Neutral Citation Number: [2019] EWCA Civ 874

Case No: C1/2018/1401

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(ADMINISTRATIVE COURT)
MRS JUSTICE CHEEMA-GRUBB
CO/51/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2019

Before :

LORD JUSTICE DAVIS
and
LORD JUSTICE IRWIN

- -

Between :

Sanjay Thakrar	**Claimant/Applicant**
- and -	
Crown Prosecution Service	**Defendant/Respondent**

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- -

Lee Schama (instructed by **Cubism Law**) for the **Applicant**
John McGuinness QC (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing date : 8th May 2019

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Approved Judgment

Lord Justice Davis :

Introduction

1. The claimant in this case, Mr Sanjay Thakrar, who is the applicant in this court, commenced criminal proceedings, by way of private prosecution, in 2016 against a number of individuals. On 10 November 2017 the Director of Public Prosecutions (DPP), by the Crown Prosecution Service (CPS), issued a decision letter to the effect that, under the powers conferred by s.6 (2) of the Prosecution of Offences Act 1985, it had been decided to take over the conduct of the prosecution. The same letter gave notice, under s.23A of the 1985 Act, to the effect that the CPS did not wish the proceedings to continue. Full reasons for such decision were given.

2. The claimant was much aggrieved at the decision to discontinue. He commenced judicial review proceedings, challenging such decision, on 13 December 2017. Permission to apply for judicial review was refused by Butcher J on the papers on 30 April 2018. Following that refusal, the claimant renewed his application at an oral hearing before Cheema-Grubb J. The applicant was represented by leading and junior Counsel: the DPP was not represented. In her full judgment dated 7 June 2018 the judge refused the application.

3. The claimant sought permission to appeal to this court, by appellant's notice filed on 14 June 2018. The point was then taken that, by reason of s.18(1) of the Senior Courts Act 1981, the Court of Appeal had no jurisdiction to entertain the proposed appeal, on the basis that the judgment was in a criminal cause or matter. By directions given on the papers by my Lord, Irwin LJ, on 23 October 2018, it was directed that the issue of jurisdiction be the subject of an oral hearing in this court.

4. At the conclusion of the hearing before us, this court announced its decision that the application for permission to appeal was refused on the basis that this court had no jurisdiction to entertain it. We indicated that we would give our reasons for such decision in writing at a later date. These are my reasons for so deciding.

Background Facts

5. Since the present issue relates to jurisdiction, the background facts need only an outline summary for present purposes.

6. The claimant is a businessman. At the relevant times he had controlled a company called Century Finance Limited (Century), a company registered in New Zealand.

7. By written contracts of sale dated 18 and 28 June 2012 a company called Expopet Green International Limited (Expopet) agreed to purchase from a company called Jamtoff Trading Limited (Jamtoff), part of a Russian group, two consignments of plastic designed to make containers for food and drinks. The total price was approximately €800,000, the first consignment being for €257,700 and the second for about €550,000. The consignments were shipped from Kaliningrad. Expopet took delivery at Felixstowe in July 2012.

8. As was to be found, errors were made by the relevant staff of Jamtoff in arranging delivery. Thus the two consignments were dispatched prior to confirmation that the relevant letters of credit had been issued and received; further, although it was intended that there be no named consignee on the bills of lading, by error or misunderstanding each bill of lading designated Expopet as consignee and, what is more, each was then forwarded to Expopet. At all events Expopet was able to take, and did take, delivery of the consignments without payment being made. Subsequently Expopet sold the consignments on. But still it did not pay for them.

9. Jamtoff looked to Century for payment as issuer of the relevant letters of credit. Those letters of credit were then rejected by Century; but its rejection of the second letter of credit was ultimately accepted to be defective. Thus Century was at all events liable for €550,000: but by the time of that acceptance (if not before) it could not pay.

10. Jamtoff commenced civil proceedings in the High Court in London (Mercantile Court) against Century, the claimant and an individual called Paresh Thakkar, who was the commercial director of Expopet. The matter came on for trial before Judge Waksman QC. Among other things Jamtoff claimed that Century, the claimant and Mr Thakkar had conspired from the outset to defraud Jamtoff by causing loss intentionally without, from the outset, ever intending that payment for the two consignments would be made. Alternatively, it was said that the defendants variously had made fraudulent misrepresentations designed to procure the two consignments: in particular in representing that Century was a bank (when it was not) and that the letters of credit had been duly issued and were genuine.

