EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 5908/12
A.L.F.
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 12 November 2013 as a Chamber composed of:

Ineta Ziemele, *President*,
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Vincent A. De Gaetano,
Paul Mahoney,
Faris Vehabović, *judges*,

and Françoise Elens-Passos, *Section Registrar*,

Having regard to the above application lodged on 22 January 2012,

Having regard to the decision to grant the applicant anonymity,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, A.L.F., is a British national, who was born in 1963 and lives in Birmingham.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. The criminal conviction and the quashing of the conviction

3. On 18 October 2004 the applicant was convicted by a jury of four offences of indecent assault and two offences of rape involving oral and

anal sex with his nephew. He was sentenced to seven years' imprisonment. Permission to appeal was refused in January 2006.

4. On 9 January 2007 the applicant submitted an application to the Criminal Cases Review Commission ("CCRC"). On 12 June 2007 the CCRC referred his case back to the Court of Appeal on the ground that fresh evidence of a singular genital abnormality from which the applicant suffered had not been properly the subject matter of challenge by way of cross-examination of the complainant at trial.

5. On 15 December 2009 the Court of Appeal (Criminal Division) ("CACD") upheld the applicant's appeal against conviction. It noted that photographs and a medical report confirmed that the applicant suffered from a condition which caused a substantial degree of curvature of his penis; and that this condition had existed since birth. The applicant's counsel at trial had been aware of his condition, although the medical report had not been available at that time. He had asked the complainant during cross-examination at trial whether he had noticed anything unusual in the applicant's genitalia, to which the complainant had replied, "No". In response to the follow-up question, "Nothing at all?", the complainant had again replied, "No". Counsel had subsequently failed to put to the complainant that if he was telling the truth he could not have failed to observe the unusual curvature of the applicant's penis. The CACD was unable to see any rational tactical basis for counsel's failure to adduce this evidence at trial. It therefore quashed the applicant's convictions on the basis that they were unsafe, explaining:

> "18. ... [H]ad the evidence been adduced, it would have significantly undermined what the complainant said, since without some further explanation from him it is difficult if not impossible to see how he did not notice the condition of the appellant's penis ..."

6. However, it added:

> "19. We underline that we have not heard from the complainant and our conclusion, since we have not done so, has no element of criticism of him. We are not finding that he did not tell the truth, we are merely concluding that in the light of the evidence now before us, this would have had a significant effect on the course of the trial, on the judgment of the jury and thus upon the safety of the verdicts."

7. By the time of the CACD's judgment, the applicant had already been released, having served his sentence.

2. The Secretary of State's decision on compensation

8. In March 2010 the applicant applied to the Secretary of State for compensation for a miscarriage of justice pursuant to section 133 of the Criminal Justice Act 1988 ("the 1988 Act"). His claim was suspended pending the judgment of the Supreme Court in *R (Adams) v. Secretary of*

State for Justice ([2011] UKSC 18). The judgment in *R (Adams)* was delivered on 11 May 2011.

9. By letter dated 25 July 2011 the applicant's solicitors were informed of the Secretary of State's decision that the applicant was not entitled to compensation. The letter explained:

> "The case of *R (Adams)* ... has been considered in this context.
>
> In that judgment the majority of the Supreme Court set out its interpretation of the term 'miscarriage of justice' as follows...:
>
> 'A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it.'
>
> In the light of that judgment, if the new or newly discovered fact which formed the basis of the reversal of the applicant's conviction does not show beyond reasonable doubt that he was innocent of the offence of which he was convicted (which would amount to a miscarriage of justice for the purposes of the Act), compensation is payable only if that fact so undermines the evidence against him that it is beyond reasonable doubt that no conviction could possibly be based upon it. This is a demanding test."

10. The letter indicated that the Secretary of State had considered the CACD judgment in the applicant's case and had concluded that this test had not been met. There was no suggestion in the judgment of the CACD that a new or newly discovered fact demonstrated beyond reasonable doubt that there was insufficient evidence upon which the court could convict. The Secretary of State explained:

> "... It cannot be said how the complainant would have dealt with the evidence of [A.F.'s] anatomy if it had been put to him. Nor is it possible to determine the effect of the complainant's reaction to the evidence, or how the jury would have considered it. It is quite possible that the jury may have made the same decision despite the putative new fact that undermined certain elements of the evidence."

11. On 19 October 2011 the applicant requested reconsideration of the decision. On 20 January 2012, his request was refused.

12. On 26 July 2013 the applicant's Member of Parliament wrote to the Secretary of State for Justice on behalf of the applicant regarding his application for compensation. He submitted that the applicant's claim should have been accepted on the basis, *inter alia*, that his prosecution should not have been brought.

