

IN THE HORNSEY CORONERS COURT
IN THE MATTER OF THE INQUEST INTO THE DEATH TOUCHING
JEREMIAH DUGGAN

SKELETON SUBMISSIONS ON BEHALF OF THE FAMILY

1. Since McCann the Courts are under a procedural obligation to investigate a potential violation under article 2 of the ECHR.
2. *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245 analysed the threshold for the engagement of Article 2 and found it not to be “tantamount to gross negligence and the wilful disregard of the duty to protect life” (as advanced by the UK government). Rather “that the authorities did not do all that could reasonably be expected of them to avoid a real and immediate risk to life which they have or ought to have knowledge” (para 116).
3. Inquests are bound to consider systemic deficiencies which are relevant to the question of how the death took place.
4. The text of Article 2 of the Convention reads as follows:

Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than is absolutely necessary:

- in defence of any person from unlawful violence;
- in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- in action lawfully taken for the purpose of quelling a riot or insurrection.

5. Article 2 imposes three obligations upon the state.

· First, the state is under a negative duty not intentionally to deprive a person of his/her life, save in the limited circumstances outlined in Article 2(2): *McCann v. United Kingdom* (1996) 21 EHRR 97.

· Second, the state is under a positive duty to take reasonable steps to safeguard the lives of individuals, especially in circumstances where there is a known real and immediate risk to their lives: *Osman v. United Kingdom* (1998) 29 E.H.R.R. 245.

· Third, the state has a procedural duty to investigate a death where it is arguable that either the negative or the positive duty to protect life has been breached: *Jordan v. United Kingdom*, (2002) 37 E.H.R.R. 2; *Edwards v. United Kingdom* (2002) 35 E.H.R.R. 19.

PROCEDURAL OBLIGATION

6. Although the procedural duty to investigate potential breaches of Article 2 is not expressly set out in the Convention, the fact that Article 2 imposes such a free standing obligation has been the subject of clear and unequivocal rulings of the European Court in the last 6 years. In *McCann* the Court emphasised that the protection conferred by Article 2 (1):

“...would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of force by State authorities. The obligation to protect the right to life under this provision read in conjunction with the State’s general duty under Article 1 of the convention to ‘secure to everyone within their jurisdiction the rights and freedoms defined in [the] convention’ requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State” [161].

11. In cases subsequent to *McCann*, most notably the cases handed down by the Court on 4th May 2001 of which *Jordan v United Kingdom* (2003) 37 E.H.R.R. 2 was the lead case, it has become clear beyond any doubt that the right to an effective investigation into an arguable violation of the right to life is a substantive entitlement under the ECHR. In other words the absence of an effective investigation constitutes a discrete violation of Article 2. Moreover, the entitlement is not limited to death that occurs as a result of the use of direct force by agents of the state.

12. In *McShane v United Kingdom*, (2002) 34 E.H.R.R. 23 the procedural requirement was held to be engaged in relation to the negligent driving of an armored vehicle into a rioting crowd. In *Keenan v United Kingdom* (2001) 33 E.H.R.R. 38 the principle was equally applicable to state negligence in relation to a suicidal prisoner. In *Edwards v United Kingdom*, (2002) 35 E.H.R.R. 19 the principle was applied to circumstances that led to an inmate being placed in a cell with a dangerous person. The obligations are binding on local or central government departments whether acts or omissions are responsible for the creation and/or continuation of unacceptable environmental risks (*Oneryildiz v. Turkey*, App. No. 48939/99, Judgment of June 18 2002). A number of admissibility decisions have also recognised that the procedural right to a public investigation extends to potential negligence cases in public hospitals: *Erikson v Italy*, App. No. 37900/97, Decision. October 26 1999.

13. The case law of the European Court since *McCann* also makes it clear that the investigatory obligation extends to circumstances, where other citizens have caused the death, and the responsibility of the authorities lies only in there unreasonable failure to prevent it (or – as in *Menson v. U.K.* – to subsequently investigate it). This was first recognised in *Osman v. U.K.*, 29 E.H.R.R. 245 (father and son attacked by citizen after long term harassment and violence), but has been subsequently acknowledged in *Ergi v. Turkey*, 32 E.H.R.R. 18 (evidence to suggest that deceased killed in crossfire between PKK and Turkish armed forces), ECtHR; *Matromatteo v. Italy*, unreported, 24 October 2002, ECtHR (deceased killed during a bank robbery conducted by prisoners on home leave); and *Menson v. United Kingdom*, (Admissibility), unreported, 6 May 2003 (deceased died as a result of an unprovoked arson attack, which the police incorrectly attributed to suicide).

14. “What form such an investigation should take and under what conditions it should be conducted” Jordan and its conjoined cases, the Court did just that. The so-called Jordan criteria are that the investigation must be, (1) prompt, (2) independent and impartial, (3) effective, (4) public and (5) sufficiently inclusive of the next of kin in order to protect the interests of the deceased.

