SECRETARY OF STATE FOR HOME DEPARTMENT EX PARTE JOHN ANTHONY SHEFFIELD, R v. [1997] EWHC Admin 843 (7th October, 1997)

IN THE HIGH COURT OF JUSTICE CO/3572/96

QUEEN'S BENCH DIVISION CO/3322/96
(CROWN OFFICE LIST)

Royal Courts of Justice
Strand
London WC2

Tuesday, 7th October 1997

B e f o r e:
MR JUSTICE COLLINS
- - - - - - -
REGINA

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
EX PARTE JOHN ANTHONY SHEFFIELD
- - - - - -
REGINA

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
EX PARTE MALCOLM BROOK
- - - - - -
(Computer-aided Transcript of the Stenograph Notes of
Smith Bernal Reporting Limited
180 Fleet Street, London EC4A 2HD
Telephone No: 0171-831 3183/0171-404 1400
Fax No: 0171-404 1424
Official Shorthand Writers to the Court)
- - - - - -

(CO/3572/96)

THE APPLICANT appeared in person.
MR H KEITH (instructed by the Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent.

- - - - - - -
(CO/3322/96)

MR J LEWIS (instructed by Messrs Cooper, Carter, Claremont, East Sussex BN27 1DA) appeared on behalf of the Applicant, Brook.

MR H KEITH (instructed by the Treasury Solicitor, London SW1H 9JS) appeared on behalf of the Respondent.

JUDGMENT

(As approved by the Court)

Tuesday 7th October 1997

1. MR JUSTICE COLLINS: There are before me two applications by Mr John Sheffield and by Mr Malcolm Brook, each seeking judicial review of a decision by the Secretary of State contained in a letter of 16th July 1996, whereby he refused to allow compensation to the Applicants in relation to the time that they spent in custody between their convictions and the Court of Appeal allowing their appeals.

2. The background is as follows in each case. Both the Applicants, together with another man called Saunderson, who was acquitted, stood trial before the Southwark Crown Court on charges of obtaining property by deception. On 2nd November 1994 each was convicted and sentenced to two years' imprisonment. On 14th July 1995 the Court of Appeal, of which I happened to be a member, quashed their convictions because of the failure by the prosecution to notify the defence of a conviction for an offence of receiving stolen goods of an important prosecution witness.

3. It is not, I think, necessary for me to go into any detail of the nature of the prosecution case. Suffice it to say that it was the Applicants' case that a man called Lynch, who had originally been arrested but who had made a statement to the police and who then gave evidence against them, was giving lying evidence. In particular, it was said that a forged banker's draft (and there was no question but that there was a forged banker's draft) had been procured by Lynch and the defendant

Saunderson who was acquitted, and that the two Applicants had been the victims rather than the perpetrators of the deception. The Applicants called on their behalf a man called Russell, an auctioneer, who identified Lynch as a person who had attempted to purchase goods at his auction by means of a stolen banker's draft which could be linked to the draft in issue in the prosecution.

4. It was plain that that evidence was highly damaging to the prosecution case against these Applicants. The police located a man called Mustapha, who was also involved in the same auctioneer's business as Russell, and called him to give evidence in rebuttal of Russell's evidence, the effect of Mustapha's evidence being that it was not Lynch at all who had been involved in the previous forged bankers' draft and that Russell's evidence was inaccurate.

5. It was clear that the evidence of Mustapha was important. That is self-evident, because his evidence was called at the last moment, it being considered by prosecuting counsel, and certainly by the police, to be necessary to call him in order to put the prosecution case back on its feet. Mustapha had a previous conviction in that five years before he had been sentenced to six months' imprisonment and fined £1,000 for handling stolen goods, consisting, apparently, of some camera lenses. That conviction, as I say, was not disclosed by the police officers to the Crown Prosecution Service and, therefore, was unknown to those representing the Applicants at the trial. Thus, counsel was not able to put to Mr Mustapha a very important matter that would have gravely affected his credit. So it was that the Court of Appeal allowed the Applicants' appeal.

