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**House of Lords**

# Judgments - Regina v. Secretary of State for the Home Department (Respondent) ex parte Amin (FC) (Appellant)

HOUSE OF LORDS

SESSION 2002-03
**[2003] UKHL 51**
*on appeal from: [2002] EWCA Civ 390*

## OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

**Regina v. Secretary of State for the Home Department (Respondent) ex parte Amin (FC) (Appellant)**

ON

THURSDAY 16 OCTOBER 2003

The Appellate Committee comprised:

Lord Bingham of Cornhill

Lord Slynn of Hadley

Lord Steyn

Lord Hope of Craighead

Lord Hutton

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## OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT

## IN THE CAUSE

## Regina v. Secretary of State for the Home Department (Respondent) ex parte Amin (FC)

## [2003] UKHL 51

### LORD BINGHAM OF CORNHILL

My Lords,

1. In March 2000 Zahid Mubarek, a 19 year-old prisoner serving a sentence in Feltham Young Offender Institution, was wantonly murdered by Robert Stewart, with whom he shared a cell. The issue in this appeal is whether the United Kingdom has complied with its duty under article 2 of the European Convention on Human Rights to investigate the circumstances in which this crime came to be committed.

*The facts*

2. Zahid Mubarek ("the deceased") was born on 23 October 1980. He lived in East London. His criminal record was a short one. On 16 January 1997, for an offence of possessing an imitation firearm with intent to cause fear of violence, he was the subject of an attendance centre order. It appears the offence may have been committed in response to provocation and racist abuse. In March 1999 he was cautioned for handling stolen goods. On 17 January 2000 he was sentenced to a total of 90 days' detention in a young offender institution for offences of theft, going equipped for theft and interfering with a motor vehicle. These were offences which he committed, as it seems, to fund a growing heroin addiction. But it seems he had not complied with bail conditions imposed to address his drug problem. He was sent to Feltham, spent his first night there in the induction wing, and on 22 January 2000 was transferred to Swallow Unit where he was accommodated in cell 38, a double cell which he occupied on his own until the arrival of Stewart on 8 February. The evidence suggests that the deceased was a model prisoner who caused no trouble and appeared to have no enemies.

3. Robert Stewart was born on 4 August 1980 and lived at Hyde in Greater Manchester. Beginning with a conviction of arson when aged 13, he was convicted of 21 further offences before being sentenced for the first time to detention in a young offender institution in August 1995. Further such sentences followed in January 1996, February 1997

(after the making of community service and supervision orders), November 1997, October 1998 and January 2000. Only two of Stewart's convictions were of offences of personal violence (assault occasioning actual bodily harm and common assault). At the end of 1999 he faced charges under the Protection from Harassment Act 1997 which were due to be heard in London. It appears that these offences, or some of them, may have been thought to be racially motivated. His personal security file suggested that while in custody he had been implicated in violence, damage to prison property, escape attempts, hostage holding, the stabbing of other inmates (one of whom had lost his eye), suspected (but unproved) involvement in the murder of another prisoner, arson, the threatening of other inmates with a metal bar and a wooden table or chair leg and threats of violence against prison staff whose addresses he had ascertained. An intercepted letter suggested that he was in possession of a gun and knew the address of a prison governor. It appears that from about January 1999 his behaviour in custody improved, although he was later diagnosed to be suffering from "a long-standing deep-seated personality disorder" and "an untreatable mental condition".

4. Stewart's first visit to Feltham was on 10 January 2000 for purposes of a court hearing in London. It was judged that he needed to be watched and he was put in a single cell. An intercepted letter written by him was found to contain a reference to "Niggers". An officer who read Stewart's security file at this time formed the opinion that Stewart was "very dangerous and a threat to both staff and other inmates". He made a note in Stewart's wing file: "Staff are advised to see the security file on this inmate (held in security). Very dangerous individual. Be careful." Having made his court appearance, Stewart returned to Hindley Young Offender Institution (from which he had come) on 12 January.

