JUDICIARY OF ENGLAND AND WALES

R

on the application of

Ismail Ali, Ian Lawless, Barry George, Kevin Dennis & Justin Tunbridge

-v-

Justice Secretary

High Court (Administrative Court)

25 January 2013

SUMMARY TO ASSIST THE MEDIA

The High Court (Lord Justice Beatson and Mr Justice Irwin) dismissed applications by Ismail Ali, Barry George, Kevin Dennis and Justin Tunbridge to quash decisions by the Justice Secretary to refuse them compensation as victims of a 'miscarriage of justice'. The Court quashed the Justice Secretary's decision to refuse compensation to Ian Lawless as a victim of a 'miscarriage of justice' and ordered him to reconsider his decision.

The decisions were given in a judgment in five lead cases of judicial review concerning the effect of the Supreme Court's decision in *Adams* which broadened the band of persons who could qualify for compensation on the ground of 'miscarriage of justice'. The judgment provides guidance as to the application of the Supreme Court's decision.

Overview

The Court sets out an overview of the cases before it in paragraphs 1 – 12.

"These judicial reviews concern the effect of the decision of the Supreme Court in *R (Adams) v Secretary of State for Justice; Re MacDermott*, and *Re McCartney* [2011] UKSC 18, hereafter "the *Adams* cases". The Supreme Court broadened the band of persons whose convictions were reversed who qualify for compensation under section 133 of the Criminal Justice Act 1988 ("the 1988 Act") on the ground that a new or newly discovered fact shows that there has been a "miscarriage of justice". As a result, some of those whose previous applications for compensation were rejected on the basis of the former understanding of the law reapplied. A number of those whose applications were again refused by the Secretary of State have challenged his decision to do so. The five claimants, Ismail Ali, Kevin Dennis, Barry George, Ian Lawless, and Justin Tunbridge, are in this category. On 18 May 2012 Irwin J ordered their cases to be treated as lead cases, presenting the court with a range of factual scenarios to enable it to provide some guidance as to the application of the decision of the Supreme Court." (para 1)

Summary of issues & outcomes

This is set out in paragraphs 13 – 14.

"It is useful to list the questions which one or both of the parties maintained fell for decision, and to summarise our conclusion on them or indicate where we address them. They are: -

(1) **When will a person be demonstrated to be clearly innocent so as to fall within category 1 as set out in the *Adams* cases?** It was not submitted that any of the claimants had been demonstrated to be clearly innocent so this question does not arise. When it does arise, its determination will depend on the particular facts and circumstances. It is not a matter which is susceptible of a generic answer.

(2) **In what circumstances will evidence be "so undermined" by a new fact or facts that no conviction could be based upon that evidence, so that the case falls within category 2 as set out in the *Adams* cases, and qualifies under the statutory compensation scheme?** This is the fundamental question before us. We address the relevant principles when considering the decision of the Supreme Court at [27] – [38]. We deal with the application of those principles, first in a general way at [39] – [50], and then when considering the individual cases of the five claimants at [73] – [213].

(3) **What is the proper approach for the Secretary of State to take when considering the decision of the CACD quashing the relevant conviction of a person who subsequently makes an application under section 133?** We discuss this at [42] – [44]. As we explain, the precise answer to this question will depend on the terms of the CACD's judgment, which, as is illustrated by its judgments in the cases of these claimants, will vary: see [86] ff., [107] ff., [147] – [148], [175], and [193]. In general terms, the Secretary of State must accept the decision of the CACD and the implications of that decision unless there is fresh evidence or there are other exceptional circumstances, such as those which obtained in *Mullen's* case where (see [25]) it was conceded that Mullen had been "properly convicted".

(4) **What test is to be applied for the purposes of section 133 where there has been a retrial after the conviction was quashed?** We discuss this at [48] – [49]. The test is the same as in cases where there has been no retrial, but its application will depend on what happens at the retrial. As is seen from the cases of Messrs Dennis and George (see [112] ff. and [149]), that will vary. Here too, the Secretary of State must generally accept the rulings of the judge presiding at the retrial and the implications of those rulings unless there is fresh evidence or there are other exceptional circumstances.

(5) **In what situations should the Secretary of State reconsider applications which have been refused by the application of a test other than that set out by the Supreme Court in the *Adams* cases?** We summarise the approach to be taken at [50] and consider its application when dealing with the cases of Messrs Dennis and Tunbridge at [128] and [196] ff.. The underlying question is whether the Secretary of State is required to reconsider all decisions under section 133 made before the decision of the Supreme Court in the *Adams* cases, however long ago the decision was made, and whether or not the earlier decision was challenged. We do not consider that he is.