15. The Coroner is the key public authority which is required under domestic law to produce a Jordan compliant inquiry. This conclusion follows from McCann itself. It was recognised by Lord Bingham in the Divisional Court prior to the HRA coming into force. It was also recognized by the House of Lords in Amin and Court of Appeal in Middleton, despite specific arguments to the contrary advanced on behalf of the Hammersmith Coroner.

16. The minimum requirement in Strasbourg terms is that the inquiry must

2 Have “taken the reasonable steps” to secure the evidence concerning the incident, including inter alia eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death: Jordan, para 107;

3 Focus upon not only those agents who were allegedly directly responsible for the death, but the State organization or operation that was responsible for the planning and training of the agents in question: paras, 147-50 and 201;

4 “Establish the cause of death or [where relevant] the person or persons responsible”: Jordan, para 107.

17. The investigation must allow the family to have effective access to the investigatory process. In Jordan the ambit of effective involvement of the next of kin was given important new emphasis when the court held that 'In all cases ... the next of kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interest'. In Edwards Court found that the inquiry was inadequate for two reasons. First, by failing to compel the attendance of key witnesses and secondly by failing to hold the inquiry in public where the family could enjoy effective access and cross-examine witnesses (see para. 83-84).

18. All state institutions have a duty to disclose material in order to assist ‘a proper and effective examination’ of Article 2 issues. The Court has emphasised that Article 2 proceedings "do not in all cases lend themselves for rigorous application of the principle of affirmanti incumbit probatio (he who alleges something must prove that allegation)". This is especially the case when the material in question is such that the State solely has access to it: "A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent state...but may also give rise to the drawing of an inference as to the well foundedness of the allegations". Thus although the standard of proof for a substantive breach of Article 2 is “beyond reasonable doubt” it is wrong to speak in terms of an applicant bearing a “burden of proof”, and in circumstances where the authorities ought clearly to be in control of the

relevant information it will be open for a tribunal to make adverse inferences from their failure to provide it.

19. The procedural obligation has a critical role in monitoring the degree to which the state has complied with its negative and positive obligations concerning the right to life. Without such an obligation it would be unclear when breaches of Article 2 had taken place. This is especially the case when those potentially responsible for the death enjoy a high degree of control over the context in which the death occurred (e.g. a prison, the work place, a hospital).

20. In seeking to identify how the death was caused and anyone who was responsible for it, the investigation therefore has the capacity to bring about three results.

22. First, the inquiry may enable the examination of evidence that would assist in the possible initiation of criminal and/or civil proceedings.

23. Second, the inquiry may enable the family to understand the fate of the deceased and assist them in the grieving process.

24. Third, the inquiry may promote the prevention of similar fatalities in the future both by rendering State institutions sufficiently accountable and by scrutinising the conduct of its agents.

21. It is important to note that ‘public scrutiny’ and ‘involvement of the next of kin’, although related in an outcome of promoting the positive obligation to protect the right to life, also derive their conceptual legitimacy from separate parts of the text of the Convention:

a. ‘Public scrutiny’ relates to the obligation under Article 1 to “secure to everyone in the jurisdiction the rights and freedoms contained” within it. This inter-relationship between Article 2 and Article 1 was identified in McCann. ‘Public scrutiny’ especially in relation to deaths involving state agents also ties into the Preamble to the Convention which commits its signatories to the existence an ‘effective political democracy’ and ‘the rule of law’.

b. ‘Involvement of the next of kin’ in an investigation will generally raise the quality of ‘public scrutiny’, because the next of kin by virtue of their interest in the true fate of the deceased will be more exacting in their analysis of ‘official versions’. However, the obligation to afford specific involvement of the next of kin is a distinct obligation under the Convention, to be derived from the express words of its text, and implicit assumptions that underpin those words. The basic pre-requisite of any grieving process involves enabling the bereaved to be in possession of the full facts of the death. Therefore although the rights of the family are not explicitly referred to in the text of Article 2, respect for private and family life. (under Article 8) and the right to receive information (under Article 10), must clearly fall within this aspect of the Jordan criteria. The provision of active involvement in the investigation, should it be so desired, is therefore central to enabling a family unit to progress beyond its bereavement, as well as facilitating the personal development and human dignity of each of its members in the course of their grief.