6. Leggatt LJ, giving the judgment of the court, said this:

"It turned out, though not before the jury's verdict, that the conviction was known to the officer who had taken the witness statement. By what was called an 'oversight' it was not passed to the prosecuting counsel or his instructing solicitors. The explanation given by the police officers concerned of why the information was given is hard to comprehend and, anyway, immaterial. As Mr Waller, on behalf of the Crown, has properly acknowledged, there was a culpable failure to disclose the information about the previous conviction for which there is no excuse."

7. As a result, the convictions were quashed. Each Applicant then, through their solicitors, applied to the Secretary of State for compensation on the basis that they had been wrongly convicted of the offence and that they were entitled to compensation following the stated policy of the Secretary of State. I should turn to consider that stated policy.

8. There is a statutory right to compensation in certain circumstances, stemming from section 133 of the Criminal Justice Act 1988. However, that applies only to cases where a conviction is subsequently shown to be ill founded as result of new or newly discovered facts which show that there has been a miscarriage of justice, and that the particular individual has undoubtedly been wrongly convicted in the sense that he is not guilty of the offence. In 1985, the then Secretary of

State announced to Parliament, in the course of a written answer, that he would in the circumstances be prepared to accept applications for payment of compensation. So far as material, what he said was this:
"There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted free pardons by the exercise of the royal prerogative of mercy."

9. Pausing there, of course, that statement was before the 1988 Act. It continued:

"Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application ex gratia payments from public funds to persons who have been detained in custody as a result of a wrongful conviction."

10. So far as material, it continued:

"I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph..."
-- The preceding paragraph deals with what is now covered by section 133 of the 1988 Act --
"... but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.

There may be exceptional circumstances that justify compensation in cases outside these "categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought."

11. That remains the basis upon which the Secretary of State will exercise his discretion when applications are made for compensation following what is said to be a wrong conviction.

12. These cases raise the question whether the Secretary of State was entitled to decide that there was not a serious default on the part of a member of the police force. It is not a case where it can be suggested that there has been a complete exoneration. I appreciate that that is something which Mr Sheffield feels strongly about, because he feels he ought to have been completely exonerated. However, the Court of Appeal did not do that nor can that be inferred from the decision. To be fair,

the case on his behalf and on behalf of Mr Brook has never been put upon that basis. What he said, as I have already indicated, is that there was here a serious default on the part of the police officers who failed to pass on the information regarding Mustapha's previous conviction, and there is no question but that the conviction resulted from that serious default.

13. As to the question of causation, Mr Keith, on behalf of the Secretary of State, accepts that the Secretary of State is satisfied that it was the default of the police officers which resulted in the conviction. Indeed, it would be difficult for him to contend to the contrary, in the light of the way in which the Court of Appeal dealt with this appeal. Therefore, the only question before me is whether the Secretary of State was, as a matter of law, entitled to form the view that the default (because it is, of course, accepted, as it has to be, that there was a default) was serious.

14. The decision of the Secretary of State, was, as I have said, given on 15th July. I should, so far as material, read that. In the third paragraph the author, a Miss Douglas, states:
"You are aware from previous correspondence that [the Applicant] has no statutory entitlement to compensation as his was an in time appeal. Accordingly, the application has been considered under the ex-gratia arrangements. The purpose of those arrangements is to cater for truly exceptional cases which cannot meet the statutory criteria and the decision on whether an applicant qualifies for ex-gratia compensation rests entirely on Ministerial discretion. There are no criteria as such to determine whether or not a case is exceptional; each case is considered on its individuals merits. But the Secretary of State's general policy is that he is not prepared to make an ex-gratia award of compensation simply because a conviction has not been sustained on appeal."

