HOUSE OF LORDS SESSION 2004–05
[2005] UKHL 14

on appeal from: [2001] EWCA Civ 1224

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina
v.
Secretary of State for the Home Department (Respondent) *ex parte* Greenfield (FC) (Appellant)

ON
WEDNESDAY 16 FEBRUARY 2005

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Carswell
Lord Brown of Eaton-under-Heywood

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LORD BINGHAM OF CORNHILL

My Lords,

1. The appellant Richard Greenfield, while serving a two year sentence of imprisonment at HM Prison Doncaster, a private prison, was charged under the Prison Rules 1999 (SI 1999/728) with a drugs offence, which he denied. The charge was heard in October-December 2000 by a deputy controller, the counterpart in a private prison of a deputy governor, but a Crown servant for whom the Secretary of State is responsible. The deputy controller refused a request by the appellant that he be legally represented. The charge was found to be proved, and the appellant was ordered to serve 21 additional days of imprisonment, a decision approved by the area manager. The appellant applied for judicial review of these decisions, contending that his rights under article 6 of the European Convention had been violated in that the hearing had involved the determination of a criminal charge, the deputy controller had not been an independent and impartial tribunal and he had wrongly been denied the right to be legally represented. He claimed damages for these violations. The respondent Secretary of State successfully resisted the appellant's contentions before the Queen's Bench Divisional Court (Latham LJ and Potts J) [2001] EWHC Admin 113, [2001] 1 WLR 1731, and the Court of Appeal (Lord Woolf CJ, Tuckey and Arden LJJ) [2001] EWCA Civ 1224, [2002] 1 WLR 545. Those courts did not therefore have occasion to consider the appellant's claim for damages. But since the decisions of the Divisional Court and the Court of Appeal the European Court of Human Rights has given judgment in *Ezeh and Connors v United Kingdom* (2002) 35 EHRR 691, (2003) 39 EHRR 1. In the light of those judgments the Secretary of State accepts that the proceedings against the appellant did involve the determination of a criminal charge within the meaning of article 6 of the Convention, that the deputy controller was not an independent tribunal and that the appellant was wrongly denied legal representation of his

own choosing which was available to him. (He makes no concession about the provision of legal assistance, which was not an issue in this case.) Thus the Secretary of State now accepts that the declarations set out in para 31 below should be made. Thus this appeal is now limited to consideration of the appellant's claim to damages.

2. Before turning to the details of the appellant's claim, it is convenient to consider, in principle, the entitlement of an applicant or claimant to damages under the European Convention and under section 8 of the Human Rights Act 1998, and then to consider the principles adopted in Strasbourg in relation to claims for compensation for violations of article 6.

Just satisfaction and damages

3. The primary aim of the European Convention was to promote uniform protection of certain fundamental human rights among the member states of the Council of Europe. Thus the fifth recital of the preamble refers to "collective enforcement" of certain of the rights stated in the Universal Declaration of Human Rights. In its original version, as ratified by the United Kingdom in March 1951 (Cmd 8969, October 1953), the Commission could receive petitions from individuals or groups of individuals claiming to be victims of a violation of a Convention right by a member state only if that state had declared that it recognised the competence of the Commission to receive such a petition (article 25), a member state was not obliged to accept the compulsory jurisdiction of the Court (article 46) and only a member state or the Commission had the right to bring a case before the Court (article 44). Not until 1966, over 12 years after the Convention came into effect, did the United Kingdom recognise the competence of the Commission to receive petitions by individuals. Under article 32 of the original version of the Convention the Committee of Ministers had authority, if a question was not referred to the Court within a specified period, to decide whether or not there had been a violation of the Convention.

4. Articles 25, 44 and 46 of the original Convention have since been repealed and no longer form part of the Convention. The jurisdiction of the Court is now compulsory (article 32) and individuals have a right to apply to the Court (article 34). But the focus of the Convention is still on securing observance by member states of minimum standards in the protection of the human rights specified in the Convention. Member states are bound by article 46(1), as they were by article 53 of the

Convention, to abide by the final judgment (or decision) of the Court in any case to which they are parties. Article 26 of the Vienna Convention on the Law of Treaties, expressing customary international law, requires states parties to a treaty to perform it in good faith.

