

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
BETWEEN:

**CHIEF COMMISSIONER OF POLICE
FOR NEWCOUNTYSHIRE**

Appellant

- and -

MR MATTHEW GANT

Respondent

SKELETON ARGUMENT ON BEHALF OF RESPONDENT

Introduction

1. This matter concerns an appeal against the finding of Hector J in the Court of Appeal that Newcountyshire Police acted unlawfully in detaining the Respondent whilst it unreasonably failed to act upon evidence in its possession which might give rise to a successful appeal. The Respondent cross-appeals against the award of nominal damages of £500.

Grounds of Appeal

2. In respect of the two grounds of appeal, the Respondent submits that:
 - i. Article 5 does cover detention following conviction, and that Protocol 7, Article 3 and the Criminal Justice Act 1988, section 133 are to be taken together as being of more limited application than Article 5; and
 - ii. Article 5 (5) ECHR requires damages to be paid that are commensurate with the extent of loss of liberty. It was wrong to reduce his damages on account of non-criminal behaviour; all that mattered was that he had appealed as soon as reasonably possible after the new evidence was communicated to him.

LEAD COUNSEL FOR THE RESPONDENT: Mr Philip Judd

The provisions should not be confounded

3. Protocol 7, Article 3 and the right to compensation following a miscarriage of justice should not be confounded with the right to compensation for unlawful detention under Article 5(5) ECHR. Protocol 7 only applies in the event of some serious failure in the judicial process involving grave prejudice to the convicted person.

4. Protocol 7, Article 3 and the Criminal Justice Act 1988, section 133 both repeat the provisions of article 14.6 of the International Covenant on Civil and Political Rights 1966. Both deriving from the same provision and implementing the same intention, they are equally distinct from Article 5.

Article 5 applies to detention following conviction

5. Article 5 explicitly contemplates detention following conviction, in that:
 - i. By providing for derogation for only lawful detention after conviction in Article 5(1)(a), post-conviction detention deemed unlawful is not permitted; and
 - ii. Everyone deprived of their liberty, in whatever regard and whether before or after conviction, has an independent actionable right to *habeas corpus* under Article 5(4).
6. Any victim of arrest or detention in contravention of Article 5 has an enforceable right to compensation under Article 5(5). Unlawful detention or the denial of *habeas corpus*, not constituting a miscarriage of justice, is actionable.

Section 133 is limited in its application

7. Section 133 provides that:

“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 or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.”

8. Section 133 is circumscribed in its application in the following ways relevant to the present appeal:
 - i. The requirement for a new or newly discovered fact that is conclusive does not include fresh evidence which simply shows the conviction was unsafe; *Regina (Adams) v Secretary of State for Justice* [2011] UKSC 18 at [100] per Lord Hope.
 - ii. That fact must show there has been a miscarriage of justice conclusively, or beyond reasonable doubt; *Adams* at [100] per Lord Hope, [178] per Lord Kerr.
 - iii. That a miscarriage of justice has occurred, which is possible only before the *conclusion* of proceedings.
 - iv. A miscarriage of justice is strictly limited in its meaning. Procedural deficiencies, irregularities in the trial, or errors in the investigation are insufficient. A claimant need not prove innocence but must show that, on the basis of the facts as they are now known, he should not have been convicted or that conviction could not be based on those facts; *Adams* at [178] per Lord Kerr.

