

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 62793/10
James Lee DUNN
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 23 October 2012 as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Päivi Hirvelä,
Ledi Bianku,
Zdravka Kalaydjieva,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*

and Lawrence Early, *Section Registrar,*

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr James Lee Dunn, is a British national, who was born in 1981 and is currently detained at HMP Wakefield. He is represented before the Court by Hadgkiss Hughes & Beale, a firm of solicitors based in Birmingham. The United Kingdom Government ("the Government") are represented by their Agent, Ms Ahila Sornarajah, Foreign and Commonwealth Office.

A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

3. On 20 July 2006 the applicant was convicted of murder at Birmingham Crown Court. He appealed against conviction before the Court of Appeal, claiming that the evidence of one of the principal prosecution witnesses was unreliable since that witness gave inconsistent evidence at later trials. The appeal was dismissed on 23 July 2009. The Court of Appeal relied on case-law to the effect that the fact that a prosecution witness has been shown to have lied may not be fatal to conviction.

4. The applicant sought to challenge the way in which the Court of Appeal had dealt with the issue of adducing fresh evidence by way of an appeal to the House of Lords. It was the applicant's case that, in determining this issue, the Court of Appeal had wrongly followed the approach of a majority of the Privy Council in the case of *Dial & Anor v. The State (Trinidad and Tobago)* [2005] UKPC 4, rather than the approach of the House of Lords in the case of *Pendleton, R. v.* [2001] UKHL 66. In order for an appeal to be lodged with the House of Lords (now the Supreme Court) in criminal matters, the Court of Appeal must certify that a point of law of general public importance arises in the case (section 33(2) of the Criminal Appeal Act 1968). The Court of Appeal indicated that it would not certify that a point of law of general public importance arose in the case.

5. The applicant then applied to the Court of Appeal for a declaration that section 33(2) of the Criminal Appeals Act was incompatible with Articles 6 and 14 of the Convention. The applicant argued that the certification requirement constituted a violation of his right to an impartial tribunal and his right of access to the Supreme Court.

6. On 18 June 2010 the Court of Appeal dismissed this application, finding that the certification requirement did not violate the applicant's rights under Article 6 of the Convention. As regards the challenge to the Court of Appeal's impartiality, the Court of Appeal distinguished between the substantive appeal and the certification process:

> "Although [counsel for the applicant] does not suggest actual bias, what he is in truth submitting is that in deciding whether to certify the Court of Appeal may be influenced by an oblique motive; the wish to avoid the Supreme Court considering the case and possibly overruling the Court of Appeal's decision. We entirely reject that. We reject too the suggestion that the fair minded and informed observer would conclude that in reaching its decision the Court of Appeal would be so influenced. As [counsel for the prosecution] submits, in deciding whether or not to certify the court is not sitting on an appeal against its own decision. It is not determining any criminal charge. It is merely assessing whether its decision contains an important point of law."

7. The Court of Appeal also emphasised that the same court was best placed to determine the existence of a point of law of general public importance, since it had already examined all the issues in the case.

8. The Court of Appeal found that the certification requirement amounted to an interference with the applicant's right of access to the Supreme Court, which was, however, justified in pursuit of the legitimate aim of providing a filtering mechanism to control the Supreme Court's case-load.

9. The essence of the applicant's right of access to the Supreme Court had not been denied since he had no right to have an uncertified point of law considered by the Supreme Court:

> "Moreover, we do not accept that a refusal to certify amounts to a denial of the essence of the appellant's right of access to the Supreme Court. The appellant has the right to have his access to the second-tier appeal court decided by an independent and impartial tribunal properly applying legal principles. If such a decision goes against the appellant that has not denied him the essence of his right to access to the Supreme Court. It means that on proper application of legal principles by an independent and impartial court he is not entitled to have his case considered by the Supreme Court in circumstances where it is legitimate for there to be a filtering of the cases before that court. That is precisely what happened here."

10. As regards Article 14 of the Convention, the Court dismissed the applicant's claim on the ground that, in criminal cases, the Supreme Court's jurisdiction was limited to resolving important matters of legal principle, whereas it had a broader remit in civil cases, sometimes encompassing factual issues. Appellants in criminal and civil cases were not, therefore, in comparable situations.