5. Stewart returned to Feltham on 24 January for a further court appearance. He was accommodated on a different wing, where staff were warned that he was dangerous. He left again on 26 January.

6. Stewart was transferred to Feltham on a longer-term basis on 7 February 2000. He spent his first night on a wing where he had not been before. On the following day, 8 February 2000, he was placed in cell 38 on Swallow Wing, with the deceased. It is said that the wing had a maximum capacity of 60 prisoners, that there were already 59 before the arrival of Stewart and that the vacant place in cell 38 was the only place available. The allocation decision was made by an officer who had, according to one source, been warned to "watch [Stewart] as he was dangerous". The officer himself does not, it appears, recollect such a warning, and did not consult Stewart's security file, or his wing file which did not reach Feltham until later.

7. Stewart shared cell 38 with the deceased from 8 February to 21 March 2000. During that time he wrote and sent a letter, not

intercepted, couched in violent and racist terms. On 19 March Stewart's sentence expired and he was thereafter held on remand pending trial of the outstanding charges, but he was not moved. There is no evidence of hostility or discord between the deceased and Stewart during the time they were sharing cell 38, although the deceased may have expressed a wish to share with someone else. There is evidence that other prisoners regarded Stewart as "strange" and "weird" and "aggressive", partly because of his manner and behaviour, partly because of a cross, with the letters RIP, tattooed on his forehead.

8. On 21 March 2000 at about 3.35 am Stewart battered the deceased into a coma with a wooden table leg. The deceased was due to be released that day. He never recovered, dying in hospital of brain damage a week later. After the attack Stewart pressed the cell alarm button and, when an officer responded, said that his cell-mate had had an accident. When moved to a nearby cell he drew a large swastika on the wall with the heel of his rubber shoe; above it he wrote "Just killed me padmate" and below it "RIP". The Director General of HM Prison Service met the parents of the deceased at the hospital on the day of the attack and, on learning of the death, wrote a letter apologising unreservedly for the failure of the Prison Service to look after the deceased and accepting responsibility for his death. He told them of an internal inquiry he had set up under the leadership of Mr Ted Butt, a serving governor and senior investigating officer of the Prison Service.

9. Stewart was charged with murder, and his trial started on 24 October 2000. He admitted the killing. The issue was whether he was guilty of murder or of manslaughter by reason of diminished responsibility. He was convicted of murder. Although the court heard evidence of the circumstances immediately surrounding the killing, including the actions of prison officers at that time, there was no exploration at the trial of cell allocation procedures or other events before the murder.

10. An inquest into the death of the deceased was formally opened on 31 March 2000 and then adjourned pending trial of the murder charge against Stewart. Following the conviction HM Coroner for West London declined to resume the inquest, a decision to which she adhered despite representations inviting her to reconsider it. In an affidavit she has given detailed reasons why the constraints to which coroners and inquests are subject make an inquest an unsuitable vehicle for investigating publicly the issues raised by this case.

11. The police investigated whether the Prison Service or any of its employees should be prosecuted for manslaughter by gross negligence or under section 3 of the Health and Safety at Work etc Act 1974. The advice of counsel was that there was insufficient evidence to provide a realistic prospect of securing any conviction relating to the death of the deceased. His family were so informed in August 2001.

12. The terms of reference of the Butt inquiry were to investigate the circumstances surrounding the murder and in particular to consider the issue of shared accommodation both generally and with particular reference to Stewart, in the light of what was known about his criminal history and institutional behaviour. The family of the deceased were consulted about these terms of reference but were not present at any stage of the investigation and although invited to meet Mr Butt did not avail themselves of this opportunity. Mr Butt's report was in two parts, completed at the end of October and November 2000 respectively. Copies of both parts were made available to the family, save for certain confidential annexes relating to individual prisoners, and no restriction was placed on their use of the report, save for the transcripts of interviews with members of the Prison Service annexed to the first part of the report. The report was made available to the police and the Commission for Racial Equality ("the CRE") but was not published. It identified a number of shortcomings at Feltham and made 26 recommendations for change.

