



4 July 2018

PRESS SUMMARY

Belhaj and another (Appellants) v Director of Public Prosecutions and another (Respondents)
[2017] UKSC 33
On appeal from [2017] EWHC 3056 (Admin)

JUSTICES: Lady Hale (President), Lord Mance, Lord Wilson, Lord Sumption, Lord Lloyd-Jones

BACKGROUND TO THE APPEALS

The appellants allege that they were abducted and mistreated by agents of foreign governments and then “rendered” to the Libyan authorities, by whom they were imprisoned and tortured. They allege that this occurred with the involvement of Sir Mark Allen, who is said to have been a senior officer of the British Secret Intelligence Service. After an investigation by the Metropolitan Police, the Director of Public Prosecutions (“DPP”) declined to bring any prosecutions. The DPP based her decision on a senior prosecutor’s decision and on legal advice that there was insufficient evidence to prosecute for any offence subject to the criminal jurisdiction of the United Kingdom. After an internal review by the Crown Prosecution Service (“CPS”) at the appellants’ request, another senior prosecutor reached the same decision. The CPS declined to disclose the potential evidence to the appellants, citing its security marking. In separate proceedings, the appellants have sued the British government for damages.

On 20 October 2016, the appellants issued the present proceedings in the High Court, seeking judicial review of the failure to prosecute Sir Mark Allen, who is alleged to have been the primary suspect in the investigation. They argue, amongst other things, that the DPP’s decision was inconsistent with the evidence. The DPP argues that her decision was based on a review of documents which cannot be released to the appellants. The Foreign Secretary applied to the court under section 6 of the Justice and Security Act 2013 for a declaration that the judicial review proceedings were “proceedings in which a closed material application may be made to the court.” A section 6 declaration is a prerequisite for an application to the Court for the use of “closed material procedure” under Part 82 of the Civil Procedure Rules, whereby the court may sit in private and without a party and his or her legal representative in order to prevent disclosures damaging to the interests of national security.

A section 6 application may be made only to a court seized of “relevant civil proceedings”, which are defined as not including “proceedings in a criminal cause or matter.” The appellants resisted the section 6 application on the basis that these judicial review proceedings were in “a criminal cause or matter.” The Divisional Court rejected that argument but certified the issue as one of public importance, suitable for consideration by the Supreme Court.

JUDGMENT

The proceedings were settled after argument before the Supreme Court, but the Court gives judgment in view of the importance of the legal issue. The Supreme Court allows the appeal by a majority of three to two. Lord Sumption gives the lead judgment, with which Lady Hale agrees. Lord Mance gives a concurring judgment. Lord Lloyd-Jones gives a dissenting judgment, with which Lord Wilson agrees.

REASONS FOR THE JUDGMENT

The adoption of closed material procedure requires specific statutory authority. The Justice and Security Act 2013 gave the High Court a general statutory power, in certain circumstances, to receive “closed material” which is disclosed only to the court and to a special advocate. As explained in the 2011 Justice and Security Green Paper, the Act was a response to a growing number of civil claims for damages against which the government was unable to defend at trial except through the unacceptably damaging disclosure of secret material. Those claims instead had to be settled [6-7].

The ordinary and natural meaning of “proceedings in a criminal cause or matter” includes proceedings by way of judicial review of a decision made in a criminal cause, and nothing in the context or purpose of the legislation suggests a different meaning. In English criminal procedure many decisions made in ongoing or prospective criminal proceedings are subject to judicial review in the High Court. Judicial review therefore cannot be regarded as an inherently civil proceeding. It is an integral part of the criminal justice system [15-16]. Judicial interpretations of the phrase “criminal cause or matter” in the Judicature Acts primarily reflected the natural meaning of the words, rather than any special feature of the Acts. A “cause” is a proceeding, civil or criminal, actual or prospective, before a court. A “matter” is something wider, namely a particular legal subject-matter, although arising in a different proceeding. The appellants’ application is an attempt to require the DPP to prosecute Sir Mark Allen. That is just as much a criminal matter as the original decision not to bring a prosecution. Parliament is unlikely to have intended to distinguish between different procedures having the same criminal subject-matter and being part of the same criminal process; but the draftsman could have done so easily, for example by omitting the reference to a “matter” [17-20].

The Green Paper indicates that the distinction between criminal and civil proceedings in section 6 reflected the greater degree of control exercisable by the government in criminal cases, in which the prosecution can: (i) chose the material on which it relies, (ii) seek to limit the disclosure of unused material on the grounds of public interest immunity; and (iii) withdraw the prosecution. That rationale does not require closed material procedure to be available in an ancillary judicial review of a decision made as an integral part of the criminal justice process, when it would not be available for an actual criminal trial [22-24].

Lord Mance agrees that the appeal should be allowed, essentially for the same reasons as Lord Sumption [25-37].

Lord Lloyd-Jones, with whom Lord Wilson agrees, would have dismissed the appeal. He concludes that the natural meaning and use of the word “cause” is appropriate to cover criminal proceedings which will result in a criminal conviction or acquittal, and that the word “matter” may extend beyond that to ancillary applications in such criminal proceedings (such as disclosure applications and extradition proceedings). They do not, however, naturally include this judicial review, which is a public law challenge extraneous to the criminal process. It is permissible to refer to the Green Paper in order to discern the purpose of the exclusion of “proceedings in a criminal cause or matter” from closed material procedure. The core concern behind the exclusion is to ensure that closed material procedure is unavailable where criminal guilt is being decided. These proceedings do not fall within the purpose of the exclusion [52-57].

References in square brackets are to paragraphs in the judgment

NOTE: 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. Judgments are public documents and are available at: <http://supremecourt.uk/decided-cases/index.html>