5. The expectation therefore is, and has always been, that a member state found to have violated the Convention will act promptly to prevent a repetition of the violation, and in this way the primary object of the Convention is served.

6. The Convention has always, however, made provision for affording just satisfaction to the injured party. Article 41 of the Convention, repeating the substance of article 50 of the original version, now provides:

> "*Just satisfaction*
>
> If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

Article 41 is not one of the articles scheduled to the 1998 Act, but it is reflected in section 8 of the Act, which is to this effect:

> "*Judicial remedies*
>
> (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.
>
> (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.
>
> (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including –
>
> (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining –

(a) whether to award damages, or

(b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated -

(a) in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;

(b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section –

'court' includes a tribunal;

'damages' means damages for an unlawful act of a public authority; and

'unlawful' means unlawful under section 6(1)."

It is evident that under article 41 there are three pre-conditions to an award of just satisfaction: (1) that the Court should have found a violation; (2) that the domestic law of the member state should allow only partial reparation to be made; and (3) that it should be necessary to afford just satisfaction to the injured party. There are also pre-conditions to an award of damages by a domestic court under section 8: (1) that a finding of unlawfulness or prospective unlawfulness should be made based on breach or prospective breach by a public authority of a Convention right; (2) that the court should have power to award damages, or order the payment of compensation, in civil proceedings; (3) that the court should be satisfied, taking account of all the circumstances of the particular case, that an award of damages is necessary to afford just satisfaction to the person in whose favour it is

made; and (4) that the court should consider an award of damages to be just and appropriate. It would seem to be clear that a domestic court may not award damages unless satisfied that it is necessary to do so, but if satisfied that it is necessary to do so it is hard to see how the court could consider it other than just and appropriate to do so. In deciding whether to award damages, and if so how much, the court is not strictly bound by the principles applied by the European Court in awarding compensation under article 41 of the Convention, but it must take those principles into account. It is, therefore, to Strasbourg that British courts must look for guidance on the award of damages.

Damages for breach of article 6

7. It is desirable for present purposes to concentrate on the Strasbourg approach to the award of damages on finding that article 6 has been violated. Article 6 seeks to ensure that everyone, in the determination of their civil rights and obligations or of any criminal charge against them, shall enjoy a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law with judgment given in public. Criminal charges entail additional rights: the presumption of innocence, the right to be informed of the charge, the right of a person to defend the charge himself or through legal assistance of his own choosing. These are important rights, and significant violations are not to be lightly regarded. But they have one feature which distinguishes them from violations of articles such as article 3, where an applicant has been tortured, or article 4, where he has been enslaved, or article 8, where a child has been unjustifiably removed from its family; that it does not follow from a finding that the trial process has involved a breach of an article 6 right that the outcome of the trial process was wrong or would have been otherwise had the breach not occurred. There is an obvious contrast with article 5, guaranteeing the right to liberty and security of the person, which provides in para (5):

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."

There is a risk of error if Strasbourg decisions given in relation to one article of the Convention are read across as applicable to another.

8. In the great majority of cases in which the European Court has found a violation of article 6 it has treated the finding of the violation as, in itself, just satisfaction under article 41. Very many examples could be cited, but it is enough to refer, among relatively recent cases, to *Benham v United Kingdom* (1996) 22 EHRR 293, para 68; *Findlay v United Kingdom* (1997) 24 EHRR 221, para 88; *Perks and Others v United Kingdom* (1999) 30 EHRR 33, para 82, in relation to the seven applicants other than Mr Perks; *Kingsley v United Kingdom* (Appn No. 35605/97, 7 November 2000, unreported), para 63, (2002) 35 EHRR 177, paras 42-43; *Ezeh and Connors v United Kingdom* (2002) 35 EHRR 691, para 114, (2003) 39 EHRR 1, para 143; *GW v United Kingdom* (Appn No. 34155/96, 15 June 2004, unreported), para 53. Both *Kingsley* and *Ezeh and Connors* were referred on to a Grand Chamber. In most of these cases the Court declined to speculate on what the outcome of the particular proceedings would have been had the violation not occurred.

