Neutral Citation Number: [2021] EWHC 2125 (Admin)

Case No: CO/1704/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2021

Before:

LADY JUSTICE MACUR and MR JUSTICE FOXTON

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Between:

The Queen (on the Application of Danny Kay)	**Claimant**
- and -	
The Secretary of State for Justice	**Defendant**

- -
- -

Mr Philip Rule and Mr Benjamin Harrison (instructed by **Instalaw Ltd**) for the **Claimant**
Mathew Gullick QC (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 26 & 27 May 2021

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 30.07.2021 at 10:00 am."

Lady Justice Macur :

Introduction:

1. The Claimant challenges the Defendant's refusal to pay him compensation under section 133 (as amended) of the Criminal Justice Act 1988 in the circumstances described below. The Defendant resists the claim.

2. Julian Knowles J granted permission on all grounds, as indicated in [21] below, expressing doubt about the strength of some aspects of certain of the grounds but stating that "*as these are just strands of the Claimant's interlocking overall Convention/fairness complaint I will not shut him out from arguing them in order that the Court can see the complete picture*."

3. In extending time for the challenge to be brought, Julian Knowles J stated that "*given the length of time (22 months, from March 2018 – January 2020) the Defendant took to reach the decision now challenged despite repeated correspondence from the Claimant's solicitors chasing for a decision which attracted stonewalling responses from the Defendant; [and] given the clearly and obviously wrong basis of the Defendant's first decision in October 2019… I do not deny permission on that basis …*".

4. Notwithstanding this admonition, it is noteworthy that the Defendant did not reply to an email dated 12 March 2021, sent from the Claimant's solicitor seeking further disclosure, until 12 April 2021 and then in a begrudging tone, in the main asserting that the Claimant was involved in a fishing expedition. We do not need to adjudicate upon that claim, since on the first day of the hearing before us, further documents were produced by the Defendant exhibited to a witness statement of Mr Glenn Palmer signed on 17 May 2021. The application to rely on this witness statement stated that this was as a result of "*reconsideration*" of the Claimant's requests in "*most recent correspondence*" and "*in the interests of assisting the Court and facilitating the effective resolution of these proceedings*". The information provides "*an account of Mr Palmer's historical involvement in the decision making process*".

5. The documents are obviously pertinent to the claim, and I have no hesitation in giving leave for them to be admitted into the proceedings. However, in doing so, I observe that there was no good reason provided, nor any that I can discern, why the relevant department was not more forthcoming to the requests made beforehand.

6. The Defendant's approach and his failure to engage with the complaint expeditiously or effectively may well have heightened the Claimant's sense of injustice and contributed to his perception that his claim for compensation had not been dealt with lawfully. Overall, I regard the Defendant as having conducted himself over-defensively at times, something which merits adverse comment. Nevertheless, for the reasons set out below, I would dismiss the claim. I consider it to be misconceived and dependent upon an entirely erroneous interpretation of the judgement of the Court of Appeal (Criminal Division) which quashed the Claimant's conviction, and upon a misguided perception that it is the process ultimately adopted by the Defendant which has denied the Claimant the opportunity to establish his 'innocence' beyond reasonable doubt.

Relevant Background Facts

7. On 23 September 2013, the Claimant was convicted of rape and subsequently sentenced to serve an immediate custodial term of 4 years and 6 months. The issue in the case was consent. The Claimant has always maintained that the complainant was obviously willing and consented to engage in sexual intercourse.

8. At trial, the jury were shown Facebook messages going between the Claimant and the complainant which the former had always insisted were partial and incomplete. The Claimant repeatedly asked the prosecution to obtain the full Facebook exchanges, which at that stage the Claimant thought he could no longer access from his own Facebook account. The full exchanges were only obtained by the Claimant's family and new legal team from his archive folder after the conviction.

9. An application for an extension of time in which to seek leave to appeal against conviction based on fresh evidence was lodged on 15 March 2016. The fresh evidence comprised the complete Facebook exchanges between the Claimant and the complainant. It became apparent from the full exchanges that by deleting certain parts of the conversation, the complainant had effectively manipulated the sequence, and therefore the apparent effect, of the substance of the messages.