9. Section 133 does not, accordingly, provide for the scope of post-conviction protection afforded under Article 5.

Failure to disclose breached distinct rights under Article 5

10. Article 5 may only be derogated from in accordance with procedures prescribed by law. The police were in breach of prescribed procedures. Accordingly, the deprivation of the Respondent's liberty was not permissible and constituted a breach of Article 5.
11. When material comes to light that casts doubt on the safety of any conviction, the prosecutor must disclose it unless there is a good reason not to; *Regina (on the application of Nunn) v Chief Constable of Suffolk and another* [2014] UKSC 37 at [30] and [35]. Further, if there exists a real prospect that inquiry may reveal something affecting the safety of the conviction, such inquiry ought to be made; *Nunn* at [42]. The withheld material rendered the Respondent's conviction unsafe, and the culpable delay unreasonably extended his detention by two years. The detention was not therefore lawful for the purposes of Article 5(1)(a) in the period concerned.
12. In any event, the Respondent was denied his rights under Article 5(4). The entitlement to have the lawfulness of detention reviewed is emptied of substance if material is withheld that would cause one to initiate proceedings; *Zenati v Commissioner of Police of the Metropolis* [2015] EWCA Civ 80 at [43-6]. When the claimant's case for review is delayed due to dilatory behaviour by the authorities, there is a breach of Article 5(4) for that period; *Zenati* at [46].
13. For these reasons, it is submitted that Hector J was correct to proceed on the basis that the Respondent had suffered a breach of his rights under Article 5.

JUNIOR COUNSEL FOR THE APPELLANT: Miss Hannah Daly

Loss of liberty suffered should have been the guiding principle of the compensatory award

14. The Supreme Court in *Regina (Faulkner) v Secretary of State for Justice and another* [2013] UKSC 23, [2013] 2 W.L.R. 1157 established that the principal considerations in assessments of damages arising from breaches of Article 5 were (i) the actual loss of liberty suffered, and (ii) frustration and anxiety caused by the breach; at [67],[70]-[71] per Lord Reed.
15. Where findings of actual loss of liberty are identified, as in the case of *Faulkner*, the quantum of damages should reflect the period of detention caused by the violation of Article 5. Far shorter periods of detention than at issue in the present case have resulted in far greater awards. In *Faulkner*, a delay of ten months in a review determining the prisoner's conditional release resulted in an award of £6,500; *Faulkner* at [84],[87] per Lord Reed.
16. The seriousness of violations of Article 5(1), where detention is found to be unlawful, will invariably result in awards that are considerably higher than for breaches only of Article 5(4) pertaining to delay in the determination of continuing detention; *Faulkner* at [74] per Lord Reed.

17. Accordingly, it was mistaken for the Judge not to have based his assessment of damages on the finding that, but for the State's breach of Article 5, the Respondent would not have suffered 24 months' loss of liberty. A higher award than in *Faulkner* would have been justified given (i) his longer period of detention in violation of Article 5, and (ii) his loss of unrestrained as opposed to conditional liberty.
18. Moreover, since the Judge found both that the State could have acted unlawfully, in contravention of Article 5(1), and given his finding of 'culpable delay', the correct quantum of the award should have been far greater and certainly not merely nominal.
19. Under the second head of damages, feelings of frustration and distress may be recovered for the period of detention whether or not it can be shown that, but for the breach, the claimant would have been released; *Faulkner* at [13(12-13)] per Lord Reed.

Conduct of the claimant was irrelevant to the assessment of damages

20. The correct legal test as to what elements of the claimant's conduct may be taken into consideration in assessments of damages under the HRA was recently restated in *D and another v Commissioner of Police of the Metropolis* [2014] EWHC 2493, [2015] 1 WLR 1833 at [37]. The two prongs of the test consider whether the claimant: (i) has contributed to the loss for which he claims, and/or (ii) has behaved reprehensibly.
21. In this case, the Respondent's conduct two years earlier than the relevant breach cannot under any sensible construction of logic be taken to have contributed to the period of his unlawful detention. Neither his failure to appeal his original conviction nor the contradictory evidence he originally gave to the police bore any causative link to (i) the State's breach of duty or (ii) the subsequent length of his unlawful detention.
22. Nor was the Respondent's conduct in originally lying to the police reprehensible to any significant degree. Even if it had been, it would be unprincipled and arbitrary to reduce his award on the basis of conduct that merely provided the occasion for the breach and which did not expose him to any foreseeable risk that the breach would occur.
23. For these reasons the judge erred when he reduced the Respondent's award on account of the Respondent's conduct two years earlier than the relevant breach.

MR PHILIP JUDD
MISS HANNAH DALY
20th October 2016