



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

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22. In its judgment in *Edwards* the Court repeated (in paragraph 54) the passage in paragraph 115 of *Osman* quoted in paragraph 19 above, and it found a breach of the obligation there defined (paragraph 64). It then turned to consider the procedural obligation to carry out effective investigations. Having summarised the parties' competing submissions the Court made its assessment which (omitting footnotes) it is necessary to quote:

"69. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its jurisdiction] the rights and freedoms defined in [the] Convention', also 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. The essential purpose of such investigation is 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.

70. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary 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.

71. The investigation must also be effective in the sense that 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. The authorities must have taken the reasonable steps available to them 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. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

72. A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

73. For the same reasons, there must 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. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

23. No light is shed on the present problem by two cases decided since *Edwards. Menson v United Kingdom* (6 May 2003, Application No 47916/99) concerned a racist attack on a victim who was set on fire and killed in the street by assailants who were not agents of the state and who were duly prosecuted, convicted and sentenced. No blame attached to state authorities for the killing and no breach of the state's investigative duty was found. While certain familiar principles were rehearsed, the complaint was held to be manifestly ill-founded. *Finucane v United Kingdom* (1 July 2003, Application No 29178/95) was a much more difficult and complex case, but it laid down no principles which had not been laid down before.

#### *The judge's decision*

24. In approaching the present case Hooper J had the benefit of a recent judgment of Jackson J in *R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520; [2001] UKHRR 1399. That case concerned a serving prisoner who suffered a severe asthmatic attack in his cell and died. An inquest was held at which the family of the deceased were present, but unrepresented for want of legal aid. There was no inquiry into the quality of the medical treatment the deceased had received in prison. It later emerged that the responsible medical officer had been suspended from duty and had previously been found guilty of serious professional misconduct. In a civil action against the Home Secretary liability was admitted, thus precluding forensic investigation of the case. The family sought judicial review on the grounds, among others, of a failure to protect the life of the deceased and a failure of the procedural obligation arising under article 2 of the Convention to investigate the circumstances of the death.

25. In a succinct and accurate judgment Jackson J reviewed the domestic and Strasbourg case law, deriving from *Jordan v United Kingdom* (2001) 37 EHRR 52 the requirement that an investigation, to satisfy article 2, must have certain features (paragraph 41):

- (1) The investigation must be independent.
- (2) The investigation must be effective.

- (3) The investigation must be reasonably prompt.
- (4) There must be a sufficient element of public scrutiny.
- (5) The next of kin must be involved to an appropriate extent.

From the recent case law Jackson J derived five propositions of which the fourth was:

"Where the victim has died and it is arguable that there has been a breach of article 2, the investigation should have the general features identified by the court in *Jordan v United Kingdom* at paras 106-109".

The judge concluded on the facts that there had not been an effective official investigation into the death of the deceased and held that there should be an independent investigation, to be held in public, at which the family should be represented.

26. Hooper J examined the facts of the present case, so far as they are known, in some detail, reviewed the relevant case law, adopted Jackson J's summary of the features identified in *Jordan* as necessary if an investigation were to comply with article 2 and accepted the fourth proposition put forward by Jackson J and quoted above. He concluded that the inquiries and investigations which had been conducted did not, singly or cumulatively, satisfy the investigative duty of the United Kingdom under article 2. In paragraph 91 of his judgment he said:

"91. Zahid Mubarek was murdered in Feltham by a racist cell mate with 'an alarming and violent criminal record, both in and out of custody'. It is accepted that Zahid Mubarek was put in the same cell as his killer because of 'systemic failures'. Established procedures were not followed and there is an appalling history at Feltham of failure to comply with earlier recommendations. It seems likely (and it is certainly arguable) that there were serious human failings both at the wing level and at higher levels which have not been publicly identified. On the facts of this case the obligation to hold an effective and thorough investigation can, in my judgment, only be met by holding a public and independent investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses. Against the background of the material which I have set out at some length, the family and the public are entitled to such an investigation".

He accordingly made the declaration quoted in paragraph 15 above. Neither Jackson J nor Hooper J had the benefit of the Court's judgment in *Edwards v United Kingdom* (2002) 35 EHRR 487.