B. Relevant domestic law and practice

11. Section 33 of the Criminal Appeal Act 1968, which replaced the Administration of Justice Act 1960, provides as regards appeals in criminal proceedings:

> "33. - Right of appeal to [Supreme Court]
> (1) An appeal lies to the Supreme Court at the instance of the defendant or prosecutor from any decision of the Court of Appeal on an appeal to that court ...
> (2) The appeal lies only with the leave of the Court of Appeal or the [the Supreme Court]; and leave shall not be granted unless it is certified by the Court of Appeal that a point of law of general public importance is involved in the decision and it appears to the Court of Appeal or the [the Supreme Court] (as the case may be) that the point is one which ought to be considered by [the Supreme Court].
> (3) Except as provided for by this part of this Act ... no appeal shall lie from any decision of the Criminal Division of the Court of Appeal."

12. Following several high profile miscarriages of justice, the Royal Commission on Criminal Justice, Cm.2263 (HMSO, 1993), chaired by Lord Runciman, was tasked to consider, *inter alia*, whether changes were needed in the criminal appeals process. In its 1993 report, the Commission recommended the abolition of the certification requirement (at § 10.79):

> "[I]t is unduly restrictive to require such a certificate to be issued in addition to the necessity of obtaining leave from the Court of Appeal or the House of Lords itself. We think therefore that the requirement that the Court of Appeal certify that the case involves a matter of law of general public importance should be dropped. The need to obtain the leave of either the Court of Appeal or the House of Lords before proceeding further is by itself a sufficient filter."

13. A review of the criminal courts carried out in 2001 by Sir Robin Auld did not address this issue, since the composition and workings of the Appellate Committee of the House of Lords did not fall within its terms of reference.

14. In Scotland the High Court of Judiciary is the highest criminal court. There is no route of criminal appeal from the High Court of Judiciary to the Supreme Court. However, there is an exception under the Scotland Act 1998 for devolution issues. Devolution issues include questions as to the compatibility with the Convention of the acts and functions of the Lord Advocate and legislation passed by the Scottish parliament. In such cases, leave to appeal is required from either the High Court of Judiciary or the Supreme Court. There is no certification requirement for criminal cases referred to the Supreme Court from the High Court of Judiciary.

15. In civil cases there is no certification requirement in respect of appeals to the Supreme Court from any order or judgment of the Court of Appeal in England and Wales or in Northern Ireland. An application for permission to appeal must be made first to the Court of Appeal. If that Court refuses permission, an application may be made to the Supreme Court. For a "leapfrog" appeal directly from the High Court to the Supreme Court, however, the High Court judge must certify that the relevant conditions are satisfied, namely that a sufficient case has been made out to justify an application for permission to appeal to the Supreme Court and that all parties consent (section 12(1) of the Administration of Justice Act 1969). The "relevant conditions" (which are set out in section 12(3) of the Administration of Justice Act 1969) are that a point of general public importance is involved and that it either:

> "(a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or
>
> (b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the [Supreme Court] in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the [Supreme Court] (as the case may be) in those previous proceedings."

COMPLAINT

16. The applicant complained under Article 6 § 1 of the Convention that his access to the House of Lords has been unjustifiably impeded by the requirement that the court from which he sought to appeal should certify in his favour. He further complained that the certification process fell short of the requirements of an impartial tribunal. In his case all three judges hearing the application for a certificate also heard the appeal.

THE LAW

17. Article 6 of the Convention provides, as relevant:

> "1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A. The parties' submissions

1. The applicant

18. The applicant submitted that the certification procedure amounted to a disproportionate restriction on his right of access to a court, submitting that at the end of criminal proceedings in the Court of Appeal he had no access at all to the Supreme Court.