10. Although the deleted messages were always "available" to the Claimant if he had thought to access his archive folder, the "fresh evidence" was nevertheless admitted pursuant to section 23 of the Criminal Appeal Act 1968 into the appeal which followed on 17 November 2017. The appeal was allowed. Significantly, for the purpose of this application, the judgment of the Court recorded the submission made on the Claimant's behalf:

> "It is submitted that the evidence of the full message exchange goes directly to the veracity of both A and the applicant. A deleted a total of 29 separate messages sent and received in February and March 2012 from the record. A comparison between the version of the messages in the exhibit before the jury and the full exchange reveals that the messages deleted were selective. In consequence, a number of significant and misleading impressions were given in the edited trial version." [26]

11. Having described the nature and contents of the complete Facebook conversation by reference to Counsel's submissions, the Court said:

> "We have come to the conclusion that, in a case of one word against another, the full Facebook message exchange provides very cogent evidence both in relation to the truthfulness and reliability of A, who, in any event, gave a series of contradictory accounts about other relevant matters, and the reliability of the applicant's account and his truthfulness. We are, of course, mindful of the approach directed by *R v. Pendleton* [2002] 1 WLR 72, HL. We are satisfied that this further evidence does raise a reasonable doubt as to whether the applicant would have been convicted had it been before the jury, thus rendering the conviction unsafe. We also consider that there is, in the unusual

> circumstances of this case, a reasonable explanation for the failure to adduce the evidence at the trial." [30]

12. Consequently, the conviction was quashed by judgment handed down on 21 December 2017. The prosecution indicated that it did not seek a retrial.

Application for compensation.

13. On 30 May 2018 the Claimant applied for compensation under section 133 of the Criminal Justice Act 1988. In the section headed 'Reasons for applying' it is stated that: "*The CA concluded that the conviction was unsafe (to apply that statutory test) on the clear basis that the applicant's (DK's) case was the truthful one, and that there had been consent to sexual intercourse contrary to the unreliable and untruthful complainant*." He went on to assert that "*the evidence now available demonstrating the innocence of DK is not reasonably to be doubted*" and that the Secretary of State must apply a presumption of innocence required by Article 6(2) ECHR "*following a clear and constant line of jurisprudence as the CA would have done if not precluded by rules of precedent*: *R (Hallam) v SSJ* [2017] QB 571. *The SC has granted leave to appeal…The ECtHR would so find*."

14. The application was supported by a witness statement of the Claimant detailing the impact upon him of the conviction and subsequent imprisonment. In summary, the experience has affected him physically, emotionally, and psychologically. The Claimant was also highly critical of the justice system because of his perception of the inadequate investigation of the case against him.

15. On 7 June 2018 the Defendant acknowledged receipt of the application. Subsequently, the Claimant's solicitors repeatedly contacted the Defendant to progress the claim to little effect. On 29 January 2019 the Claimant's solicitors indicated that judicial review proceedings were in contemplation, and requested, inter alia, a copy of the internal guidance and policy in use for determining the process to be followed when deciding applications for compensation; a copy of any internal submission or provisional decision that was provided to, or placed before the decision-maker in relation to the Claimant's application; and, an opportunity to provide representations in relation to that material before a decision was taken.

16. On 6 February 2019 the Defendant responded stating that the case was under active review; referring to the documents and information being obtained from external agencies such as the courts and the Crown Prosecution Service and the fact of a backlog of applications. On 1 March 2019 the Claimant's solicitors emailed the Defendant re-iterating their previous requests and seeking a reliable time estimate for a response. By letter dated 2 May 2019, the Defendant stated the case remained under active review, and that the decision would be taken taking into account the documents submitted with the application form and from case papers obtained from external agencies. On 20 August 2019 the Claimant's solicitors emailed again. There was no substantive reply or disclosure prior to the extant claim being made.

17. By letter dated 31 October 2019, the Defendant indicated that the Claimant's application had been refused on the basis that: "*While the complainant's credibility was in issue at the original trial and the Facebook messages add evidential weight to credibility, the new evidence does not point to a new or newly discovered fact*".

18. On 28 November 2019 the Claimant sent a letter before action. On 19 December 2019 the Defendant indicated that the decision would be withdrawn, and the application reconsidered; a decision would be made by 30 January 2020.

19. By letter dated 30 January 2020 the Defendant notified the Claimant that the application was refused, in the following terms:

> "The Secretary of State now accepts that the previously undisclosed content of Facebook messages and the date and timing of the Facebook message exchanges on which the Court of Appeal based its decision to quash your conviction was a newly discovered fact. However, the Secretary of State has found that this new fact of communication between you and the complainant does not demonstrate beyond reasonable doubt that you did not commit the offence…The Facebook messages… demonstrate friendly exchanges between you and the complainant after 10 February 2012 undermining her testimony on these points. They do not, however, make any reference to the sexual encounter in which the alleged rape took place, and the complainant did not withdraw her allegation of rape at any stage in the court process. These new facts therefore do not demonstrate beyond reasonable doubt that you did not commit the offence."