9. The routine treatment of a finding of violation as, in itself, just satisfaction for the violation found reflects the point already made that the focus of the Convention is on the protection of human rights and not the award of compensation. It is noteworthy that, in exercising its former jurisdiction under the original article 32, the Committee of Ministers did not, before 1987, award compensation at all, even where a violation was found: D J Harris, M O'Boyle and C Warbrick: *Law of the European Convention on Human Rights* (Butterworths, 1995), p 699. Thus the Court of Appeal (Lord Woolf CJ, Lord Phillips of Worth Matravers MR and Auld LJ) were in my opinion right to say in *Anufrijeva v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124, paras 52-53:

> "52. … The remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the Convention, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages.
>
> 53. Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance."

Where article 6 is found to have been breached, the outcome will often be that a decision is quashed and a retrial ordered, which will vindicate the victim's Convention right.

10. The Court has acknowledged the principle of *restitutio in integrum* (see *Piersack v Belgium* (1984) 7 EHRR 251, para 11; *De Cubber v Belgium* (1987) 13 EHRR 422, para 21), but has on the whole preferred to express the principle without resort to the Latin tongue. Thus in *Bönisch v Austria* (1985) 13 EHRR 409, para 11, the Court noted

> " … that in the present case an award of just satisfaction can only be based on the fact that the applicant did not have, before the Austrian courts, the benefit of the guarantees of Article 6(1)."

Similar statements may be found in *Delta v France* (1990) 16 EHRR 574, para 43; *Vidal v Belgium* (Appn No. 14/1991/266/337, 28 October 1992, unreported), para 8; *Pelissier and Sassi v France* (1999) 30 EHRR 715, para 80; *Zielinski and Others v France* (1999) 31 EHRR 532, para 79; *Davies v United Kingdom* (2002) 35 EHRR 720, para 34; *Polskiego v Poland* (Appn No. 42049/98, 21 September 2004, unreported), para 47; *Edwards and Lewis v United Kingdom* (Appn Nos. 39647/98 and 40461/98, 27 October 2004, unreported), para 49, in which the Grand Chamber endorsed the earlier finding of a Chamber. A recent statement of particular authority, since given by a Grand Chamber on a reference specifically directed to the issue of just satisfaction under article 41, is found in *Kingsley v United Kingdom* (2002) 35 EHRR 177, para 40:

> "The Court recalls that it is well established that the principle underlying the provision of just satisfaction for a breach of Article 6 is that the applicant should as far as possible be put in the position he would have enjoyed had the proceedings complied with the Convention's requirements. The Court will award monetary compensation under Article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, since the State cannot be required to pay damages in respect of losses for which it is not responsible."

11. As appears from the passage just cited, the Court has ordinarily been willing to depart from its practice of finding a violation of article 6 to be, in itself, just satisfaction under article 41 only where the Court finds a causal connection between the violation found and the loss for

which an applicant claims to be compensated. Such claim may be for specific heads of loss, such as loss of earnings or profits, said to be attributable to the violation. The Court has described this as pecuniary loss, which appears to represent what English lawyers call special damage. This head does not call for consideration here. It is enough to say that the Court has looked for a causal connection, and has on the whole been slow to award such compensation.

12. More germane to the present case is a second head of claim for what English lawyers would call general damages and the Court tends to call, but not always consistently, non-pecuniary damage. A claim under this head may be put on the straightforward basis that but for the Convention violation found the outcome of the proceedings would probably have been different and more favourable to the applicant, or on the more problematical basis that the violation deprived the applicant of an opportunity to achieve a different result which was not in all the circumstances of the case a valueless opportunity. While in the ordinary way the Court has not been easily persuaded on this last basis, it has in some cases accepted it: see *Goddi v Italy* (1984) 6 EHRR 457, para 35 ("a loss of real opportunities"); *Colozza v Italy* (1985) 7 EHRR 516, para 38 ("a loss of real opportunities"); *Lechner and Hess v Austria* (1987) 9 EHRR 490, para 64 ("some loss of real opportunities"); *Weeks v United Kingdom* (1988) 13 EHRR 435, para 13 ("a loss of opportunities"); *O v United Kingdom* (1988) 13 EHRR 578, para 12 ("some loss of real opportunities");*Delta v France* (1990) 16 EHRR 574, para 43 ("a loss of real opportunities").