19. In challenging the restrictive nature of certification, the applicant made reference to Article 14 § 5 of the International Covenant on Civil and Political Rights (ICCPR) which provided that everyone convicted of a crime should have the right to have his conviction and his sentence reviewed by a higher tribunal according to law. He further referred to *Henry v. Jamaica*, (Communication No. 230/197, U.N. Doc. CCPR/C/43/D/230/1987(199), a decision by the United Nations Human Rights Committee, which interpreted the aforementioned ICCPR provisions as meaning that if domestic law provided for further instances of appeal, a convicted individual must have effective access to each of them.

20. The applicant referred to the recommendation of the Royal Commission on Criminal Justice and underlined that the Commission had been established following a series of miscarriage of justice cases, to ensure that convicted criminals had access to full appeal rights. The Auld Review, on the other hand, had been essentially concerned with the general efficiency of the criminal justice system.

21. In response to the Government's reliance on *Sainte-Marie v. France*, no. 12981/87, 16 December 1992 (where the Court

held that the fact that the judge had earlier ruled on the question of detention or remand did not necessarily imply a lack of objective impartiality), the applicant submitted that this confused the substantive with the procedural aspects at play. For the Court in *Sainte-Marie*, there was no question that the trial judges were hearing an appeal against their decision to refuse bail and that the question of guilt or innocence and proper sentence was quite distinct from the question of a remand in custody. In distinguishing his case, the applicant noted that the Court of Appeal judges were taking a decision as to whether or not their dismissal of his appeal raised legal points that had arguable merit. Thus, they had to consider the possibility that their decision might be wrong. The applicant argued that to entrust the same person with the function of considering the merits of an argument that they were wrong amounted to an obvious violation of the impartiality requirement.

22. The applicant considered it significant that the Government had not provided any examples from any other jurisdiction whereby access to the superior court was finally determined by a decision of the inferior court. The applicant contended that the only explanation for this lay in a fundamental and unjust flaw within the United Kingdom system.

2. The Government

23. The Government accepted that Article 6 applied to the certification procedure before the Court of Appeal. However, it was not accepted that this procedure amounted to a disproportionate restriction on the applicant's right of access to a court or that it breached the applicant's rights to a fair hearing before an independent and impartial tribunal.

24. In particular, the Government contended that section 33(2) of the Criminal Appeal Act 1968 regulated the criminal case-load of the Supreme Court by ensuring that its business was limited to considering points of law of general public importance and that the certification requirement acted as a filter, not as a bar, to appeals. Secondly, the Government submitted that there could be no serious challenge to the independence or impartiality of the Court of Appeal when exercising its powers under section 33(2). In such an instance, the Court of Appeal was not sitting in judgment on its earlier decision, nor determining a criminal charge; rather it was simply deciding whether the matters before it gave rise to a point of law of general public importance. The Government did not accept the argument that Court of Appeal judges might be incapable of distinguishing between the determination of the substantive merits of an appeal and the determination of the separate question whether the appeal raised a point of law of general public importance. They submitted that the Court's case-law supported the contention that Article 6 imposed no absolute requirement that different tribunals should hear procedural and substantive questions arising from the same set of facts (see *Sainte-Marie v. France*, cited above). Similarly, the Government also relied on the principle that nothing in Article 6 prevented

States from regulating access to the courts, particularly where the limitation was imposed on a second appeal (*X. Y. and Z. v. Switzerland*, no. 6916/75, 12 March 1976). They stressed that the Court of Appeal was best placed to determine whether a question was to be certified for the Supreme Court's consideration. This filtering process did not deny the applicant the essence of his right under Article 6, and the "well informed and rational observer" would not detect any difficulty with this approach.

25. The Government noted that whilst the Royal Commission on Criminal Justice had recommended the abolition of the certification requirement, this was not on the basis that the procedure, as it stood, was incompatible with the Convention. Furthermore, the Government found it significant that a review of the criminal courts carried out in 2001 by Sir Robin Auld, did not recommend any changes to the certification procedure.

26. In response to the applicant's submissions regarding the lack of evidence that other jurisdictions exercised a similar restriction on access to their superior courts, the Government stated that the current procedure in England and Wales accorded with an international consensus that accepted that a lower court might properly exercise discretion to restrict access to a senior court in certain circumstances. In support of their argument, the Government made reference to a decision of the High Court of the Hong Kong Special Administrative Region Court of First Instance which upheld the rules restricting appeals as of right and had noted that all of the major Commonwealth jurisdictions had abandoned appeals as of right to their final appellate courts (see, *ChinaChem Charitable Foundation Ltd. v. Chan Chun Chuen* [2011] 6 HKC 273).