Proceedings

20. Accordingly, this claim was issued on 1 May 2020 ("the Judicial Review Claim"). An Acknowledgment of Service and summary grounds of defence were served on 16 June 2020. The Claimant served Supplemental Grounds of Claim and a Reply on 24 June 2020.

21. As previously indicated on 17 December 2020, Julian Knowles J. granted permission to apply for judicial review, and an extension of time in which to do so, on the pleaded grounds that the Defendant had: (1) Failed to adopt and apply a fair procedure to the determination of the Claimant's application, contrary to common law fairness; and/or (2) made an error of principle in taking an incorrect approach to the proper application of the statutory test; and/or (3) failed to consider all relevant factors, or wrongly took into consideration immaterial factors; and/or (4) was responsible for an unlawful act or omission in breach of section 6 of the Human Rights Act 1998, by violation of the protections of Article 6 and/or 8 of the European Convention on Human Rights 1950; and/or (5) made a fundamental error of material fact or important facts were wrongly overlooked; and/or (6) the decision is wrong, or Wednesbury unreasonable or irrational.

22. Detailed Grounds of defence were served on 18 February 2021, together with a witness statement of the same date from Mr Paul Daly, Head of Miscarriages of Justice, Children's Funeral Fund and Coroner's Casework team. The witness statement, whilst largely attempting to remain above the fray, does respond to some of the more provocative accusations made in the claim form as to the Defendant's partiality and vested interest in denying compensation to protect the departmental budget and to save embarrassment. However, it also contained reference to the applicable policy and guidance on applications for compensation (which are available online) and confirmed

that all applications for compensation are determined in accordance with the statutory criteria. The statement confirms that which had been assumed in the Claimant's Judicial Review Claim, namely that authority to reach a decision on the application had been delegated to "*appropriate decision makers under the Carltona principle*", on which basis "*a decision to refuse an application for compensation under section 133 may be made by officials on behalf of the Secretary of State, without reference to Ministers, unless the case is borderline, high profile or raises a novel point*." Indicating that the decision had been made only on "*what was contained in public records*", the statement also confirmed that "*all documents in the case have now been disclosed to the Claimant including all of the appendices to the preliminary view document*."

23. The Claimant then applied to the Court to rely on "further evidence and submissions". Granting permission on 2 April 2021 to rely on the witness statement of Mr Bridger, the Claimant's solicitor, and if necessary to do so, to rely on "Supplemental Grounds and Further Supplemental Grounds", Julian Knowles J. berated the multiple sets of pleadings and the repetitive and prolix submissions running to 74 pages. He required the Claimant to file a "*succinct and focussed Skeleton Argument in support of the claim of a much shorter length than the pleadings filed to date. Repetition must be avoided*".

24. The Claimant's and Defendant's skeleton arguments were filed sequentially approximately three weeks before the hearing which took place over two days on 26 and 27 May 2021. There is considerable overlap between the grounds, and we see repetition of the arguments in various guises. The respective pertinent arguments are canvassed in the judgment below, and it is unnecessary to reproduce them in full here.

Legal Framework

25. At the heart of the Claimant's case must be the interpretation of section 133 of the Criminal Justice Act 1988 which, so far as relevant, provides:

> "*133.— Compensation for miscarriages of justice.*
>
> *(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction …*
>
> *(1ZA) For the purposes of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales … <u>if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence</u> (and references in the rest of this Part to a miscarriage of justice are to be construed accordingly).* (Emphasis added)
>
> …

> *(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.*
>
> *(4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State. …*"

26. Sub-section (1ZA), defining "miscarriage of justice", was inserted on 13 March 2014 by virtue of section 175 of the Anti-social Behaviour, Crime and Policing Act 2014, following on from (and to reverse the effect of) the decision of the Supreme Court in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, which had determined that there was a second category of miscarriage of justice in addition to those cases in which conclusive proof of innocence was shown (Category 1). Category 2 covered those cases where a new or newly discovered fact so undermined the evidence at trial that no conviction could be based upon it. As a result of that statutory reversal, the Claimant's application for compensation depended on establishing a Category 1 miscarriage of justice.