13. On 17 November 2000 the CRE announced that it would be conducting a formal investigation into racial discrimination in the Prison Service. Its terms of reference were wide-ranging and general across the Prison Service but made specific reference to the circumstances leading to the murder of the deceased and any contributing act or omission on the part of the Prison Service. The family were involved in the preparation of the terms of reference and expressed views on the procedures proposed. The family wrote to the CRE asking that they be allowed to participate in its inquiry and for its hearings to be in public, but the CRE refused this request. It stated that the inquiry had to be seen to be impartial and that, although there was to be a "public component" in its proceedings, it could not conduct the whole inquiry in public. In the event, a public hearing was held on 18 September 2001 when certain high-level policy witnesses made statements and were questioned by counsel for the CRE. Before this hearing the family were offered a meeting with counsel at which they could raise topics which they would like to be covered in the cross-examination. They did not take up this offer and did not attend the public hearing. They had no opportunity to question witnesses. The CRE published its report relating to the deceased in July 2003, very shortly before the hearing in the House. It made a finding of race discrimination against the Prison Service and identified 20 respects in which the administration of Feltham had failed.

14. Very shortly after the death of the deceased, on 3 April 2000, solicitors for his family wrote to the responsible minister of state, asking for an independent public inquiry into the death. On 7 and 12 April the minister replied that it was too early to make a decision about a public inquiry pending the police investigation and the Butt inquiry. At a meeting on 2 November 2000 the minister did not agree to establish a public inquiry. On 31 July 2001 he was asked to reconsider this decision, but he replied that he saw no reason to reverse his earlier

decision not to hold such an enquiry.

15. The appellant, an uncle of the deceased, sought judicial review of (a) the decision of the CRE not to allow the family to participate in the proceedings in any meaningful manner or to hold any significant part of its investigation in public, (b) the decision of the Coroner not to resume the inquest and (c) the decision of the Home Secretary not to hold an inquiry in public. Hooper J, before whom these applications came, adjourned the applications against the CRE and the Coroner but granted permission to pursue the claim against the Home Secretary. This claim he upheld, ruling that the refusal to hold a public inquiry was a breach of article 2 of the Convention: [2001] EWHC Admin 719. He declared that

> "an independent public investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses, must be held to satisfy the obligations imposed by Article 2 of the European Convention on Human Rights."

The Home Secretary appealed against this decision. In a judgment of the court (Lord Woolf CJ, Laws and Dyson LJJ) the appeal was allowed and the judge's order set aside: [2002] EWCA Civ 390; [2003] QB 581. The appellant challenges the ruling of the Court of Appeal and seeks to restore the judge's order.

*Domestic law*

16. For many centuries the law of England has required a coroner to investigate the death of one who dies in prison. *Sewell on Coroners* (1843), referring to the Statute de Officio Coronatoris 1276, put it thus at page 32:

> "It is observable that this statute being wholly directory, and in affirmance of the common law, the coroner is not thereby restrained from any branch of his power, nor excused from any part of his duty, not mentioned in it, which was incident to his office before; and therefore, though the statute mentions only inquiries of the deaths of persons slain, drowned, or suddenly dead, yet the coroner ought also to inquire of the death of those who die in prison; to the end that the public may be satisfied whether such persons came to their end by the common cause of nature, or by some unlawful violence, or unreasonable hardships put on them by those under whose power they were confined".

