

IN THE UNITED KINGDOM SUPREME COURT

BETWEEN:

A & B

Appellants

- and -

REGINA

Respondent

AND BETWEEN:

REGINA

Appellant

- and -

DS RAYNER

Respondent

SKELETON ARGUMENT ON BAHALF OF THE RESPONDENT

Introduction

1. This matter concerns two appeals against decisions of the Court of Appeal, that A and B could not rely on the defence of necessity for a charge of torture and that DS Rayner was not guilty in relation to the offence of misconduct in the public office.
2. The issues dealt with by Senior Counsel in the first ground of appeal are as follows:
 - (a) is there a defence of necessity to a charge of torture (Human Rights Act (HRA) 1998);
 - (b) are the exceptions of s.134 Criminal Justice Act (CJA) 1988 invalid in light of the HRA 1998 obligations; and
 - (c) do the exceptions of s.134 CJA 1988 apply on these facts?
3. The issues dealt with by Junior Counsel in the second ground of appeal are as follows:
 - (a) can the acceptance of payment constitute the offence of misconduct in public office notwithstanding any other considerations;

- (b) did DS Rayner's conduct harm the public interest; and
- (c) did DS Rayner act with reasonable justification or excuse?

Senior Counsel's Submissions

There is no defence of necessity to a charge of torture

4. There are no exceptions in HRA 1998:
 - (a) s.1 and Schedule 1 HRA 1998 give direct effect to Article 3 ECHR;
 - (b) Article 3 is an 'absolute right' (*Saadi v Italy* (2009) 49 EHRC 30); and
 - (c) the state and its officials have a 'negative duty' not to torture anyone, and a 'positive duty' to ensure those individuals are not tortured by others.
5. Article 3 ECHR should be applied:
 - (a) the Court is required to take into account Strasbourg jurisprudence (s.2 HRA 1998) such as *Saadi v Italy*;
 - (b) although decisions of ECHR are not binding, they will usually be followed; and
 - (c) the international treaty presumption applies.
6. The exceptions of s.134(4) CJA 1988 are not valid:
 - (a) all primary legislation must be interpreted in line with HRA 1998 (s.3 HRA 1998) (*R v DPP ex parte Kobilene* [2000] 2 AC 326 at 375);
 - (b) a public authority can never have "lawful authority, justification or excuse" (s.134(4) CJA 1988) because it is always unlawful for a public authority to act in a way which is incompatible with a Convention right (s.6 HRA 1998);
 - (c) a declaration of incompatibility should be issued under s.4(2) HRA 1998;
 - (d) when any legislation and HRA 1998 have contrary provisions, HRA 1998 should prevail.

The exceptions of s.134(4) CJA 1988 do not apply

7. A & B do not fall within the exception of "lawful authority, justification or excuse" because:
 - (a) there is no lawful authority since A and B were not officially authorised to torture Mr Al-Basir (assuming such authorisation was legally possible);
 - (b) there can be no justification or excuse in torturing one individual to save others, as comparing the value of different lives is inherently immoral.

The misconduct did not meet the high threshold of seriousness

8. The Crown must show that DS Rayner's acceptance of payment for passing confidential information:

- (a) caused harm to the public interest, either through the information itself or the manner it was disclosed (*R v Chapman* [2015] QB 883, para 36);
- (b) met the high threshold of seriousness required to be characterised as a criminal abuse of the public's trust in him as an officer holder (*Chapman*, para 32); and
- (c) was without reasonable excuse or justification (*Chapman*, para 17).

9. The information provided to media benefited the public interest:

- (a) it revealed an illegal and immoral practice by the officers of the Security Service (MI5) (*R v France* [2016] EWCA Crim 1588, para 15);
- (b) it led to the reversal of the DPP's initial decision not to prosecute A and B;
- (c) it promoted a public debate on an important issue; and
- (d) a misconduct which benefits the public interest cannot constitute the offence (*Chapman*, para 36).

10. The manner in which DS Rayner provided the information did not meet the high threshold of seriousness:

- (a) the relationship between DS Rayner and the journalist was a one-off and did not reveal corruption "on a wide scale" (*R v Norman* [2016] EWCA Crim 1564, paras 45); and
- (b) DS Rayner's conduct was not capable of damaging "the efficient and effective running of the police service", nor had "an adverse impact on the morale of the staff" (*Norman*, para 46).

DS Rayner acted with reasonable justification or excuse

11. DS Rayner was acting as a whistle-blower:

- (a) DS Rayner disclosed "illegal, immoral or illegitimate practices under the control of his employers to persons or organisations who can affect action" (*The Law Commission Report, Misconduct in Public Office* (2016), Para 2.193);
- (b) at all times, DS Rayner believed that providing information to the media was in the public interest; and

- (c) DS Rayner contacted the news desk after having pursued the internal avenues by submitting a full report to his superiors.
12. The public benefit generated by the information disclosed may establish reasonable excuse to the acceptance of payment:
- (a) *Chapman, Norman and France* can be distinguished.
 - (b) DS Rayner's primary aim has been to reveal information in the public interest, rather than to make personal profits by selling multiple stories.

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