The grounds for Judicial Review

27. The Claimant's challenge to the decision refusing him compensation falls into three distinct parts, namely the Defendant (i) made a material error of fact in interpreting the basis upon which the Court of Appeal quashed the Claimant's conviction and failed to have regard to all relevant factors, which resulted in a perverse decision; (ii) adopted an unfair process in determining the application; and (iii) breached the Claimant's human rights.

The Decision

28. The Claimant relies upon that part of the Court of Appeal's judgment, recorded in [11] above, as conclusively establishing his veracity (and, thus, his innocence) on all matters in dispute between himself and the complainant, including the issue of consent. He submits that the Defendant has failed to take into account: (i) the complainant's manipulation of the Facebook record, which was an act akin to perverting the course of justice and undermined her credibility; (ii) the substance of the Facebook messages which demonstrate a relationship and ongoing interaction which is consistent with consent to sexual intercourse; (iii) the reason why the Court of Appeal would have refused a retrial had one been sought and/or why there was not a case to answer; and (iv) a failure to consider all of the witness statements, exhibits and transcripts, the Claimant's skeleton argument, and other documents submitted in support of his criminal appeal. It should be noted at this point that the Defendant did appear to have regard of the CPS Briefing Note, supplied in response to a request regarding the decision not to apply for a retrial.

29. In response, the Defendant relies upon the principle to be derived from *R v Pendleton* [2001] UKHL 66 as to the Court of Appeal's function in criminal appeals, Lord Bingham stating at [19]:

> "I am not persuaded that the House laid down any incorrect principle in Stafford, so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether

> the conviction is safe and not whether the accused is guilty. But the test advocated by counsel in Stafford and by Mr Mansfield in this appeal does have a dual virtue to which the speeches I have quoted perhaps gave somewhat inadequate recognition. First, it reminds the Court of Appeal that it is not and should never become the primary decision-maker. Secondly, it reminds the Court of Appeal that it has an imperfect and incomplete understanding of the full processes which led the jury to convict. The Court of Appeal can make its assessment of the fresh evidence it has heard but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard."

30. The Defendant denies that he has failed to have adequate regard to the factors enumerated in [28] above in so far as they were relevant to the single issue he had to determine, namely, did the new fact establish beyond reasonable doubt that the Claimant did not commit the offence of which he had been convicted?

31. I regret that despite several discussions concerning the Court of Appeal's judgment in this case which we initiated with Mr Rule, Counsel for the Claimant, he appeared unable to move beyond the mantra that the way their decision was expressed (see above) inevitably meant that the Claimant did not commit the offence of which he was convicted. That is, Mr Rule refused to accept that the complainant's lack of credibility on the Facebook record did not of itself establish what happened on the evening in question (indeed, as noted above, the substance of the retrieved messages did not explicitly or implicitly discuss the act of sexual intercourse or the issue of consent, nor establish that the nature of the ongoing interaction was inconsistent with an offence of rape). Instead, the full Facebook record, and the fact that it had been manipulated by the complainant, was evidence of obvious materiality to the jury's assessment of the complainant and the Claimant's credibility, when considering whether they could be sure, on the basis of all the evidence at the trial, that the offence had been committed.

32. I am simply unable to accept his assertions on this point which run counter to the principle propounded in *Pendleton*, to which the Court of Appeal made specific reference, and the precise terminology used in the judgment in characterising the conviction as "unsafe", not "wrong". This is not one of those "extreme" cases in which the effect of the newly discovered fact is not simply to establish that the conviction is unsafe, but where there is "*only one rationally correct conclusion as to the result of the application of the statutory test*", namely that the defendant is innocent beyond reasonable doubt. (See *R (Ali) v Secretary of State for Justice* [2014] 1 WLR 3202, [27] and [28]).

33. Neither do I accept Mr Rule's argument on the 'four factors' set out in [28] above. The letter dated 30 January 2021, refusing the Claimant's application for compensation, refers to the detail of the Facebook messages in so far as they did reveal an ongoing friendly exchange, and correctly stated that they led to the 'undermining of [the complainant's] testimony'. The Preliminary View form ["PV"] completed by Mr Palmer shows that he clearly had regard to the newly discovered facts seen in the context of the complainant's evidence at trial about the messages that had been disclosed by her. He concluded that the new evidence "*affects the credibility of [the*

complainant's] accusation but did not categorically show that [the Claimant] did not rape her".