This duty was recognised by Hale (*History of the Pleas of the Crown*, 1736, volume II, page 57) and Blackstone (*Commentaries on the Laws of England, vol 4, Of Public Wrongs*, 1769, page 271). It found expression in section 11 of the Gaols etc (England) Act 1823, section 48 of the Prisons Act 1865, section 56 of the General Prisons (Ireland)

Act 1877, section 53 of the Prisons (Scotland) Act 1877, section 3 of the Coroners Act 1887, section 13(2)(b) of the Coroners (Amendment) Act 1926 and section 8 of the Administration of Justice (Emergency Provisions) (Northern Ireland) Act 1939. These statutes are not to identical effect. But in all of them deaths in prison are singled out as cases calling for inquiry. All of them require the inquiry to be conducted by an independent judicial officer (in England, Wales, Ireland and Northern Ireland, a coroner, in Scotland, a sheriff or sheriff substitute). Most of them expressly require the inquiry to be before a jury, and some (the Acts of 1823 and 1865 and the Irish Act of 1877) provide that no inmate or officer of the prison where the death occurred shall be a juror. In some it is provided that, if practicable, "sufficient time shall be allowed before the holding of the inquest to allow the attendance of the nearest relative of the deceased" (the Irish Act of 1877) or that "sufficient time shall intervene between the day of the death and the day of the holding the inquiry, to allow the attendance of the next of kin of the deceased" (the Scottish Act of 1877).

17. Section 8(1)(c) of the Coroners Act 1988, applicable in England and Wales, requires a coroner to hold an inquest on being informed that a person has died in prison. Such an inquest must, by section 8(3)(a), be conducted with a jury. By section 8(6), neither a prisoner in the prison where the deceased died nor any person engaged in any sort of trade or dealing with the prison may serve as a juror at the inquest. The inquest must be held in public: Coroners Rules 1984 (SI 1984/552), rule 17. The family may attend and be legally represented: Coroners Rules 1984, rule 20. They or their representative may question witnesses at the hearing. The coroner is however ordinarily required by section 16(1)(a)(i) to adjourn the inquest on being informed that a person has been charged with the murder or manslaughter of the deceased and on the conclusion of the criminal proceedings has a discretionary power (conferred by section 16(3)) to resume the adjourned inquest "if in his opinion there is sufficient cause to do so". Section 17A(1)(a) provides for the adjournment of an inquest if the coroner is informed by the Lord Chancellor that a public inquiry conducted or chaired by a judge is being or is to be held into the events surrounding the death.

*The Convention*

18. By article 1 of the Convention member states bound themselves to secure to everyone within their respective jurisdictions the rights and freedoms defined in Section 1 of the Convention. The first of those rights, expressed in article 2(1), is the right to life:

> "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."

The provisions of article 2(2), relating to the use of necessary force in defence against unlawful violence, to effect an arrest or prevent an escape from lawful detention or to quell a riot or insurrection, have no bearing on this appeal. Article 2(1) has been repeatedly described as "one of the most fundamental provisions in the Convention": *McCann v United Kingdom* (1995) 21 EHRR 97, para 147; *Salman v Turkey* (2000) 34 EHRR 425, para 97; *Jordan v United Kingdom* (2001) 37 EHRR 52, para 102. The European Court has made plain that its approach to the interpretation of article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied so as to make its safeguards practical and effective: *McCann*, para 146; *Salman*, para 97; *Jordan*, para 102.

19. The primary purposes of article 2 were well described by the European Court in paragraph 115 of its judgment in *Osman v United Kingdom* (1998) 29 EHRR 245 when it said (I omit the footnote):

> "115. The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. . . ."

But the scope of article 2(1) goes beyond the primary purposes thus defined, as the Commission explained in paragraph 193 (page 140) of its opinion in the report of *McCann*:

> "193. Having regard therefore to the necessity of ensuring the effective protection of the rights guaranteed under the Convention, which takes on added importance in the context of the right to life, the Commission finds that the obligation imposed on the State that everyone's right to life shall be 'protected by law' may include a procedural aspect. This includes the minimum requirement of a mechanism whereby the circumstances of a deprivation of life by the agents of a state may receive public and independent scrutiny. The nature and degree of scrutiny which satisfies this minimum threshold must, in the Commission's view, depend on the circumstances of the particular case. There may be cases where the facts surrounding a deprivation of life are clear and undisputed

> and the subsequent inquisitorial examination may legitimately be reduced to a minimum formality. But equally, there may be other cases, where a victim dies in circumstances which are unclear, in which event the lack of any effective procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 of the Convention."