15. Pausing there, that is, it is accepted, generally a correct statement of the position with this proviso. Mr Lewis submits that it is wrong to say that the decision on whether the Applicant qualifies rests entirely on Ministerial discretion in the light of the terms of Mr Hurd's statement. Of course, Mr Hurd's statement is merely an indication of the manner in which the discretion, which is perhaps absolute, will be exercised. It would be open to the present Home Secretary to make a statement indicating that he proposes to change that policy, if he wishes to do so. However, so long as that policy remains in being, it must, as it seems to me, be followed, and it would not be open to the Secretary of State to disregard it in any individual case. Indeed, Mr Keith does not suggest anything to the contrary. However, if the Secretary of State chooses to indicate how he is proposing to exercise his discretion, and he uses ordinary English words which convey an ordinary meaning to those who read them, then he must follow the meaning of those words in applying the policy. It, therefore, is open to me in this court to decide whether, in any individual case, what he has done is capable of falling within those words. I put it that way because I can only intervene if either the Secretary of State has clearly disregarded or misunderstood or misconstrued anything that his predecessor has said, or has reached a decision which is, in Wednesbury terms, irrational. It has been put by the Court of Appeal through the Master of the Rolls in a case called R v Secretary of State for the Home Department, ex parte Bateman (unreported) 17th May 1994 thus:

"On any showing, all the court could properly do, if it could do anything, would be to enquire whether the Secretary of State was obviously wrong in concluding that the period in custody did not "result from serious default on the part of a member of a police force or of some other public authority."

16. At the end of his judgment he, having referred to the test and fact that exceptional circumstances were being raised, says:

"It was essentially a question for the Secretary of State as to what he regarded as an exceptional case. It is difficult to imagine circumstances in which this court could properly interfere with a judgment by him that a case was not so exceptional as to justify special treatment."

17. That refers to the aspect of the policy dealing with exceptional cases outside those where there has been a serious default on the part of a member of the police force. Therefore, the obviously wrong test referred to by the Master of the Rolls must be, effectively, another way of stating what we all know as the rationality test in Wednesbury terms.

18. I am conscious too, as I have to be, that we are here concerned with the exercise of a prerogative power and circumstances where, as I have said, a wide discretion is given to the Secretary of State. I bear in mind Mr Keith's warning that in those circumstances the court should be most reluctant to intervene. I also recognise that, as indeed is stated in the policy itself, it is designed to cater for exceptional cases, and Mr Keith submits truly exceptional cases. I am not sure what the difference between an exceptional case and a truly exceptional case is, but I prefer to use the language of the policy statement which talks about exceptional circumstances. The mere fact that there has been an acquittal or an appeal against conviction has been allowed cannot trigger a claim for compensation. That remains the case even if errors by the police, by the Crown Prosecution Service or possibly by counsel for the prosecution have contributed to that conviction. It is only if the default of a member of a police force or a member of some public authority can properly be said to be serious that the right to compensation arises.

19. Going back to the decision letter, it continues:
"In keeping with the 1985 statement, the start point for a possible ex-gratia payment is whether the Home Secretary is satisfied that there has been serious default on the part of a member of a police force or of some other public authority."

20. Pausing there, the submission is made that that is to put it wrongly; it is not the start point, it is the basis of the payment or the basis of the agreement that compensation can be awarded. It may be that that is not such a significant error, but it does indicate, it is said, an erroneous approach. It goes on:
"Normally such conduct will be manifested by some deliberate act, the effect of which will be to

impede or obstruct the course of justice. Suppression of evidence or the concoction of evidence are obvious examples. It is clear from the Court of Appeal's judgment of 14th July 1995 that the crucial issue in this case is the failure of the Metropolitan Police to disclose to the Crown Prosecution Service the previous conviction of a prosecution witness (Mr Mustapha). The focus of our attention has therefore been on whether that failure amounted to serious default within the terms of the 1985 statement; to that end, as you know, the Secretary of State has sought and "taken into account the comments of the Metropolitan Police."

21. As drafted, that paragraph seems to suggest, on the face of it, that there needs to be more than negligence. That is, at least, what is submitted by Mr Lewis.