34. The documents listed as accompanying the PV included the Notice of Appeal and grounds, the Court of Appeal judgment, and transcript, the Respondent's Skeleton argument and correspondence with the CPS. The reason why the prosecution did not seek a retrial is detailed in the transcript at page 300 E – G. There is nothing in the CPS correspondence that expands upon the reason there given as to why the Prosecution did not seek a retrial. Whether, if an application for a retrial had been made, the Court would have refused, and for what reasons, is entirely speculative, and in any event, a decision by the Court of Appeal to refuse a retrial would not mean that the newly discovered fact had established the defendant's innocence beyond reasonable doubt.

35. The Court of Appeal was not the 'primary decision maker' on issues of fact, and would not have needed to consider the new evidence in the context of "*all the witness statements and exhibits*" (as Mr Rule argued), only in the context of the evidence given at trial in order to assess the impact of the "new" evidence when considering the safety of the conviction. I find it difficult to understand the argument that Mr Palmer, the decision maker in respect of the application, was required (or even entitled) to do that which *Pendleton* cautions the Court of Appeal not to do, that is to become primary decision maker as to what had happened based on his own assessment of the entirety of the witness statements and exhibits.

36. I find no legitimate basis for concluding that the Defendant erred in principle in the approach taken in answering the statutory question posed by section 133(1ZA), or that the Defendant failed to consider all relevant considerations or considered immaterial considerations. The Claimant cannot demonstrate that the decision was unlawful or irrational. Subject to my Lord's agreement, this disposes of Grounds 2, 3 and 5. It would also attract the operation of section 31(2A) of the Senior Courts Act 1981, for regardless of any procedural unfairness that may be found, the outcome would be the same.

The Process

37. The Defendant's decision is "*amenable to judicial review on conventional grounds of challenge*" and subject to "*ordinary public law principles*": see *R (Ali) v Secretary of State for Justice* [2014] 1 WLR 3202, [27].

38. The application form to be completed by an applicant for compensation annexes a "*general guide giving information about the legislation and how applications are dealt with*", indicates what documents will usually suffice to determine the application and makes it clear that "*It may be necessary for the MJT* [Miscarriages of Justice Team] *to make some inquiries (e.g., of the police, the Crown Prosecution Service or other public authority or the court at which the trial was held)*". The applicant's "reasons for applying" are restricted to 5000 characters.

39. Thereafter, as appears in Mr Palmer's witness statement, the claim is "*triaged by a member of the team who seeks the relevant court documents and in some cases prosecution documents*" and to determine that the application has been made in time. Next, a preliminary view is made by a caseworker, overseen by a team leader who then, subject to any necessary correction or amendment of the PV, submits a draft for "a legal assessment of [the] analysis". The determination that an applicant is not eligible is made

by officials under the Carltona principles without reference to Ministers unless the case is "*borderline, high profile or raises a novel point*". Any case in which an applicant is deemed eligible for compensation is referred to Ministers for a decision.

40. Having rightly made the point that what is required as a matter of procedural fairness "*is acutely sensitive to context*" (see *R(L) v West London Mental Health NHS Trust* [2014] EWCA Civ 47), Mr Rule goes on to make a 'sevenfold' and generalised attack on the process for determination of the applications by drawing comparison with the procedure adopted in cases involving prison categorization, licence and parole, immigration, and housing. I have not found these examples relating to very different kinds of decisions to be particularly enlightening in the present context.

41. In *R (Howard League for Penal Reform & anr) v Lord Chancellor (Equality & HRC intervening)* [2017] EWCA Civ 244, Beatson LJ at [39] referred to the "*broad consensus of the appellate courts as to the factors that affect what is required in a given context*" which include "*the nature of the function under consideration, the statutory and other framework in which the decision maker operates, the circumstances in which he or she is entitled to act and the range of decisions open to him or her, the interest of the person affected, the effect of the decision upon the person's rights or interests, that is the seriousness of the consequences for the person.*" Having regard to these factors, the nature and context of the decision to be made upon an application for compensation under section 133 of the 1988 Act is of a very different kind to that in any of the types of cases on which Mr Rule relies.

42. However, there are general principles of procedural fairness which he maintains are impeached in the determination of this Claimant's case and his general points can be summarised as follows: (i) Failing to disclose all relevant documentation and information that the decision-maker has considered; (ii) Failing to afford an adequate opportunity to the applicant to engage in the decision-making process; (iii) Adopting a secret policy or approach.