13. By letter dated 20 August 2013 the Minister of State replied in the following terms:

> "... I cannot comment on why the decision was taken to prosecute your constituent. However, there is no suggestion in the Court of Appeal's decision to overturn your constituent's conviction dated 15 December 2009 that the prosecution had been improper. Indeed, although finding that the conviction was unsafe, the Court at paragraph 10 of its judgment plainly considered that the complainant's evidence was capable of going to a jury ..."

14. In these circumstances there was no basis for reconsidering the decision to refuse compensation.

B. Relevant domestic law and practice

15. Details of the relevant domestic law and practice are set out in the judgment of the Grand Chamber in *Allen v. the United Kingdom* [GC], no. 25424/09 [GC], 12 July 2013 and the Chamber decision in *Adams v. the United Kingdom* (dec.), no. 70601/11, 12 November 2013.

COMPLAINT

16. The applicant complains under Article 6 § 2 of the Convention that the refusal to pay him compensation was based on doubts as to his innocence.

17. By letter dated 11 September 2013, the applicant also complained under Article 6 that the prosecution against him should never have been brought and that the decision on compensation ought to have been taken under an *ex gratia* scheme in place at the time that the miscarriage of justice was alleged to have occurred, rather than under the 1988 Act.

THE LAW

A. Complaint under Article 6 § 2

18. Article 6 § 2 of the Convention provides:

> " Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

19. The first question is whether that provision applied to the compensation proceedings, which did not themselves involve the determination of a criminal charge. The Court is satisfied that, for the reasons given in *Allen*, cited above, §§ 107-108, the necessary link between the concluded criminal proceedings and the section 133 proceedings existed. Article 6 § 2 was accordingly applicable to the latter proceedings.

20. As the Grand Chamber said in *Allen*, cited above, §§ 93-94, Article 6 § 2 safeguards the right to be presumed innocent until proved guilty according to law. In the context of a criminal trial, it imposes specific procedural requirements. However, it also protects individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials

and authorities as though they are in fact guilty of the offence charged. In this second aspect, Article 6 § 2 requires that such persons be treated in a manner consistent with their innocence.

21. As to the correct approach to assessing compliance with Article 6 § 2 in a given case, the Grand Chamber in *Allen* explained:

> "125. ... [T]here is no single approach to ascertaining the circumstances in which that Article will be violated in the context of proceedings which follow the conclusion of criminal proceedings. As illustrated by the Court's existing case-law, much will depend on the nature and context of the proceedings in which the impugned decision was adopted.
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> 126. In all cases and no matter what the approach applied, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2 ... However, when regard is had to the nature and context of the particular proceedings, even the use of some unfortunate language may not be decisive ..."

22. The applicant in the present case challenges the compatibility with Article 6 § 2 of section 133 itself. However, as the Grand Chamber found in *Allen*, cited above, § 128, there is nothing in the section 133 criteria which calls into question the innocence of an acquitted person and the legislation itself does not require any assessment of the applicant's criminal guilt. Section 133 cannot therefore be regarded as incompatible with Article 6 § 2.

23. The applicant further complained that the test formulated by Lord Phillips in *R (Adams)* was contrary to Article 6 § 2. However, in its decision in *Adams*, cited above, this Court examined the interpretation given to the term "miscarriage of justice" by Lord Phillips, namely that the test would be satisfied where a new fact so undermined the evidence against the defendant that no conviction could possibly be based upon it. It found this interpretation to be compatible with the presumption of innocence.

24. It is true that in his letter the Secretary of State made reference to innocence. Such reference was both unfortunate and unnecessary in light of the test articulated by Lord Phillips, which the Secretary of State clearly applied. In order to demonstrate his entitlement to compensation, the applicant was required to demonstrate that the new fact so undermined the evidence against him that it was beyond reasonable doubt that no conviction could possibly be based on it. The Secretary of State concluded that he had failed to meet this test. In particular, he commented that it was not possible to predict how the jury would have viewed the new evidence (see paragraph 10 above). As the Court explained in *Adams*, cited above, § 41, it should be apparent from the judgment of the Supreme Court in *R (Adams)* that questions of guilt and innocence are irrelevant to proceedings brought under section 133 of the 1988 Act. Having regard to the foregoing, in order to avoid both any possible misconceptions in the minds of future claimants under section 133 and any suggestion of bringing into play the presumption of innocence under Article 6 § 2 of the Convention, it would be more

prudent to avoid such language altogether in future decisions made under this section.

25. In conclusion, the Court is satisfied that the refusal of compensation did not demonstrate a lack of respect for the presumption of innocence which the applicant enjoys in respect of the criminal charge of which he was acquitted. There is therefore no appearance of a violation of Article 6 § 2 of the Convention. The complaint must accordingly be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. The other Article 6 complaints

26. By letter dated 11 September 2013, the applicant further complained under Article 6 about the decision to prosecute him and the later failure to apply an *ex gratia* compensation scheme which he says was in place at the time of his conviction. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

27. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos	Ineta Ziemele
Registrar	President