20. Most of the recent European cases to which reference was made in argument before the House concerned killings deliberately carried out, or allegedly carried out, by agents of the state. Naturally, therefore, such deliberate killings by state agents were the primary, although not the exclusive, subject of the Court's attention. The cases clearly establish a number of important propositions:

(1) It is established by *McCann*, paragraph 161, *Yasa v Turkey* (1998) 28 EHRR 408, paragraph 98, *Salman,* paragraph 104 and *Jordan*, paragraph 105 that (as it was put in *McCann*):

> "The obligation to protect the right to life under [article 2(1)], 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 alios*, agents of the State."

(2) Where agents of the state have used lethal force against an individual the facts relating to the killing and its motivation are likely to be largely, if not wholly, within the knowledge of the state, and it is essential both for the relatives and for public confidence in the administration of justice and in the state's adherence to the principles of the rule of law that a killing by the state be subject to some form of open and objective oversight: paragraph 192 of the opinion of the Commission in *McCann,* set out at pages 139-140.

(3) As it was put in *Salman*, paragraph 99,

> "Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused [footnote omitted]. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies."

Where the facts are largely or wholly within the knowledge of the state authorities there is an onus on the state to provide a satisfactory and convincing explanation of how the death or injury occurred: *Salman*, paragraph 100; *Jordan*, paragraph 103.

(4) The obligation to ensure that there is some form of effective official investigation when individuals have been killed as a result of the use of force is not confined to cases where it is apparent that the killing was caused by an agent of the state: *Salman,* paragraph 105.

(5) The essential purpose of the investigation was defined by the Court in *Jordan*, paragraph 105:

> "... to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures ....."

(6) The investigation must be effective in the sense that (*Jordan,* paragraph 107)

> "it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances . . . and to the identification and punishment of those responsible . . . This is not an obligation of result, but of means."

(7) For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary (*Jordan*, paragraph 106)

> "for the persons responsible for and carrying out the investigation to be independent from those implicated in the events . . . This means not only a lack of hierarchical or institutional connection but also a practical independence . . . ".

(8) While public scrutiny of police investigations cannot be regarded as an automatic requirement under article 2 (*Jordan*, paragraph 121), there must (*Jordan*, paragraph 109)

> "be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case."

(9) "In all cases", as the Court stipulated in *Jordan*, paragraph 109:

> "the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests".

(10) The Court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure: *Jordan,* paragraph 143. But it is "indispensable" (*Jordan*, paragraph 144) that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force.

21. As pointed out above, the propositions I have sought to summarise were, in the main, laid down in cases involving deliberate killing or alleged killing by agents of the state. *Edwards v United Kingdom* (2002) 35 EHRR 487 is of central importance in this appeal because it was not such a case. Factually it bore strong similarities to the present case. Christopher Edwards, who had shown marked signs of mental illness, was remanded in custody and placed in a prison cell with another man, Richard Linford, who was suffering from acute mental illness. During their first night in the shared cell Richard Linford kicked and stamped Christopher Edwards to death. There were factual differences between that case and this. The period for which the two men shared a cell was much shorter. Richard Linford's plea of guilty to manslaughter on grounds of diminished responsibility was accepted by the prosecution, and a hospital order was made, so there was no contested trial. There was no acceptance of responsibility by the Prison Service. There was in that case a long and thorough inquiry conducted by independent Queen's Counsel. But the case is important because, although addressing a case in which there had been no killing or alleged killing by state agents and the responsibility of the state (if any) could only rest on its negligent failure to protect the life of Christopher Edwards, a prisoner in its custody, the European Court applied essentially the same principles as in the cases already considered. In my respectful opinion, the Court was fully justified in doing so, for while any deliberate killing by state agents is bound to arouse very grave disquiet, such an event is likely to be rare and the state's main task is to establish the facts and prosecute the culprits; a systemic failure to protect the lives of persons detained may well call for even more anxious consideration and raise even more intractable problems.

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