Documentation

43. There can be no issue, but that procedural fairness will generally require an applicant to be aware of the sources of information upon which the decision maker may and, ultimately, does rely. This principle is clearly recognised in the authorities which need no reference here. The letter rejecting the Claimant's application refers to these documents as: the application, the Court of Appeal judgment and "*the evidence on which it reached its decision*", which obviously refers to the Facebook messages which are referred to in the body of the decision letter. The content of all these documents were known to the Claimant, if not submitted in support of his claim.

44. The application form makes clear that the Defendant may make inquiries of the Crown Prosecution Service, which happened in this case. Mr Daly's statement confirms that information was sought regarding their decision not to seek a retrial, to "*ascertain if the CPS have documents relevant to the statutory test which were not contained in the Court of Appeal's judgment or in the Claimant's application*". The CPS responded by producing the Respondent's Notice and skeleton argument, which would have been seen by the Claimant during the appeal, and a briefing note. That briefing note, and the email communications providing the provenance of the documents, was only disclosed by the witness statement of Mr Daly despite the Claimant's previous and repeated

requests for their production. Both were apparently seen by the decision maker, Mr Palmer, but played no part in his decision. I am not surprised. The lately disclosed CPS communications appear to me to be mundane and provide no new material save to demonstrate a very defensive attitude towards the extent of the disclosure that did take place during the trial. It is arguable that once seen, even if then subsequently ignored, the documents should have been disclosed unless they engage matters of national security or reveal sensitive information, if only to guard against any issues or suspicions of unconscious bias. I simply cannot understand why the Defendant was loathe to disclose them until the Judicial Review Claim was underway.

45. I do not consider that this failing undermines the fairness or adequacy of the process in the circumstances of this case. However, we were reassured to be told by Mr Gullick QC, appearing on behalf of the Defendant that, without prejudice to the regularity of past practice adopted in these applications, the officials attending court now recognise the good sense in disclosing the CPS documentation (and presumably any other documentation) received, suitably redacted as necessary whether it has informed the decision or not.

46. The Claimant was obviously aware of the terms of the first decision which rejected his claim but complains that he did not have sight of the PV which advised this decision. This too has been lately produced. It is apparent that there are several errors on the face of the document which were not corrected and other reasoning which led to the irrational decision in October 2020. The PV was seen by Mr Palmer at different stages in his tenure in the department. It obviously has not played any part in the reworked decision. It can fairly be said that Mr Palmer seeks to distance himself from the form, which was commenced under his supervision, but submitted after his departure. However, this document is certainly not a silver bullet and was never likely to be so since a pre-action protocol letter sent on behalf of the Claimant caused and justified the almost instant withdrawal of the decision which based itself upon that PV. However, I observe that yet again it is regrettable that it required the prospect of litigation to convince the Defendant to release it. I cannot see the harm in doing so. As before, I do not consider that this failing indicates a substantive unfairness albeit it has damaged the Claimant's confidence in the process.

47. I do not consider that the lack of opportunity to comment upon either set of documents prejudiced the Claimant's position.

Opportunity for effective participation

48. It became clear during Mr Rule's submissions that he was advocating for the need for a root and branch investigation into the issue of the Claimant's innocence, requiring the Defendant to embark upon a quasi-judicial inquiry into the facts after the event, including perhaps hearing the Claimant's oral testimony or submissions made on his behalf. It seemed to me that the nature of the inquiry he suggested would itself involve a breach of procedural fairness by failing to consider the submissions of other interested parties, including in this case the complainant, but more significantly would be to subvert the process of trial by jury and potentially conflict with the (rationale of the) decision of the Court of Appeal. In this way it 'unwisely' seeks to 'transfer principles established in one branch of administrative law too slavishly into another' (See *R (Hassett & Price) v Secretary of State for Justice* [2017] 1 WLR 4750; *R (Kumar) v Secretary of State for Justice* [2019] EWHC 444 (Admin).)

49. I agree with Mr Gullick QC, that completion of the application form by, or on behalf of, the Claimant affords an important opportunity to initiate and participate in the determination process. The Claimant's attention was directed to the statutory criteria and the documents upon which a decision would be based. I reject Mr Rule's submission that it was procedurally unfair for the Defendant not to notify a preliminary view and receive further representations. This would only be necessary if there is an unanswered allegation that lingers and may taint the decision to be made. In this respect, if the contents of the documents produced by the CPS and the first PV did contain detail that could inform the decision and which the Claimant had not already had an opportunity to address, procedural fairness requires that the applicant's view/submissions be sought. However, I do not accept that the Defendant was required to provide an opportunity to make further submissions merely to re-argue a point already made.