22. In a subsequent affidavit sworn by a Kathleen Hall for the purposes of these proceedings, it has been indicated that the Secretary of State does have regard to a negligent act as well as to a wilful or a deliberate one. As it seems to me, the decision letter does not exclude the possibility of negligence. It says that the relevant conduct will normally have been deliberate. The reason why it would seemed that the decision letter does not refer to negligence is because, having heard the explanation, the view was taken that the officers had been negligent rather than wilful, and in the circumstances of this case it was decided that the negligence was not such as to amount to a serious default.

23. Going back to the letter, it continues:

"The basic facts appear to be these. The officer who took Mr Mustapha's statement and conducted the PNC check which revealed his previous conviction was DC Cresswell. It was then left to another officer, DC Woolmore, to present the information to the Crown Prosecution Service or to prosecuting counsel. DC Cresswell assumed he had done so but it subsequently transpired that he had not. For their part, the Metropolitan Police have said that the failure to disclose the previous conviction was a significant oversight but that there is no evidence to suggest that the two officers acted deliberately in withholding the information. It is noted that in his written skeleton argument to the Court of Appeal, counsel for the Crown ... accepted that 'the duty to disclose the previous convictions of prosecution witnesses is one of the most important elements of the Crown's duty to 'disclose, and that an innocent failure is no excuse'.

24. Ministers have now personally considered the claim "for compensation on behalf of [the Applicant] most carefully. They recognise that the failure to disclose in this case had serious consequences but they take the view that it stemmed in all probability from a lack of communication between the two officers concerned, rather than any wilful or deliberate action designed to weaken the defence. Consequently, they are not persuaded that the actions of members of the Metropolitan Police can be regarded as constituting serious default per se, for these purposes."

25. That has been expanded in the affidavit of Kathleen Hall. I bear in mind Mr Lewis' concerns that I should beware of ex post facto rationalisation. In paragraph 5 Miss Hall says:
"However not every negligent act will amount to serious default. The question that is applied is whether degree of default on the part of the authority concerned falls far short of accepted standards so as to amount to 'serious' default and whether, in the circumstances of the particular case, it resulted in the wrongful conviction or charge."

26. The test that is, therefore, applied is said to be whether the degree of default falls far short of accepted standards so as properly to be regarded as serious. In paragraph 8 it is recorded that the Secretary of State was satisfied on balance that the failure to disclose resulted from a negligent oversight. Paragraph 9 continues:
"The question then to be determined was whether the failure to disclose amounted to serious default in the circumstances of the particular case. Although the applicants satisfied the Court of Appeal that the conviction was unsafe and should be quashed by reason of the non-disclosure "of the previous conviction, the Secretary of State did not consider the failure on the part of the police serious enough to meet the terms of the 1985 statement."

27. That submits, Mr Lewis, is wrong. He accepts, as indeed is clearly right, that seriousness governs the nature of the default. He cannot refer to the consequences of the default, because in every case, where a default has resulted in a conviction, that default must have had serious consequences. Accordingly, we are looking at the nature of any individual default.

28. As it seems to me, once one accepts, as Mr Keith rightly does, and indeed as Miss Kathleen Hall indicates, that negligence can result in a default being seriousness, it is necessary to consider the circumstances in which the default arose. Any police officer must appreciate the importance of the disclosure of significant previous convictions of a witness. Miss Douglas' letter makes it clear that the police officers were well aware of the duty of disclosure. Indeed, the citation of counsel for the Crown's skeleton argument, that "the duty to disclose previous convictions of prosecution witnesses is one of the most important elements of the Crown's duty to disclose", underlines that very point. The statement of Mr Mustapha was taken and he was put forward as a witness in order to rebut evidence which indicated, or so the prosecution no doubt believed, that their case was weakening. The police officers must, therefore, have been aware of the potential importance of Mustapha's evidence. They were aware of the importance of complying with the obligation to disclose the conviction. They negligently failed to ensure that that conviction was disclosed.