#### *The Court of Appeal decision*

27. In paragraph 32 of its judgment the Court of Appeal outlined its general approach to the investigative duty arising under article 2:

"32. Against this framework of obligations created by article 2, it is useful?and here is our third preliminary?to make some general observations about the nature of the procedural duty to investigate. Plainly there is *no* duty on the face of the Convention

to investigate a death. It is clear that such a duty has been constructed or developed by the court at Strasbourg out of a perception that, without it, the substantive rights conferred by article 2 would or might in some cases be rendered nugatory or ineffective. Thus the duty to investigate is adjectival to the duty to protect the right to life, and to the prohibition of the taking of life. It follows that by its nature it cannot be a duty defined by reference to fixed rules. It only has life case by case, contingent upon what is required in any individual instance for the substantive right's protection. Across the spectrum of possible article 2 violations, there are classes of case which can readily be distinguished. One class is that of allegations of deliberate killing?murder?by servants of the state. A second is that of allegations of killing by gross negligence?manslaughter?by servants of the state. A third is that of plain negligence by servants of the state, leading to a death or allowing it to happen. In the context of any of these classes, there exists the lamentable possibility that the state has concealed or is concealing its responsibility for the death. That possibility gives rise to the paradigm case of the duty to investigate. The duty is in every instance fashioned to support and made good the substantive article 2 rights. We shall see, as we go through the movements of the argument, that this approach sits with the Strasbourg jurisprudence, whose character has always been essentially pragmatic".

After addressing other matters not now relevant, the court considered the scope of the duty to investigate and said, in paragraph 45:

"45. In the terms in which it was articulated by Mr Crow [for the Home Secretary] at the hearing, the focus of this part of the case appeared to be relatively narrow. Building on Jackson J's judgment in *R (Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399, 1409-1410, para 41, which we need not set out, Hooper J held, *R (Amin) v Secretary of State for the Home Department* [2001] EWHC Admin 719 at [81]-[86], that for an investigation to satisfy the procedural requirements of article 2 a number of conditions must be met, including these two: (a) there must be a sufficient element of public scrutiny, and (b) the next of kin must be involved to the appropriate extent. Mr Crow submitted that that is a wrong approach. There are not discrete and cumulative requirements of publicity and family participation. Depending on the particular facts, participation by the next of kin may itself satisfy applicable standards of openness without any additional requirement of public hearings. Now, while these two elements are plainly of great potential importance, it seems to us that this part of the case raises a deeper, or at any rate a more general question. How far may the nature and quality of any investigation embarked upon in satisfaction of the article 2 adjectival duty vary according to the context and subject matter of the case? Are such requirements as publicity and family participation, and other virtuous procedures, *constant*? It was broadly the claimant's position that they are: the duty is essentially a uniform one, whether the death is due to unlawful violence by state servants, or to recklessness or to negligence. In so submitting Mr O'Connor built especially on *Jordan v United Kingdom* 11 BHRC I, and now also on *Edwards v United Kingdom* The Times, 1 April 2002."

The court then considered the relevant cases, citing passages from the decisions in *Jordan*, *Wright* and *Edwards* and expressed clear conclusions in paragraphs 60-63:

"60 In our view *Edwards's* case represents no fresh departure in the Strasbourg jurisprudence, which in this area, as it is generally, is essentially pragmatic. The *Jordan* requirements are by no means set in stone. Particular considerations?the

absent witnesses, the relative exclusion of the family?coloured the court's decision in *Edwards's* case, just as they might colour the decision of a common law court.

61 In light of the arguments on *Edwards's* case it is right to draw special attention to two matters in particular. The first is that the procedural duty to investigate does not appear on the Convention's face: it is no more nor less than an adjectival duty, imposed as a corollary of the substantive right guaranteed by article 2. Secondly, the task of our courts is to develop a domestic jurisprudence of fundamental rights, drawing on the Strasbourg cases of which by section 2 of the Human Rights Act 1998 we are enjoined to take account, but by which we are not bound. In this present context, these two features march together. The reason is that the nature and scope of an adjectival duty, which by definition is not expressly provided for in the Convention, must especially be fashioned by the judgment of the domestic courts as to what in their jurisdiction is sensibly required to support and vindicate the substantive Convention rights.

