned until after the inquest or allowed without adjudication on the merits to enable the issue of a fresh claim. The cross appeal is dismissed.