29. It seems to me that, in those circumstances, as a matter of common sense, the failure to disclose was serious. If it is recognised that it is important that something be done and that if it is not done there may be a serious consequence, then the failure to comply with the obligation must, as a matter of ordinary language, as it seems to me, be regarded as serious. It does not matter that the negligence itself was not malicious; it does not matter that it was caused by an oversight. The fact is

that where it is of such importance to do something the officers must ensure and take great care to ensure that it is done. On any view, if you would like to talk in terms of the degrees, this was, in my view, a high degree of negligence. It seems to me that any decision to the contrary cannot be sustained.

30. It is to be noted that the approach of Leggatt LJ, admittedly not needing to decide whether the explanation was one which could be acceptable or not, was that the explanation was hard to comprehend and that there was a culpable failure to disclose the information. So there was. Of course, the reasons why it was not disclosed are immaterial. The fact is there could be no excuse put forward for the failure. One can imagine cases, where, for example (not this case) there is a genuine question mark as to whether any particular information should be disclosed - not necessarily previous convictions. If the police or the Crown Prosecution Service consider and decide that there is no need to disclose but the court later takes the view that they were wrong, then no doubt there was a default, but it would be difficult, in my judgment, to say that the default was serious. There may be other instances where a default was one which had serious consequences, but it could not be said that it was appreciated at the time by the officers that it was likely to be of importance. In those circumstances, it may be that inadvertence resulting in such a default could properly be said to mean that it was not a serious default.

31. I am far from saying that negligence ipso facto equals "serious". It must, as Mr Keith submits, be a question of degree, depending upon the circumstances of any case. It would be very rare indeed for this court to feel able to interfere with a decision of the Secretary of State in any given circumstances. It seems to me that this is one of those very rare cases, because having regard, as I have indicated, to the importance of the obligation in this case and the failure to comply with it, coupled with the admitted result of that failure, this is a case where the Secretary of State's decision was obviously wrong.

32. In those circumstances and for those reasons in both cases it seems to me that his decision must be quashed.

33. MR LEWIS: My Lords, there is a consequential application: Mr Brook, is fact, legally aided.

34. MR JUSTICE COLLINS: Before we go to that, let us consider the form of relief.

35. MR LEWIS: My Lord, I would have thought, given the nature of your Lordship's judgment the relief should be certiorari to quash the decision of the Secretary of State, and no doubt the Secretary of State would take into account that decision.

36. MR JUSTICE COLLINS: It seems to me that at the moment that all the relief that you need is certiorari. The Secretary of State will then reconsider, in the light of my judgment. If he does, then

it may be there is only one answer. I cannot preclude him from reaching a different decision, because I do not think it is right that I should dictate to him what decision he reaches. If he does not reach the right decision, so far as you are concerned, and he does not appeal my decision, it may be that you will be coming back here. He knows that, and there is here a question of form which is important. Normally speaking, it is wrong for this court to issue a mandamus in connection with a discretionary decision of a Minister, even though it may be that, in the light of the judgment, the decision is likely to be able to be only one way.

37. MR LEWIS: For my part, I would certainly be content with the quashing of the decision and no doubt the Secretary of State takes into account all of those matters.

38. MR JUSTICE COLLINS: Mr Keith, what do you have to say about that?

39. MR KEITH: My Lord, the first application I have is in relation to leave to appeal.

40. MR JUSTICE COLLINS: We will come to that. I want to concern myself with the Order first.

41. MR KEITH: Certainly, I would adopt what your Lordship said, with respect. Certiorari is all, in my submission, that is required.

42. MR JUSTICE COLLINS: I would have thought so. If this judgment stands, it may be that you can hardly reach any other decision other than that this is ----

43. MR KEITH: It is either a serious default or it is not. In view of your Lordship's decision that it was not a serious default is obviously wrong. There can be no other alternative.

44. MR JUSTICE COLLINS: I do not think there is a need for mandamus because if the Secretary of State, notwithstanding, simply does not follow, then ----

45. MR KEITH: It is always open to the Applicant ----

46. MR JUSTICE COLLINS: The Applicants will have to come back, but I suspect certain obvious consequences will follow.

47. MR KEITH: Indeed, and those consequences are very obvious.

48. MR JUSTICE COLLINS: Certainly. Just before I turn from that, Mr Sheffield, do you have anything to add to this debate?