62 Accordingly, this part of the case cannot be satisfactorily resolved by a process of reasoning which sticks like glue to the Strasbourg texts. Just as, in our view, on question (2) Mr Crow originally adopted too rigid an approach to the Human Rights court's jurisprudence in submitting that the duty to investigate was only triggered in cases of the use of unlawful force by state agents, so also on question (3) Mr O'Connor makes the same error in submitting that there are fixed requirements of publicity and family participation, uniformly applicable to every investigation. 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 had 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's* case are perfectly consistent with this. And it is an approach which embraces what we will say in the *Middleton* appeal about the coroner's jurisdiction and inquest verdicts of neglect.

63 In all these circumstances we agree with Mr Crow that publicity and family participation are not necessarily discrete compulsory requirements which must be distinctly and separately fulfilled in every case where the procedural duty to investigate is engaged. Further, and somewhat more broadly, we consider that Jackson J's fourth proposition in para 43 of his judgment in *R (Wright) v Secretary of State for the Home Department* [2001] UKHRR 1399, 1410 cannot be accepted at face value. For convenience we set it out again:

'4. Where the victim has died and it is arguable that there has been a breach of article 2, the investigation should have the general features identified by the court in *Jordan v United Kingdom* at paras 106-109.'

This might seem to suggest something of a universal formula for all investigations undertaken in fulfilment of article 2, and to that extent we disagree with it. In fairness the judge had just indicated, in proposition (3), that 'there is no universal set of rules for the form which an effective official investigation must take', and in our judgment that is entirely correct."

The Court of Appeal accepted the submission, made on behalf of the Home Secretary, that the judge should have held, on the facts of the case, that the procedural obligation of the United Kingdom had been discharged.

28. In argument before the House Mr O'Connor QC, for the appellant, sought to restore the order of the judge for very much the reasons the judge had given and contended that the Court of Appeal, in departing from the judge's reasoning, had erred. He accepted that it was for member states to decide how the investigative duty arising under article 2 should be discharged and accepted that some cases would call for more intense scrutiny than others. But he argued that *Jordan* and *Edwards* specified an irreducible, minimum, standard of review, however achieved and whether by a single means of investigation or several. That irreducible minimum could be met only by an appropriate level of publicity and an appropriate level of participation by the next of kin. In this case there had been neither. The appellant's legal argument was broadly supported by the Northern Ireland Human Rights Commission, which was granted leave to intervene.

29. Mr Crow, for the Secretary of State, supported the reasoning and the decision of the Court of Appeal. The Strasbourg jurisprudence had laid down principles but not rules which could never be departed from. A member state's duty to investigate was shaped by the facts and circumstances of the particular case. There was no single model of investigation which must be applied in all cases. It was for the state to decide what form of investigation would be appropriate in a given case. Public scrutiny and family participation were not separate requirements. Here, the Prison Service had accepted responsibility for the death. A civil action could be begun with an assured prospect of success. The criminal culpability of Stewart and prison staff had been investigated by the police. There had been a contested criminal trial. There had been a detailed investigation by Mr Butt, leading to a full report, severe criticism of the régime at Feltham and many recommendations. There had been a full report by the CRE, which had been published. The family of the deceased had not taken advantage of the opportunities offered to them to participate. There was no reason to think that any further enquiry would uncover any facts not already known or lead to any improvements not already in train.

### *Conclusions*

30. A profound respect for the sanctity of human life underpins the common law as it underpins the jurisprudence under articles 1 and 2 of the Convention. This means that a state must not unlawfully take life and must take appropriate legislative and administrative steps to protect it. But the duty does not stop there. The state owes a particular duty to those involuntarily in its custody. As Anand J succinctly put it in *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 at 767

"There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life".

Such persons must be protected against violence or abuse at the hands of state agents. They must be protected against self-harm: *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360. Reasonable care must be taken to safeguard their lives and persons against the risk of avoidable harm.

31. The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred: *Menson v United Kingdom*, page 13. It can fairly be described as procedural. But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country, as noted in paragraph 16 above, effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

32. Mr Crow was right to insist that the European Court has not prescribed a single model of investigation to be applied in all cases. There must, as he submitted, be a measure of flexibility in selecting the means of conducting the investigation. But Mr O'Connor was right to insist that the Court, particularly in *Jordan* and *Edwards*, has laid down minimum standards which must be met, whatever form the investigation takes. Hooper J loyally applied those standards. The Court of Appeal, in my respectful opinion, did not. It diluted them so as to sanction a process of inquiry inconsistent with domestic and Convention standards.