Undisclosed policy

50. This aspect of the Claimant's case probably reflects his reasonably expressed irritation at the delay and defensive handling of his claim, but it is difficult to reconcile with the reality of an application for compensation under section 133 of the 1988 Act. The comparison drawn by Mr Rule with the situation in *Lumba (WL) v Secretary of State for the Home Department* [2012] 1 AC 245 is unwarranted. That is, the statutory criterion that must be strictly applied in reaching a decision is explicit. An applicant is notified via the authorised application form of the case he/she must make and the manner in which the application will proceed.

51. Paragraph 61 of the Judicial Review Claim asserts that the decision-making process is carried out by officials "*in secret from the individual, and apparently do not afford the applicant the opportunity to see that information or material, or to make any submissions about it.*" I have previously commented on undisclosed documents and the necessity to disclose the same if they inform a decision, and what I observe to be the good sense of doing so otherwise, but I find there is no proper basis in this case to allege clandestine dealing or systematic unfairness.

52. The witness statements of Mr Daly and Mr Palmer describe the process in general and, in relation to this application, in particular, I consider the PV form to provide all necessary guidance and a checklist of what is required to the caseworker. There is nothing in the pre-populated text which undermines the statutory criteria or misleads the assessment per se. The list of key documents accompanying the PV going forward for the purpose of legal advice is revealed. I would observe that the PV in this case is well articulated and reasoned, which makes it more regrettable that it took so long to disclose it.

53. This 'failing' did not prejudice the Claimant's application. It does not demonstrate substantive unfairness. If my Lord agrees, this disposes of Grounds 1 and 6.

Convention Rights

54. Section 133 was enacted to give effect to the United Kingdom's international obligations under Article 14.6 of the International Covenant on Civil and Political Rights 1966. However, regardless of the title of the Covenant which suggests the creation of a civil right, the Divisional Court in *R (Ali) v Secretary of State for Justice*

[2013] 1 WLR 3536, doubted that Article 6 was engaged by a decision of the Secretary of State under section 133 of the 1988 Act.

55. Article 6 (1) of the European Convention on Human Rights 1950 ("ECHR") so far as relevant provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"

56. In [56] of its judgment, the Divisional Court rejected the submissions on behalf of the claimant that Article 6 was engaged to require determination of a claim made pursuant to section 133 of the 1988 Act by an independent or impartial tribunal. Rejecting the submission that the court is required to adopt a "*substitutionary, and in effect appellate, approach*" it went on to say:

> "62. Even where the court is as well-equipped as the Secretary of State to deal with an issue, it must not lose sight of the fact that Parliament has assigned the primary decision-making function to a minister or another public body….
>
> 63…. Lord Bingham in *In re McFarland* [2004] 1WLR 1289, para 7…referred to the "*interaction . . . of judicial and executive activity*" and the consequent need for each of these two branches of the state to recognise and respect the proper role of the other. The submissions on behalf of the claimants on this question would effectively reduce the role of the Secretary of State to a purely administrative one….
>
> 66. The considerations which led us to reject the submission that the role of the court is to determine de novo whether the Secretary of State has made a correct decision as to eligibility and qualification under the statute are relevant in considering whether the Secretary of State's decision under section 133(1) of the 1988 Act qualifies as a determination of a civil right for the purposes of article 6. They are also relevant in considering whether the level of scrutiny by the court in judicial review proceedings satisfies the requirements of article 6."

57. Thereafter, having indicated that "*the right involved is not at the core of civil rights*" ([69]), the Divisional Court nevertheless proceeded to assume that Article 6 (1) was engaged for the purpose of considering whether the process of a claim for judicial review satisfied the requirement that the determination be by "*an independent and impartial tribunal established by law*" by reference to *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening)* [2003] 2 AC 430 and the cases that have followed it (see *A's case* [2009] 1 WLR 2557, *Wright's case* [2009] AC 739, and *Ali's case* [2010] AC 39 which showed that :

> "In general, the composite procedure of the administrative decision by the minister or public official designated by statute,

> together with access to the court, will be sufficient if the court has "full jurisdiction" over the administrative decision. "Full jurisdiction" does not necessarily mean jurisdiction to re-examine the merits of the case. All that is needed is jurisdiction to deal with the case as the "nature of the decision requires"., but in the alternative determined that the process of judicial review was sufficient to ensure there be no interference with that right. This part of the decision was not challenged in the Court of Appeal, nor has it been subsequently argued to the contrary successfully."