49. THE APPLICANT [MR SHEFFIELD]: My Lord, bearing in mind the time it has taken to arrive at this point in these proceedings (it is five years from the very start) could your Lordship suggest a time limit to the Home Secretary?

50. MR JUSTICE COLLINS: I cannot, I am afraid. He must be aware of the time. The problem is, as we are just about to get to, he may want to appeal my decision. I cannot stop him doing that. If he does not appeal, then obviously this must be dealt with as soon as possible. That goes without saying.

51. I come back to you, Mr Lewis. We have dealt with the Order.

52. MR LEWIS: My Lord, Mr Brook is legally aided. In those circumstances, I would ask for costs in case there is an Order for compensation and the Legal Aid Board could have a substantial claim against us for compensation.

53. MR JUSTICE COLLINS: Normally costs will follow the event. I do not imagine Mr Keith is able to resist the Orders for costs.

54. MR KEITH: My Lord, I cannot resist the application.

55. MR JUSTICE COLLINS: You want to apply for your costs, Mr Sheffield?

THE APPLICANT [MR SHEFFIELD]: My Lord, yes.

56. MR JUSTICE COLLINS: Basically, I am afraid, in your case it would be what you have spent on instituting the proceedings. You have may have exemptions. If you can show that you have lost money as a result of coming to court you may be able to cover that, but I do not suspect you will get very much. Anyway, you are entitled to an Order for costs such as you can establish.

57. MR LEWIS: May I have legal aid taxation?

58. MR JUSTICE COLLINS: You may, of course, have legal aid taxation. Mr Keith?

59. MR KEITH: My Lord, I do seek leave to appeal. Although, as I have outlined already, there are many cases that come before the Home Secretary in relation to ex gratia compensation, but in view of the fact that it is an exceptional scheme, it is obviously of considerable importance to him and to those officials in the Home Department dealing with cases of this type. Your Lordship's judgment, as I read it, has two effects. Firstly, in relation to the general observations made by your Lordship, this will obviously have an effect on future applications.

60. MR JUSTICE COLLINS: I was not aware of having made any general observations which were controversial.

61. MR KEITH: My Lord, I have to say that they are not controversial, but they obviously have a wider application.

62. MR JUSTICE COLLINS: If they are not controversial why do you want to appeal them?

63. MR KEITH: My Lord, I want to appeal this case in relation to the individual findings in this case. It is this: it seems, in my submission, to be implicit in your Lordship's judgment that the Home Secretary was wrong in concluding, as he is entitled, in my submission, to conclude, that this was not a serious default.

64. It also has an effect in this sense. We submit, that it was open to the Home Secretary to have regard to the explanation given by the Metropolitan Police and to conclude that that was not a serious default, but that there was a low level of negligence, so low that it did not trigger payment under the scheme. Your Lordship has taken a different view and we say that that has important consequences on the way it is looked at in the future.

65. MR JUSTICE COLLINS: Hardly likely, if there are only 20 applications a year, and most of them are equivalent to section 133.

66. MR KEITH: That may be so and I accept there are not that many cases every year. I am reminded, there are 120 cases a year. Of course, as I have pointed out, only a small proportion are actually granted and only a small proportion are granted in relation to the ex gratia aspect itself. However, in relation to those cases there will be an effect and certainly those who instruct me are concerned as to how they will approach the operation of this discretion in the future.

67. MR JUSTICE COLLINS: Do you have anything to say, Mr Lewis?

68. MR LEWIS: My Lord, it is entirely a matter for your Lordship.

69. MR JUSTICE COLLINS: No, Mr Keith. I take the view that this is very much a one-off case. I have decided it on its own facts and its own circumstances. I do not regard myself as having said anything controversial so far as the general approach is concerned, merely to indicate that on the facts of this case, in my view, unusually, the Secretary of State got it obviously wrong. If you want to pursue this you must persuade the Court of Appeal that you should be able to.

MR KEITH: My Lord, so be it.