



6 June 2019

PRESS SUMMARY

In the matter of an application by Dennis Hutchings for Judicial Review (Northern Ireland)
[2019] UKSC 26
On appeal from [2017] NIQB 121

JUSTICES: Lord Reed (Deputy President), Lord Kerr, Lady Black, Lord Lloyd-Jones, Lord Sales

BACKGROUND TO THE APPEAL

In 1974, there was much terrorist activity in Northern Ireland, a large part of which was generated by the Provisional Irish Republican Army (“**PIRA**”). On 13 June 1974, members of the Life Guards regiment of the British Army, under the command of the appellant, found a group of men loading material into a vehicle. A firefought ensued and arms and explosives were discovered in the vehicle.

On 15 June 1974, a Life Guards patrol, also led by the appellant, was travelling on a road about 3.5 miles from the location of the firefought. They saw a man, Mr Cunningham, who appeared startled and confused. Mr Cunningham climbed a gate into a field and ran towards a fence. The appellant ordered the patrol to halt and three members, including the appellant, pursued Mr Cunningham. After shouting a number of commands to stop, the appellant and another soldier fired shots and Mr Cunningham was killed. It later transpired that he had limited intellectual capacity, that he was unarmed, and that he had been running towards his home. In 2015, the appellant was charged with the attempted murder of Mr Cunningham and with attempting to cause him grievous bodily harm.

On 20 April 2016, the Director of Public Prosecutions (“**DPP**”) issued a certificate pursuant to section 1 of the Justice and Security (Northern Ireland) Act 2007 (“**the Act**”) directing that the appellant stand trial by a judge sitting without a jury. Section 1(2) of the Act provides that the DPP may issue such a certificate if he (a) suspects that any of the relevant conditions are met and (b) is satisfied that in view of this there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury. Condition 4 is defined by section 1(6) of the Act: “*Condition 4 is that the offence or any of the offences was committed to any extent (whether directly or indirectly) as a result of, in connection with or in response to religious or political hostility of one person or group of persons towards another person or group of persons.*”

Section 7(1) of the Act reads: “*No court may entertain proceedings for questioning (whether by way of judicial review or otherwise) any decision or purported decision of the Director of Public Prosecutions for Northern Ireland in relation to the issue of a certificate under section 1, except on the grounds of – (a) dishonesty, (b) bad faith, or (c) other exceptional circumstances (including in particular exceptional circumstances relating to lack of jurisdiction or error of law).*”

The appellant was not made aware of the issue of the certificate until 5 May 2017. He sought to challenge the DPP’s decision to issue the certificate by way of judicial review. He was unsuccessful before the Divisional Court, which certified the question of whether a true construction of condition 4 included a member of the armed forces shooting a person he suspected of being a member of the IRA.

The appellant also seeks to challenge the DPP’s decision on procedural grounds, arguing that he ought to have been provided with the reasons that the DPP was minded to issue a certificate and with the material on which his consideration of that question was based. He also claims that he should have been given the opportunity to make representations on whether a certificate should have been issued in advance of any decision on the matter.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. It holds that a true construction of condition 4 does include a member of the armed forces shooting a person he suspected of being a member of the IRA and it rejects the procedural challenges advanced by the appellant. Lord Kerr writes the judgment.

REASONS FOR THE JUDGMENT

The breadth of the power under section 1 of the Act is immediately apparent. The DPP need only *suspect* that one of the stipulated conditions is met and that there is a *risk* that the administration of justice might be impaired if there was a jury trial. These decisions can be of the instinctual, impressionistic kind. Whilst the DPP must be able to point to reasons for his decision, it may be based on unverified intelligence or suspicions, or on general experience, rather than on hard evidence [13].

The circumstances covered by condition 4 are also extremely wide. This covers offences committed *to any extent* (even if indirectly) in connection with or in response to religious or political hostility of one person or group of persons. The PIRA campaign in Northern Ireland was based on that organisation's political hostility to continuing British rule and the incident which occurred a few days before Mr Cunningham was killed bore all the hallmarks of a PIRA operation. When this is considered, it is entirely unsurprising that the DPP should have concluded that the offences with which the appellant is charged were connected (directly or indirectly) with or in response to the political hostility of PIRA members against those who believe that Northern Ireland should remain a part of the UK [14].

The “other exceptional circumstances” referred to in section 7(1)(c) of the Act are not specified, but they must take their flavour from the preceding provisions and the succeeding words which particularise “lack of jurisdiction and error of law”. These are clear indications that the full panoply of judicial review superintendence is generally not available to challenge decisions under section 1 [16].

There is no need to consider the Explanatory Notes to the Act or the ministerial statements referred to by the appellant because the language of the relevant statutory provisions is clear [20] & [24].

Trial by jury should not be assumed to be the unique means of achieving fairness in the criminal process. Trial by jury can in certain circumstances be antithetical to a fair trial and the only assured means, where those circumstances obtain, of ensuring that the trial is fair is that it be conducted by a judge sitting without a jury. [34]. Further, although trial by jury has been referred to as a right, it is not an absolute right. Moreover, the right has been restricted by the express provisions of the Act and must yield to the need to ensure that a trial is fair [37].

Although it has been argued that the DPP erred in stating that section 1(1) should be broadly interpreted, this is irrelevant so long as (a) he acted within his powers and (b) any misapprehension was immaterial to the decision he took. On the facts of this case, it is clear that the DPP was bound to have made the decision even if he had considered that section 1 had to be construed narrowly [44]. As to whether he acted within his powers, the DPP took proper steps to allow him to consider whether he suspected that condition 4 was met [47]. He also addressed whether there was a risk that the administration of justice would be impaired and his conclusion was entirely unsurprising [48].

As to the procedural argument, section 7 expressly provides that a judicial review challenge is only admissible on grounds of bad faith, dishonesty, or other exceptional circumstances. This is not a case of bad faith or dishonesty [54]. Whilst the appellant claims that this case falls into the “exceptional circumstances” category because of the fundamental right to a jury trial, the fundamental right is to a fair trial. Whilst there is a right to a jury trial, this cannot make this case an exceptional one, particularly in the context of a statute whose purpose is to prescribe the circumstances in which someone can be denied the right to a jury trial [55]. There are no circumstances in this case which could be said to be exceptional within the terms of section 7(1)(c) of the Act [62].

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>