(6) **To what extent must the Secretary of State apply procedural and evidential rules of the type that would be applied by a trial judge in determining whether particular forms of evidence are admissible or not?** We discuss this at [46] – [47]. Again, the Secretary of State must generally accept such rulings and their implications unless there is fresh evidence or other exceptional circumstances. However, there can be differences of approach by judges about whether to admit evidence and the exercise of discretion under, for example, section 78 of the Police and Criminal Evidence Act 1984 (hereafter "PACE"). The Secretary of State may be entitled to conclude that a different view might be taken on such a matter if there is good reason for so concluding.

(7) **What is the role of the court in determining these applications for judicial review in the light of (i) common law principles, and (ii) the European Convention on Human Rights ("the ECHR")?** Our analysis is in [51] – [72]. We have concluded that the role of the court is not itself to determine whether or not the statutory test in section 133 has been met, but to supervise the Secretary of State's decisions using the familiar tools of its judicial review jurisdiction. On the assumption (which we have made without accepting) that ECHR Article 6 applies to these decisions, we have also concluded that the level of scrutiny by the court in judicial review proceedings satisfies its requirement for the determination overall to be by an independent and impartial tribunal.

(8) **What is the outcome of the challenges by the five claimants?** The circumstances of the individual claimants and the application of the principles and the test in the *Adams* cases to them is considered at [74] – [213]. We have concluded that the judicial review brought by Mr Lawless must be allowed. The Secretary of State's decision is set aside and his application for compensation must be reconsidered. We reject the challenges of Messrs Ali, Dennis, George, and Tunbridge to the decisions to refuse them compensation under section 133 of the Criminal Justice Act 1988."

Compensation for miscarriage of justice: the legal framework

The legal framework for compensation for miscarriages of justice is set out in paragraphs 15 – 38.

Applying the Principles in the *Adams* cases

The Court considers how the *Adams* cases principles should be applied in paragraphs 39 – 50.

It considers: establishing a case is within category 2; the approach to decisions of the [Court of Appeal Criminal Division] and to procedural and evidential rules; the effect of a retrial; and reconsidering previous decisions.

The Role of the Court

The Court considers its role in these cases in paragraphs 51 – 72. It concludes that under both the common law and Article 6 of the ECHR its role is not to determine whether the statutory test is met, but to review the legality of the decision of the Secretary of State by applying the principles of judicial review.

The claimant's cases

The Court considers the five individual lead cases from paragraph 73.

Ismail Ali

Ismail Ali was convicted of assault occasioning actual bodily harm upon his wife at Luton Crown Court in May 2007. His conviction was quashed by the Court of Appeal in November 2008.

The Court considers Ismail Ali's case in paragraphs 74 – 100.

After considering the facts of the case the Court concluded:

" … The simple critical questions in this case are therefore: (a) did the Secretary of State approach the case in the wrong way, and (b) was he irrational in concluding that the key proposition was not established with the necessary degree of confidence?

"With due consideration to the arguments advanced by [counsel], our view is that the decision of 23 August 2011 was a rational and proper conclusion. In this instance, the Secretary of State had the correct test in mind, following the decision of the Supreme Court in the *Adams* cases. The extracts from the letter which we have quoted make that sufficiently clear. On the crucial second question, it seems to us that the Secretary of State was entitled to say the claimant had not established to the necessary degree of confidence that no jury could properly convict on all the evidence taken together. … if the first part of the test formulated by Lord Phillips in the *Adams* cases and reflecting section 133(1) is to be given proper respect, the decision by the Secretary of State was proper and this claim must fail." (paras 99 – 100)

Kevin Dennis

Kevin Dennis was convicted of the murder of Babatunde Oba in December 2000. His conviction was quashed in March 2004 and a retrial ordered. During the retrial in 2005 the trial judge agreed with submissions there was no case answer and directed the jury to acquit Dennis of murder. His conviction for violent disorder remains.

The Court considers Kevin Dennis' case in paragraphs 101 – 139.

On the facts of the case the Court concluded:

"It is consistent with logic, and we believe with the language of the 1988 Act, that the question must be answered by reference to the facts known at the time of the assessment of the claim. This is not only rational and consistent with the broader approach, but seems to us to be the natural conclusion from the language of the statute, which provides that "the conviction is not to be *treated* (emphasis added) for the purposes of this section as "reversed" unless and until … (etc)". The essential word in the provision is how the Secretary of State will "treat" a conviction which has been overturned. The "treatment" by the Secretary of State is something which can only arise when the matter is under active consideration. It is hard to see how this reading is capable of causing injustice or is to be thought disproportionate."

However, while the court considered the approach taken by the Secretary of State in July 2012 was subject to valid criticism, this claim failed on grounds of time. The language of the transitional provisions excluded this claim from the ambit of s133(5A). (paras 138 – 139)

Barry George

Barry George was convicted of the murder of Jill Dando in July 2001. His appeal against conviction was dismissed by the Court of Appeal in July 2002. Following an investigation the Criminal Cases Review Commission George's case was referred to the Court of Appeal in May 2007; the Court of Appeal concluded his conviction was unsafe and quashed it; a retrial was ordered. George was found not guilty in August 2008.