B. The Court's assessment

27. There is no dispute between the parties that Article 6 applies. Therefore the Court will focus its examination on whether or not the certification procedure amounted to a violation of the applicant's rights under Article 6.

28. The Court underlines, first, that its role under Article 6 § 1 is not to assess the facts which led the domestic courts to adopt one decision rather than another (see *Tolstoy Miloslavsky v. United Kingdom* judgment of 23 June 1995, Series A no 316-B, § 59). Article 6 § 1 does not guarantee a particular outcome in any case or that the "right result" will be reached by the domestic courts.

29. It follows from the Court's established case-law that Article 6 § 1 does not guarantee a right of appeal and the United Kingdom did not ratify Protocol No. 7. Nevertheless, where a State does institute appellate courts, it is required to ensure that persons within its jurisdiction enjoy before these courts the fundamental guarantees contained in Article 6 (see, amongst

others, *Andreyev v. Estonia*, no. 48132/07, § 68, 22 November 2011; *Mercieca and Others v. Malta*, no. 21974/07, § 36, 14 June 2011; *Delcourt v. Belgium* judgment of 17 January 1970, Series A no. 11, § 25; and *Tolstoy Miloslavsky*, cited above).

30. The right of access to a court is inherent in the right to a fair trial set out in Article 6 § 1 (see *Golder v. the United Kingdom*, 21 February 1975, § 36, Series A no. 18). Whilst limitations on access to court may be imposed, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. In other words, to ensure compatibility with Article 6, limitations must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (*Georgel and Georgeta Stoicescu v. Romania*, no. 9718/03, 26 July 2011; *Levages Prestations Services v. France* judgment of 23 October 1996, Reports 1996-V, § 40; *Fayed v. the United Kingdom*, 21 September 1994, Series A no. 294-B, § 65; *Tolstoy Miloslavsky*, cited above; and *Bellet v. France*, 4 December 1995, Series A no. 333-B, § 31). Contracting States enjoy a certain margin of appreciation in their regulation of access to a court; however, the final decision as to the observance of the Convention's requirements rests with the Court (see *Kart v. Turkey* [GC], no. 8917/05, ECHR 2009). Moreover, the right of access to a court is impaired when the rules cease to serve the aims of legal certainty and the proper administration of justice and form a sort of barrier preventing the litigant from having his or her case determined on the merits by the competent court (*Kart*, cited above).

31. The Court recalls that it is of fundamental importance in a democratic society that the courts inspire confidence in the public *(Hanif and Khan v. the United Kingdom*, nos. 52999/08 and 61779/08, § 138-140, 20 December 2011). To that end it has constantly stressed that a tribunal must be impartial from an objective as well as a subjective point of view (see *Hauschildt v. Denmark*, 24 May 1989, § 46, Series A no. 154; *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII, § 118; *Pullar v. the United Kingdom*, 10 June 1996, § 30, *Reports of Judgments and Decisions* 1996-III; *Gregory v. the United Kingdom*, 25 February 1997, § 43 Reports 1997-I; and *Hanif and Khan*, cited above, § 138).

32. In applying the subjective test – that is, endeavouring to ascertain the personal conviction or interest of a given judge in a particular case – the Court has consistently held that the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Piersack v. Belgium*, 1 October 1982, § 30, Series A no. 53; *Kyprianou*, cited above, § 119; *Sander v. the United Kingdom*, no. 34129/96, § 25, ECHR 2000-V; *Szypusz v. the United Kingdom*, no. 8400/07, § 80, 21 September 2010; and *Toziczka v. Poland*, no. 29995/08, 24 July 2012).

