APPEAL COURT, HIGH COURT OF JUSTICIARY

[2021] HCJAC 25
HCA/2020/5/XM

Lord Justice General
Lord Justice Clerk
Lord Menzies
Lord Glennie
Lord Woolman

STATEMENT OF REASONS

issued by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the application for permission to appeal to the Supreme Court of the United Kingdom

by

THE REPRESENTATIVE OF THE LATE ABDELBASET ALI MOHAMED AL MEGRAHI

Applicant

against

(First) HER MAJESTY'S ADVOCATE; and (Second) HER MAJESTY'S ADVOCATE GENERAL

Respondents

Applicant: G Jackson QC, CM Mitchell QC, C Connelly; John Pryde & Co (for Aamer Anwar, Glasgow)
Respondents (HMA): R Clancy QC, the Crown Agent
(HMAG): Duguid QC; Office of Advocate General

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1 April 2021

[1] The applicant seeks permission to appeal to the UK Supreme Court. The court has had some difficulty in understanding the exact nature of the challenge.

[2] The applicant appears to be maintaining that there are four Article 6 compatibility issues arising from the refusal of his appeal against his father's conviction ([2021] HCJAC 3).

These are to some extent intermingled, but they seem to correspond broadly with the court's two preliminary decisions (scope of appeal and order for disclosure) and its ultimate rejection of the two substantive grounds of appeal (unreasonable verdict and failure to disclose).

[3] In determining whether to grant permission, the court has considered: (a) whether the applicant has identified a potential error by this court; and (b) whether the point of law is one of general public importance. This court would not normally grant permission if it had correctly identified the relevant principles of Convention jurisprudence but, on the particular facts, may have erred in its application of those principles.

[4] The first issue concerns the court's refusal to allow grounds which were not contained in the SCCRC's reference. Appeals which follow references can only be based on the grounds referred, unless the court considers that it is "in the interests of justice" to allow additional grounds to be advanced (Criminal Procedure (Scotland) Act 1995, s 194D(4B)). The applicant sought to add a ground that the Crown ought to have had an adequate system of disclosure in place. The SCCRC had considered, but not referred this ground. For the reasons provided in its Opinion (No 1) of 26 August 2020 ([2020] HCJAC 39) the court (at para [27]) did not consider that it was in the interests of justice to allow this ground to be advanced. In short, the only questions in a disclosure case are whether the material ought to have been, but was not, disclosed and then whether there was a real possibility of a different verdict. The general adequacy of the system was not relevant, or at least not directly so.

[5] The scope of an appeal, in the context of a reference from the SCCRC, is a matter for the court to determine according to its view on where the interests of justice lie. It decided that the establishment of this ground could not result in a finding that a miscarriage of justice had occurred. This decision did not raise any compatibility issue and none was

decided. The provisions of section 194D(4B) of the 1995 Act, which the court applied, were not said to be incompatible with Article 6.

[6] The second issue, which is linked to the first, relates to the court's refusal to order the disclosure of two documents which were the subject of a Public Interest Immunity Certificate. In its Opinion (No 2) of 20 November 2020 ([2020] HCJAC 54), the court balanced the public interest with the fairness of the proceedings in terms of *Al Rawi* v *Security Service* [2012] 1 AC 531. It applied the test in *McInnes* v *HM Advocate* 2010 SC (UKSC) 28. The court agreed with the SCCRC's analysis of the importance of these documents. In so far as the defence had been unaware of the content of these documents, the court determined (para [33]) that they would not have been of use to, nor would they have been used by, the defence at the trial. This involved a judgement on these matters, primarily as a matter of fact. This did not raise a compatibility issue. The test in *McInnes* is compatible with Article 6.

[7] The third issue is a more general one of whether the court's decision on the disclosure ground of appeal amounted to a breach of Article 6. In its ultimate Opinion (No 3) of 15 January 2021 (2021 SLT 73; [2021] HCJAC 3) the court again applied the test in *McInnes* (see para [124). It determined, primarily as a matter of fact, that, in so far as the defence were unaware of the undisclosed material, it would not have been of assistance to them at the trial. When the whole of the evidence, and the circumstances of the trial in general, were taken into account, the content of the documents would not have produced a real possibility of a different verdict. No compatibility issue arises from what was an evaluation of the material against the test in *McInnes*. The applicant simply disagrees with the court's conclusion.

[8] The fourth issue concerns whether this court reached a reasoned decision on the application of the "no reasonable jury" test in section 106(3)(b) of the 1995 Act. This does not raise a compatibility issue. The court determined that the verdict of the trial court was reasonable, although it had erred in excluding from its consideration certain evidence which would have further incriminated the deceased. Issues of admissibility of evidence do not generally raise a compatibility issue.

[9] Although the case is clearly one of public importance, the proposed grounds of appeal do not raise points of law of general public importance. The principles of law which the court applied were all well known, settled and largely uncontroversial in the appeal.

[10] For these reasons, the court refuses permission to appeal to the UK Supreme Court.

[11] On receipt of the application, the court raised with parties the matter of the applicant's victim status in terms of Article 34 of the Convention. The jurisdiction of the Supreme Court of the United Kingdom, in appeals from the High Court of Justiciary, arises from the need to ensure that the UK complies with its treaty obligations in terms of the Convention. An order under section 303A of the 1995 Act transfers a deceased's rights of appeal. An appeal to the UK Supreme Court is competent in relation to the High Court's determination of a compatibility issue (1995 Act, s 288AA). This requires victim status (Human Rights Act 1998, ss 6(1), 7(1)(b) and 7(7)).

[12] The question then is whether the applicant is a victim in respect of Article 6 violations. The general rule is that he would not be so classified (*Biç* v *Turkey* (2007) 44 EHRR 38 at para [22]; see also *Fairfield* v *United Kingdom* App no 24790/04, 8 March 2005). Exceptionally, a reputational interest in a deceased's exoneration may confer victim status (*Grădinar* v *Moldova* (App no 7170/02, 8 April 2008; *Nölkenbockhoff* v *Germany* (1988) 10 EHRR 163 at para 33). A pre-condition is that the proceedings involve civil rights (*Grădinar* at

paras 92 and 96). An application is inadmissible where the domestic proceedings are not concerned with rights such as a personal honour, reputation, image or privacy.

Section 303A of the 1995 Act facilitates an appellate court's function of determining whether there has been a miscarriage of justice relative to a deceased. This does not involve the determination of a living person's civil rights. The court therefore queries the competency of the application, although it is unnecessary to determine that matter, given its decision on the substantive points raised.