13. In some cases the national court has indicated its opinion that, had an applicant enjoyed the benefit of his article 6 right, as he should, the outcome of the proceedings would or very well might have been more favourable to him. In such cases the Court is ready to find a causal connection. Such an opinion was expressed in *Perks and Others v United Kingdom* (1999) 30 EHRR 33, paras 15, 64, 79, 80 and 81, and the Court on this account distinguished the case of Mr Perks from that of the other applicants. In *Hooper v United Kingdom* (Appn No. 42317/98, 16 November 2004, unreported) the judge had expressed himself in a more understated way, but was treated by the Court, in my view quite rightly, as having expressed a similar opinion: see para 31.

14. The point was made in argument that the Court had used a number of different expressions in concluding that a sufficient causal connection had been found. This is factually correct, as an array of examples will demonstrate: *Goddi v Italy*, above, para 35 ("the outcome

might possibly have been different"); *Colozza v Italy* (1985) 7 EHRR 516, para 38 ("does not find it unreasonable to regard"); *Bönisch v Austria* (1985) 13 EHRR 409, para 11 ("does not exclude the possibility"); *Weeks v United Kingdom* (1988) 13 EHRR 435, para 13 ("it cannot be entirely excluded"); *O v United Kingdom* (1988) 13 EHRR 578, para 12 ("cannot, in the Court's opinion, be entirely excluded"); *Delta v France* (1990) 16 EHRR 574, para 43 ("does not find it unreasonable to regard"); *Vidal v Belgium* (Appn No. 14/1991/266/337, 28 October 1992, unreported), para 9 ("not unreasonable to regard"); *de Geouffre de la Pradelle v France* (A/253-B, 16 December 1992, unreported), para 39 ("considers it reasonable, however, to hold"); *Pelissier and Sassi v France* (1999) 30 EHRR 715, para 80 ("does not find it unreasonable to regard"); *Krcmár and Others v Czech Republic* (2000) 31 EHRR 953, para 50 ("does not find it unreasonable to regard"); *P C and S v United Kingdom* (2002) 35 EHRR 1075, para 149 ("cannot be excluded"); *Polskiego v Poland* (Appn No. 42049/98, 21 September 2004, unreported), para 47 ("not unreasonable to regard"). Thus while the Court laid down in the authoritative case of *Kingsley* in the passage quoted in para 10 above, and repeated in *Edwards and Lewis v United Kingdom* (Appn Nos. 39647/98 and 40461/98, 27 October 2004, unreported), paras 46 and 49, that the Court will award monetary compensation under article 41 only where it is satisfied that the loss or damage complained of was actually caused by the violation it has found, and it has repeatedly stressed that it will not speculate on what the outcome of the proceedings would have been but for the violation, it has on occasion been willing in appropriate cases to make an award if of opinion that the applicant has been deprived of a real chance of a better outcome.

15. Counsel for the appellant relied on these variations of language to criticise the jurisprudence of the Court as showing a lack of principle. The criticism is in my view misplaced. In the absence of a clear causal connection, the Court's standard response has been to treat the finding of violation without more as just satisfaction. It has done so even in cases such as *Benham*, *Perks* (in the cases of the seven applicants other than Mr Perks) and *Ezeh and Connors* where an award might well have been made. But it has softened this response where it was persuaded that justice required it to do so. The variations of language used are such as occur when a court addresses itself to the detailed facts of the case before it, rather than endlessly reproducing a form of words stored in the court's word processor. Wisely, in my opinion, the Court has not sought to lay down hard and fast rules in a field which pre-eminently calls for a case by case judgment, and the Court's language may be taken to reflect its assessment of the differing levels of probability held to attach to the causal connection found in individual cases.