22. The event of the HRA brings about the following key changes that must inform the conduct of every inquest:
23. The investigation must focus upon not only those who were allegedly directly responsible for the death, but the planning and organization of the State agency or operation that provides the context in which the death took place. Therefore, the interpretation of the word 'how' in rule 36 Coroners Rules cannot be read to exclude a consideration of (a) individual assessments/actions (McCann ~1) and (b) systemic/information deficiencies (McCann ~ 2).
24. If the circumstances of the death give rise to an engagement of Article 3 then the inquest is bound to consider those circumstances in so far as they have a causal nexus to the death.
25. The current inquest system is built around the primacy of the coroner's role with interested party's playing a secondary role in the inquisitorial process. The effective access jurisprudence under Article 2 read in conjunction with Article 8 obliges the coroner to put the interests of private and family life in a primary position save where it is “necessary” to interfere with such rights.
26. The required scope and nature of an effective Article 2 investigation. The Amin, Khan and Middleton recognises that the coroner is the key public authority responsible for fulfilling the adjectival obligation of the State to carry out an effective investigation into a possible violation of the right to life. They also agrees that this obligation is not limited to fatal shootings or to deaths that necessarily involve the direct responsibility of agents of the state. The Jordan criteria are recognised as constituting the clear position of the Strasbourg authorities and that ordinarily the inquest should comply with the requirements of this jurisprudence, including in the provision of appropriate verdicts.

Jordan:

“What is required will vary with the circumstances. A credible accusation of murder or manslaughter by State agents will call for an investigation of the utmost rigour, conducted independently for all to see. An allegation of negligence leading to death in custody, though grave enough in all conscience, bears a different quality from a case where it is said the State has laid on lethal hands. The procedural obligation promotes these interlocking aims: to minimise the risk of future like deaths; to give the beginnings of justice to the bereaved; to assuage the anxieties of the public. The means of their fulfilment cannot be reduced to a catechism of rules. What is required is a flexible approach, responsive to the dictates of the facts case by case. In our judgment the Strasbourg authorities including Edwards are perfectly consistent with this.”.

Submissions

1. In the light of the above submissions, this inquest should be adjourned pending further investigations.
2. The learned coroner is duty bound to conduct basic Jordan type investigations.

3. The deceased died in suspicious circumstances. The Germany authorities have thus far failed to investigate. As the state Agent, the Coroner could request that basic matters be looked into. The family cannot require the Germany authorities to conduct these investigations however, as a judicial officer the Coroner can make certain requests.

e.g.

7. Have statements been taken from key witnesses? The driver, witnesses at the scene at the garage, and subsequently, Sebastian, witnesses as to Jerry's state of mind in the last week or days before his death. Witness statement from the person where he was staying. If these statements have not been taken, the Coroner can ask why not? But currently there do not appear to be any enquiries into these matters. The family are entitled to know that efforts have been made to trace and contact these witnesses before the inquest proceeds, and the outcome of those inquiries.

8. What has happened to basis forensic evidence? Clothing and shoes etc. If it has been destroyed, why?

9. The accident report of the Germany authorities should be questioned and clarified, in the light of the families's report.

10. In summary to proceed with the inquest without embarking on these basic matters would be in breach of Article 2 of the ECHR as incorporated into Domestic Law.

Counsel will expand on these arguments and the failings of the current investigation in oral argument.

Leslie Thomas
2 Garden Court Chambers
4 November 2003

R v HM Coroner for Wiltshire ex p Clegg 520 JP 521 at 531; R v HM Coroner for Western District of East Sussex ex p Homber: 158 JP 357, 379H

For recognition of the procedural obligation in domestic law see R (Wright and Bennett) v SSHD [2002] HRLR 1 (negligent treatment by a prison doctor of a chronic asthmatic patient); R (Amin) v SSHD [2002] 3 WLR 505 (concerning negligence in relation to a homicidal prisoner); R (Middleton) v SSHD (conjoined with Amin) [2003] QB 581, CA (concerning the negligent treatment of a suicidal prisoner).

Siemiska v Poland 37602/97, App. No. Decision. March 29 2001

R. v. DPP ex. p. Manning and Melbourne [2001] QB 330, para. 33

R. (Amin and Middleton) v. SSHD [2003] QB 581, paras 90-91

Salman v. Turkey, (2002) 34 E.H.R.R. 17

Andrinicou and Constantinou v Cyprus, (1997) 25 EHRR 491, para 171.

Assenov v Bulgaria 28 EHRR 652, para 117; Aydin v Turkey 25 EHRR 251, para 103; Ergi v Turkey, judgement of July 28, 1998, para 96; R v DPP ex p Manning and Melbourne [2000] 3 WLR 463; R (Wright and Bennett) v SSHD [2002] HRLR 1; R (Amin and Middleton) v SSHD [2002] 3 WLR 505

Timurtas v Turkey 33 EHRR 121, para 66

ibid.

McCann v UK at paragraphs 200-201 and 212-214, Jordan v UK at paragraph 101-109, R (Amin) v SSHD at paragraphs 27 and 75; Edwards v UK at 60-61

Assenov v Bulgaria 28 EHRR 652 paragraph 117; R v (Wright and Bennett) v SSHD. This position directly contrasts with the position adopted R v Walthamstow Coroner's Court ex p Rubenstein, The Times, 24 February 1982, (transcript page 7) as applied in ex p Jamieson, 93E-H).

Cackici v Turkey, 31 EHRR 133, para 85. Timurtas v Turkey 33 EHRR 121, para 66; Salman v Turkey 34 EHRR 17, para 99.