58. The Divisional Court concluded in [72] that:

> "The nature of the issues that fall for consideration (see again Lord Bingham's statement in *In re McFarland* [2004] 1WLR 1289 which we have summarised at para 2 above) have also led us to conclude that the process of a claim for judicial review satisfies the requirement of article 6 that the determination overall be by an independent and impartial tribunal."

59. This ratio has not been subject to adverse comment by any superior court considering questions arising from the interpretation and application of section 133 of the 1988 Act subsequently. I do not accept Mr Rule's submission that dicta of Lord Hughes JSC and Lord Reed JSC in *R(Hallam); R (Nealon) v Secretary of State for Justice* [2020] AC 279 at [123] and [155] respectively do support the proposition that Article 6.1 is engaged.

60. Sir Ronald Weatherup in *In the matter of an application by Veronica Ryan for judicial review* [2020] NIQB 47 found that compensation for miscarriage of justice is a civil right, and that Article 6 is engaged but that "*Parliament sets the scope of claims for compensation for miscarriage of justice by defining the applicable conditions. The Secretary of State must deal with such applications in the manner prescribed by Parliament and is held to such obligation by judicial review*".

61. I am not persuaded that it is necessary in this judgment to pursue the difference in opinion between *Ali* and *Ryan* as to whether Article 6 is engaged or not. Both Courts arrived at the same outcome and ultimately this court is now able to supervise the Secretary of State's decision, so providing an independent and impartial Tribunal.

62. That Article 6.2 (which provides for the presumption of innocence unless an individual is "proved guilty according to law"), is not applicable to the operation of section 133 of the 1988 Act, and even if it were, that section 133 is not incompatible with Article 6.2, has been determined by *R (Hallam); R (Nealon) v Secretary of State for Justice* [2020] AC 279. This decision is conclusive and binding upon us. The dissenting judgments of Lord Reed and Lord Kerr of Tonaghmore have no precedential value.

63. Mr Rule's arguments relating to the Claimant's Article 8 rights, and more particularly the impact of a failure to pay compensation on the Claimant's reputation, are unsustainable. No separate issue arises which is not addressed by a public law review of the procedure above. The interrogation of the January decision letter and isolation of one word taken out of context lacks objectivity. The Court of Appeal has determined

his conviction to be unsafe. He is to be presumed innocent. His failure to secure compensation for a miscarriage of justice does not denote otherwise but reflects the expressly and extremely limited circumstances in which an award will be made.

64. If my Lord agrees, this disposes of Ground 4 and what remains of Ground 6.

Conclusions

65. It is arguable that the Claimant's case would fall into *Adams* Category 2, but that does not meet the definition of a miscarriage of justice provided by section 133(1ZA) which dictates the scheme of compensation.

66. The statutory scheme is strictly and unequivocally defined. It permits no element of discretion regardless of the privations and traumatic consequences of the conviction upon the claimant; and I have no doubt that this Claimant has suffered greatly because of his conviction and imprisonment. However, for compensation to be payable, the newly discovered fact admitted into the appeal proceedings must positively disprove the commission of the offence beyond reasonable doubt, and not merely undermine the safety of the conviction.

67. Appeals against conviction allowed based on newly discovered DNA, scientific or technical evidence which positively exonerates the Claimant, or independent alibi evidence prompted by news of a conviction which may do so, will be few and far between. The data disclosed because of the Claimant's Freedom of Information Request, and which had been included in the Minister's briefing exhibited to Mr Palmer's statement, which shows only five successful applications in the five years to 2018/19 underlines this point. These are the 'extreme cases' as described by the Court of Appeal in *Ali*.

68. However, it is difficult to envisage a case when the 'new' evidence goes to issues of general credibility and unreliability of a significant witness, in which this test will be met. Specifically, on the issue of consent in rape and other sexual assaults, it is difficult to see what new fact would positively exonerate the applicant and thereby entitle him to compensation, save (perhaps) a wholescale and convincing retraction by the complainant of the allegation itself.

69. For the reasons above, I would dismiss this claim.

Mr Justice Foxton

70. For the reasons set out by Macur LJ, I too would dismiss this claim.