16. A second head of general or non-pecuniary damage has been variously described: "physical and mental suffering" (*Colozza*, above, paras 36, 38); "prolonged uncertainty" (*Bönisch*, above, para 11); "prolonged uncertainty and anxiety" (*Lechner and Hess*, above, para 64); "a certain feeling of frustration and helplessness" (*O*, above, para 13); "a certain sense of isolation and confusion" (*Granger v United Kingdom* (1990) 12 EHRR 469, para 52); "the stress and strain which he has suffered over the years in which he has been fighting legal battles instead of practising medicine" (*Darnell v United Kingdom* (1993) 18 EHRR 205, paras 23-24); "a feeling of uncertainty and anxiety as to whether they would be able to carry on their occupation and a deep feeling of injustice" (*Hornsby v Greece* (Appn No 107/1995/613/701, 1 April 1998, unreported, para 18); "distress, anxiety and frustration" (*Davies v United Kingdom* (2002) 35 EHRR 720, para 38); "distress and anxiety" (*P, C & S*, above, para 149); "distress and frustration" (*Massey v United Kingdom* (Appn No 14399/02, 16 November 2004, unreported, para 34). In considering claims under this head the Court has, consistently with its general approach, only been willing to award compensation for anxiety and frustration (however described) attributable to the article 6 violation. It has recognised that for very many people involvement in legal proceedings is bound to cause anxiety irrespective of any article 6 breach, and no award is made in such cases. In some cases the Court has found on the facts that the applicant had suffered attributable anxiety and frustration: see, for example, *Bönisch*, above, para 11; *De Cubber*, above, para 24; *P, C & S*, above, para 149. In other cases the Court has found that the applicant "must have" suffered such feelings (as in *O*, above, para 13, and *Granger*, above, para 52) or that it is reasonable to assume he did (as in *Davies*, above, para 38, and *Massey*, above, para 34). To gain an award under this head it is not necessary for the applicant to show that but for the violation the outcome of the proceedings would, or would probably, or even might, have been different, and in cases of delay the outcome may not be significant at all. But the Court has been very sparing in making awards, as its refusals in the cases of *Saunders v United Kingdom* (1996) 23 EHRR 313, paras 87-89; *Findlay*, above, paras 86-88; *Robins v United Kingdom* (1997) 26 EHRR 527, paras 40-41; and *Kingsley*, above, para 43 may be said to show. In the last cited passage the Grand Chamber said:

> "In all the circumstances, and in accordance with its normal practice, in civil and criminal cases, as regards violations of Article 6(1) caused by failures of objective or structural independence and impartiality, the Court does not consider it appropriate to award monetary compensation to the applicant in respect of loss of

> procedural opportunity or any distress, loss or damage allegedly flowing from the outcome of the domestic proceedings."

Thus, whatever the practice in other classes of case, the ordinary practice is not to make an award in cases of structural bias.

17. Where, having found a violation of article 6, the Court has made an award of monetary compensation under article 41, under either of the heads of general damages considered in this opinion, whether for loss of procedural opportunity or anxiety and frustration, the sums awarded have been noteworthy for their modesty. The Court itself has recognised this, referring in *Nikolova v Bulgaria* (2001) 31 EHRR 64, para 76, an article 5 case, to the award of "relatively small amounts", and in *Migon v Poland* (Appn No 24244/94, 25 September 2002, unreported, para 91), another article 5 case, to "modest awards". It made plain in *Osman v United Kingdom* (1998) 29 EHRR 245, para 164:

> "The Court notes that it conducts its assessment of what an applicant is entitled to by way of just satisfaction in accordance with the principles laid down in its case law under Article 50 [now article 41] and not by reference to the principles or scales of assessment used by domestic courts".

It made the same point in an article 5 case, *Curley v United Kingdom* (2000) 31 EHRR 401, para 46:

> "It does not, however, consider that the domestic scales of compensation applicable to unlawful detention apply in the present case where there has been no equivalent finding of unlawfulness."