33. There was in this case no inquest. The coroner's decision not to resume the inquest is not the subject of review, and may well have been justified for the reasons she has given. But it is very unfortunate that there was no inquest, since a properly conducted inquest can discharge the state's investigative obligation, as established by *McCann*. It would overcome the problems exposed by this appeal if effect were given to the recommendations made in "Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review 2003" (Cm 5831) (June 2003), and no doubt that report is receiving urgent official attention.

34. The police investigations into the criminal culpability of Stewart and the Prison Service were, very properly, conducted in private and

without participation by the family. The Advice Report on which counsel based his advice not to prosecute the Prison Service or any of its members was produced in evidence during these proceedings but not before. It is written in an objective and independent spirit, but it raises many unanswered questions and cannot discharge the state's investigative duty.

35. The trial of Stewart for murder was directed solely to establishing his mental responsibility for the killing which he had admittedly carried out. It involved little exploration, such as would occur in some murder trials, of wider issues concerning the death.

36. There is no reason to doubt that Mr Butt set about his task in a conscientious and professional way. He explored the facts, exposed weaknesses in the Feltham régime and recommended changes which, it is understood, have been and are being implemented. It is however plain that as a serving official in the Prison Service he did not enjoy institutional or hierarchical independence. His investigation was conducted in private. His report was not published. The family were not able to play any effective part in his investigation and would not have been able to do so even if they had accepted the limited offer made to them.

37. The CRE report, which was not before the judge or the Court of Appeal, brings additional facts to light (although some of these, such as the discovery of a handmade wooden dagger under Stewart's pillow after the murder, raise many further questions). The report has been published. But the CRE inquiry, conducted under the Race Relations Act 1976, was necessarily confined to race-related issues and this case raises other issues also (as did *Edwards*, where there was no race issue). Save for a single day devoted to policy issues, the inquiry was conducted in private. The family were not able to play any effective part in it and would not have been able to do so even if they had taken advantage of the limited opportunity they were offered. Whether assessed singly or together, the investigations conducted in this case are much less satisfactory than the long and thorough investigation conducted by independent Queen's Counsel in *Edwards'* case, but even that was held inadequate to satisfy article 2(1) because it was held in private, with no opportunity for the family to attend save when giving evidence themselves and without the power to obtain all relevant evidence.

38. I consider that the judge was right to reach the conclusion and make the order which he did. For the foregoing reasons, and those given by my noble and learned friends Lord Slynn of Hadley, Lord Steyn and Lord Hope of Craighead, I would accordingly allow the appeal and restore his order.

39. I cannot accept the submission of Mr Crow that any further inquiry is unlikely to unearth new and significant facts. The papers

before the House raise questions which any legal representative of the family would properly wish to pursue and the discovery of further new facts of significance may well be probable. But it is true that there are factual areas - for example, the killing itself, and the cause of death - which have already been fully explored and of which little or no further examination is required. Many of the factual findings made by Mr Butt and the CRE can no doubt be taken as read. It will be very important for the investigator to take a firm grip on the inquiry so as to concentrate the evidence and focus the cross-examination on issues justifying further exploration. Reliance should be placed on written statements and submissions so far as may properly be done at a hearing required to be held in public. All those professionally engaged, for any party, should bear in mind their professional duty to ensure that the investigation of this tragic and unnecessary death is conducted in a focused and disciplined way.

### **LORD SLYNN OF HADLEY**

My Lords,

40. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. He has set out in detail the facts and the relevant passages of the opinions of the Commission and the judgments of the Court of Human Rights in Strasbourg. These judgments clearly recognise that Article 2 of the Convention is to be read as including not only a duty not to take life, but in some circumstances to take steps to prevent life being taken and as part of that duty an obligation to investigate the circumstances surrounding the death.

41. The duty to investigate is partly one owed to the next of kin of the deceased as representing the deceased: it is partly to others who may in similar circumstances be vulnerable and whose lives may need to be protected. The significance of this duty to those detained in prison, not least where prisons are crowded and prisoners often dangerous, is obvious. It does not seem to me to be possible to say that there is a clear dividing line between those cases where an agent of the state kills and those cases where an agent of the state or the system is such that a killing may take place. The result of "an incident waiting to happen" may just as much as an actual killing require detailed and profound investigation, though in some cases the procedure to be adopted may be justifiably different.

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