The Court considers Barry George's case in paragraphs 140 – 187.

On the facts of the case the Court concluded:

"… in the end, there was no submission formulated by [counsel for Barry George] capable of persuading us that the trial judge was wrong to leave the case to the jury. In our view, this has the consequence that this claimant's case inevitably fails the test even as formulated by [counsel for Barry George]. There was indeed a case upon which a reasonable jury, properly directed, could have convicted the claimant of murder. That was the effect of the judge's ruling on the submission made to him.

"It follows that in our judgment the Secretary of State was entirely justified in the conclusion he reached. For those reasons the claimant's case fails." (paras 159 – 160)

Ian John Lawless

Ian John Lawless was convicted of the murder of Alfred Wilkins in February 2002. Following a referral from the CCRC, the Court of Appeal concluded his conviction was unsafe and quashed it in June 2009. There was no application for a retrial.

The Court considers Ian John Lawless' case in paragraphs 161 – 187.

The Court concluded:

"… it is important not to lose sight of the fact that, notwithstanding the autonomous nature of the concept in section 133, it is also necessary to consider whether the new fact "so undermines the evidence against the defendant that no conviction could possibly be based on it". Mr Lawless's confessions to a number of prosecution witnesses were effectively the only evidence against him. Focusing on the fact that in lay terms he might be said to have brought the prosecution and conviction upon himself is to disregard or marginalise the uncontroverted evidence of his psychological makeup and pathological behaviour or to assume that the non-disclosure of the tendency of such a person to make false confessions is nevertheless inevitably "wholly or partly attributable" to that person. In this case, the claimant had all along claimed he had such a tendency.

"Despite the elegance with which [counsel] sought to defend the decision of the Secretary of State, we have concluded that the decision was in error. The view taken by the Crown that there should be no application for a retrial in this case was correct. The agreed psychological analysis had become available many years earlier. Once all expert evidence agreed that the confessions were unreliable, no jury could properly convict on the basis of such admissions. This was not a fresh issue; it was the central issue at first instance. What was new was the joint view of the experts, accepted by all parties and by the [Court of Appeal Criminal Division], that the confessions were unreliable. In the absence of the confessions there was simply no case. The Secretary of State should have concluded that this was a case where he was sure no jury could properly convict. He failed to consider whether, in the light of Mr Lawless's psychological makeup and pathological behaviour, it is proper to regard the non-disclosure of his tendency to make false confessions as "wholly or partly attributable" to him." (paras 184 – 185)

The Court went on to say:

"For these reasons, the Secretary of State's decision to refuse compensation in this case is quashed and Mr Lawless's entitlement to compensation must be reconsidered by the Secretary of State in the light of this judgment." (para 187)

Justin Tunbridge

Justin Tunbridge was convicted of two counts of indecent assault in September 1995. In December 1995 he was refused leave to appeal his conviction. His case was subsequently investigated by the CCRC and refereed to the Court of Appeal (Criminal Division) in February 2007. His convictions were quashed by the Court of Appeal in April 2008.

The Court considers Justin Tunbridge's case in paragraphs 188 - 214.

The Court concluded:

"Essentially, two points arise in this case. Firstly, was there an obligation on the part of the Secretary of State to reconsider the application for compensation following the *Adams* cases? Secondly, if there was such an obligation, then should this claim for compensation have succeeded in the light of the principles laid down in the *Adams* cases?" (para 200)

On the first point the Court concluded:

"We consider that the approach in *Cheung* was correct. A three month "limitation" period is appropriate. Hence, only where the earlier, challenged decision was made within 3 months of the decisions in the *Adams* cases, would it be appropriate to accede to the challenge. Hence, **this case fails on the grounds of time." (para 212)**

Despite this finding the Court went on to consider the second point and on the facts of the case concluded:

"… it would not be irrational or unreasonable on the part of the Secretary of State to conclude that he could not be sure an acquittal would be the outcome of a trial before a reasonable jury, properly directed. This would obviously be a case where the jury's conclusions would turn on their view of the credibility of the two witnesses whose evidence was in conflict.

"For these reasons, we would in any event reject the challenge to the decision in this case." (para 213 – 214)

<u>In summary:</u>

For the reasons given in the judgment:

Ismail Ali – application to quash decision to refuse compensation refused.

Kevin Dennis – application to quash decision to refuse compensation refused.

Barry George – application to quash decision to refuse compensation refused.

Ian Lawless – application to quash decision to refuse compensation allowed; Justice Secretary must reconsider his decision in light of this judgment.

Justin Tunbridge - application to quash decision to refuse compensation refused.

(para 215)

-ends-

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.