18. It was submitted for the appellant that courts in England and Wales, when exercising their power to award damages under section 8 of the 1998 Act, should apply domestic scales of damages. It was also suggested, in reliance on an article by Sir Robert Carnwath ("ECHR Remedies from a Common Law Perspective" (2000) 49 ICLQ 517, 524), that the European Court had relied on English scales when

calculating the sum of damages payable to Mr Perks. It appears that that may have been so. Counsel also relied on the decisions of Sullivan J in *R (Bernard) v Enfield LBC* [2002] EWHC 2282 (Admin), [2003] HRLR 111, para 45, Stanley Burnton J in *R (KB) v South London and South and West Region Mental Health Review Tribunal* [2003] EWHC 193 (Admin), [2004] QB 936, paras 47 and 53 and the Court of Appeal in *Anufrijeva v Southwark London Borough Council* [2004] QB 1124, paras 73 and 74, to suggest that awards under section 8 should not be on the low side as compared with tortious awards, that English courts should be free to depart from the scale of damages awarded by the European Court and that English awards by appropriate courts or bodies should provide the appropriate comparator. In calculating awards for anxiety and frustration, counsel suggested, the scales of damages awarded by English courts and tribunals in discrimination cases provided an appropriate comparison.

19. None of the three English cases cited involved a violation of article 6, and to that extent they have only a limited bearing on the present problem. But there are in my opinion broader reasons why this approach should not be followed. First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. Secondly, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg. This intention was clearly expressed in the White Paper "Rights Brought Home: The Human Rights Bill" (Cm 3782, 1 October 1997), para 2.6:

> "The Bill provides that, in considering an award of damages on Convention grounds, the courts are to take into account the principles applied by the European Court of Human Rights in awarding compensation, so that people will be able to receive compensation from a domestic court equivalent to what they would have received in Strasbourg."

Thirdly, section 8(4) requires a domestic court to take into account the principles applied by the European Court under article 41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents. The appellant contended that the levels of Strasbourg awards are not "principles" applied by the Court, but this is a legalistic distinction which is contradicted by the White Paper and the language of section 8 and has no place in a decision on the quantum of an award, to which principle has little application. The Court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the Court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them. They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the Court might be expected to be, in a case where it was willing to make an award at all.

The appeal

20. On 16 October 2000 the appellant underwent a mandatory drugs test which proved positive. He was charged with an offence under rule 51(9) of the Prison Rules 1999 (SI 1999/728), which provides that "A prisoner is guilty of an offence against discipline if he … (9) administers a controlled drug to himself or fails to prevent the administration of a controlled drug to him by another person (but subject to rule 52)". Rule 52 provides that it shall be a defence for a prisoner charged with an offence under rule 51(9) to show that "…(b) the controlled drug was administered by or to him in circumstances in which he did not know and had no reason to suspect that such a drug was being administered".

21. The appellant appeared on 20 October 2000 before Mr Parry, a deputy controller, who was authorised to conduct adjudications such as this under the Prison Rules then in force. The appellant pleaded not guilty to the charge and claimed that he had smoked a cigarette which, without his knowledge or consent, had been spiked with heroin by another prisoner. The adjudication was adjourned for the drug test result to be confirmed and to allow the appellant to seek legal advice. At the reconvened hearing on 27 October the appellant was shown the result of the confirmatory test result, which was again positive. The hearing was adjourned again to enable the appellant to seek legal advice.

22. The hearing was reconvened on 10 November 2000 but the proceedings were again adjourned so that the appellant could have the test result verified independently. This independent test confirmed the presence of opiates in the appellant's urine.

23. At a resumed hearing on 24 November 2000 the proceedings were adjourned again. On 7 December 2000 the appellant's solicitor wrote to the controller, relaying the results of the independent analysis and requesting an adjournment so that the appellant could be legally represented. On 12 December, when the hearing resumed, Mr Parry considered whether, in addition to having had access to legal advice, the appellant should have legal representation at the substantive hearing. He sought to direct himself in accordance with earlier Court of Appeal authority and decided that the appellant should not have legal representation.