33. As to whether the court was impartial from an objective point of view, this Court must examine whether, in the circumstances, there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the tribunal. Any misgivings of an accused, although important, cannot be decisive for its determination (see *Piersack v. Belgium*, 1 October 1982, § 30, Series A no. 53; *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 194, ECHR 2003-VI; *Gregory*, cited above, § 45; *Sander*, cited above, § 27; *Szypusz*, cited above, § 81; *Grieves v. the United Kingdom* [GC], no. 57067/00, § 69, ECHR 2003-XII; and *Hanif and Khan*, cited above, § 140).

34. The Court is cognisant of the fact that where judges exercise consecutive functions in the same proceedings, what matters is not the fact of dual participation, but the scope and nature of the decisions taken (*Nortier v. the Netherlands*, 24 August 1993, § 33, Series A no. 267; and *Hauschildt v. Denmark*, cited above, § 21).

35. As in *Indra v. Slovakia*, (no. 46845/99, 1 February 2005) the Court considers it appropriate to examine whether there was a close link between the issues examined by the Court of Appeal on the two occasions at issue. In the present case, the question determined by the Court of Appeal on 13 August 2009 was not the same as the question which the Court of Appeal had determined on 23 June 2009. In the 23 June 2009 hearing, the court examined the merits of the applicant's appeal against his criminal conviction. In the 13 August 2009 decision, the court had to determine whether the case raised a point of law of general public importance. Thus, in the Court's view, the scope of the examination involved, which can be considered tantamount to an assessment of admissibility, cannot be said to be the same or intrinsically linked to the merits of the original appeal.

36. The Court notes that the Convention organs have in the past examined a similar certification requirement applied in English criminal proceedings. In *R.M.B. v. the United Kingdom*, (no. 371120/97, 9 September 1998) the Commission observed as follows:

> "More important, however, is the fact that the question for determination by the Court of Appeal on 31 July 1996 was not the same as the question before the court on 13 December 1996: on the former occasion, the court was determining the appeal, whilst on the latter the question was limited to whether a point of public importance was involved. The Commission can agree with the applicant to the extent that if a judge is able to refuse leave to appeal against his own judgment in circumstances where no further recourse is available, a litigant may hold objectively justified fears as to his objectivity. There is, however, no reason why such fears should apply to the determination of the question whether the case raises a point of public importance. In the present case, the question for the Court of Appeal on 13 December 1996 was not whether the judgment of 31 July 1996 was right or wrong, but merely whether it raised important general issues of public importance. The Commission can discern no objective reason why a litigant should hold fears as to the impartiality of judges on the second occasion."

37. Similarly, in *Wells v. the United Kingdom*, no. 37794/05, (dec.) 16 January 2007, the Court held:

> "The Court considers that, taking into account the margin of appreciation to be afforded to the respondent Government, the fact that the High Court was acting as a first tier appellate court and the characteristics of the national system in which the House of Lords' jurisdiction as superior court of appeal is limited to a narrow category of cases of a particular legal importance, there is no appearance of unreasonable or disproportionate restriction on access to court for the purposes of Article 6 of the Convention."

38. The Court concludes that, whilst the certification requirement undoubtedly restricted the applicant's access to the superior court, this fell within the respondent Government's margin of appreciation and was proportionate to the legitimate aim of the proper and effective administration of justice.

39. The Court is satisfied that there is no evidence before it which would rebut the presumption as to the personal impartiality of the Court of Appeal judges in the applicant's case. Furthermore, when considering the objective strand of the impartiality test, there are no ascertainable facts which may raise doubts as to their impartiality. The Court of Appeal was not deciding on whether its decision had been right or wrong, rather its consideration was limited solely to the existence or otherwise, of a point of law of general public importance. The Court finds no reason to conclude that their decision was either arbitrary or unreasonable. Therefore, the Court finds that there were sufficient guarantees to exclude any objectively justified or legitimate doubts as to the impartiality of the tribunal.

40. The Court, finds therefore that there is no appearance of a breach of Article 6 § 1. The applicant's complaint is manifestly ill-founded and therefore inadmissible pursuant to Article 35 §§ 3(a) and 4 of the Convention.

For these reasons, the Court by a majority

Declares the application inadmissible.

Lawrence Early
Registrar

Lech Garlicki
President