24. At the substantive hearing on 14 December the appellant called as a witness a fellow prisoner who testified that he had accidentally given to the appellant a cigarette containing heroin. He said that he was on the frequency test programme but had never tested positive for drugs. When asked by Mr Parry how he had not tested positive after smoking the cigarette he claimed accidentally to have given the appellant, he said that this had occurred before he had been put on the frequency test programme. The hearing was then adjourned for a week. Before the next hearing Mr Parry investigated whether the evidence given by the witness about his own drug history was correct and he found that it was.

25. On 21 December 2000 Mr Parry found the charge against the appellant proved and ordered the appellant to serve 21 additional days of imprisonment.

26. The appellant's complaints that the charge against him had involved the determination of a criminal charge, that article 6 of the Convention required that charge to be determined by an independent and impartial tribunal, that Mr Parry was not such a tribunal and that he should not have been denied the right to be legally represented are now vindicated by a finding in his favour at the highest judicial level based on a public concession by the Secretary of State. This would seem on its face to be pre-eminently a case in which the finding in the appellant's favour affords just satisfaction and in which, applying Strasbourg principles, the award of damages is not necessary.

27. But counsel for the appellant seeks to advance a claim for loss of the opportunity to achieve a different result which the appellant might have achieved had he been allowed, as he should have been, to be legally represented. It was said that there were questions of law on the standard of proof required of a prisoner relying on the defence under rule 52 of the Prison Rules, and that the appellant was somewhat immature and had mental health problems.

28. I would reject these arguments. It is now accepted that Mr Parry lacked the structural independence and impartiality required for such adjudications. But he appears to have conducted this adjudication with exemplary conscientiousness, patience and regard for the appellant's interests. The standard of proof would have been very familiar to him if not to the appellant. The appellant struck Mr Parry as articulate and alert, and the contrary was not suggested when legal representation was sought before the substantive hearing. The issue for Mr Parry was whether he believed the appellant and his witness. Clearly he did not. A legal representative might have persuaded Mr Parry or another tribunal to take a different view or he might not. It is inappropriate to speculate.

29. A claim to damages for anxiety and frustration was also advanced, on the basis that the appellant did not think the charge against him would be fairly tried, because the prison authorities were biased against prisoners. It may readily be accepted that the appellant did think this, as many other prisoners have no doubt done. At the time, however, adjudication by a governor or deputy governor (or their private prison counterparts, also Crown servants) was the norm. The appellant had no expectation of any other procedure, and was treated no differently from anyone else. The conduct of the adjudication itself, as already noted, appears to have been exemplary. There is no special feature of this case which warrants an award of damages.

30. The House was urged, because of the course the case had taken and because the appellant had not been able to deploy his full case on damages, to remit this issue to a judge for consideration. I would not accede. The appellant claimed damages almost from the outset. It was open to him to put forward such material as he chose to support his claim, and in the absence of any contrary procedural order it was his duty to do so. But the pursuit of damages should rarely, if ever, be an end in itself in an article 6 case, and the Court of Appeal's strictures in *Anufrijeva*, above, para 79, are very much in point.

31. For reasons already given, declarations will be made:

(1) that the Secretary of State for the Home Department acted unlawfully by failing to provide the appellant with a hearing before an independent tribunal, contrary to article 6(1) of the European Convention;

and

(2) that the Secretary of State for the Home Department acted unlawfully by refusing to allow the appellant to be legally represented, contrary to article 6(3) of the Convention.

Written submissions on costs, in the House and below, are invited within 14 days.

LORD RODGER OF EARLSFERRY

My Lords,

32. I have had the privilege of considering in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. I agree with it and, for the reasons he gives, I too would make the order which he proposes.

BARONESS HALE OF RICHMOND

My Lords,

33. For the reasons given in the opinion of my noble and learned friend, Lord Bingham of Cornhill, with which I agree, I would make the declarations which he proposes but make no order for damages under section 8 of the Human Rights Act 1998.

LORD CARSWELL

My Lords,

34. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Bingham of Cornhill. For the reasons which he has given I would make the order which he proposes.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

35. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. For the reasons which he gives I too would make the order proposed.