11. The judge, by judgment delivered on 14 August 2015, rejected the claim in conspiracy. He found that Expopet did at the start intend to pay for the plastic at the time of purchase. But he upheld the claim against the defendants for fraudulent misrepresentation. He awarded damages representing the value of the goods accordingly. The judge in reaching his conclusions was very critical of the evidence of the claimant (described as "generally unreliable and evasive") and of Mr Thakkar.

12. Thereafter, in November 2016 the claimant instituted proceedings by way of private prosecution, initially against Mr Thakkar. He claimed to be much aggrieved that he (the claimant) had suffered loss but that Mr Thakkar, through Expopet, had in effect obtained the goods and the proceeds of sale of the goods without paying for them. The initial counts were of theft, fraud and fraudulent trading; but subsequently these were reduced to two counts of theft. By this time, three other individuals – all closely connected with Expopet - had been added as co-accused defendants. The proceedings were by now continuing in the Harrow Crown Court.

13. The defendants in due course indicated that they would be applying to stay the proceedings on the ground of abuse of process and also to dismiss. The Crown Court judge understandably then directed that the case be considered by the CPS.

14. That resulted in the letter from the CPS dated 10 November 2017. It was signed by a specialist Crown Prosecutor. It was detailed. As for the decision to discontinue, the letter stated that the reason for discontinuance was that there was "insufficient evidence to provide a realistic prospect of conviction on either charge". It was pointed out that in the civil proceedings Judge Waksman QC had found that Expopet had intended to pay for the plastic from the outset. There was, it was said, no admissible evidence to

support the allegation that Expopet had intended to commit theft; the assertions of the claimant to the contrary did not suffice and in any event he had been the subject of adverse credibility findings by Judge Waksman QC and also by another judge in another, unrelated, case. It was further said that the claimant's evidence was the sole evidence against the defendants; and his evidence could not be relied upon.

The proceedings below

15. A decision not to prosecute, or a decision to pursue a prosecution, is in principle amenable to judicial review. Nevertheless responsibility for such a decision is assigned to the DPP or CPS, as the case may be, who of course have the appropriate expertise; and it is well established that it is in only in a rare case that the courts will interfere. That said, if a conventional public law ground of challenge is made good the courts may then interfere.

16. The grounds set out in the judicial review claim filed on 13 December 2017 and brought against the CPS (strictly, it should have been the DPP) are not, it has to be said, very well focused: and in many respects might be said to involve mere disagreement with the CPS' evaluation of matters. But in essence they involve an assertion that the assessment of the CPS, which had been to the effect that there was insufficient evidence to provide a realistic prospect of conviction, was wholly unreasonable and was flawed. It was also argued that it was wrong to say that the evidence of the claimant was the "sole" evidence against the defendants.

17. Butcher J, on 30 April 2018, refused permission on the papers. He could find no arguable basis for saying that the decision to discontinue the prosecution was perverse or unreasonable: to the contrary, he concluded that the assessment that there was insufficient evidence of dishonesty such as to provide a realistic prospect of conviction was one which the CPS was entitled to reach. He further considered that the claimant's evidence was potentially "central to any prosecution"; and the previous adverse judicial findings against his reliability were properly taken into account.

18. Cheema-Grubb J, in her judgment of 7 June 2018, reached essentially the same conclusion. She among other things took the view that the CPS had "expressed [itself] badly in stating, for example, that the claimant's evidence is the 'sole evidence' against the interested parties"; but she held that it remained central evidence and that whether the actions of the accused were to be interpreted in the inculpatory way contended for "must be influenced by evaluation of the claimant's own credibility." She also reminded herself that it was exceptional for the courts to disturb a decision of this kind made by an independent prosecutor. She concluded:

> "…I do not hesitate to conclude that there is no basis for contending that the decision of 10 November 2017 was perverse or one that no reasonable prosecutor could have reached."

19. Mr Schama (who had not appeared below) did briefly address us on the substance of the case with a view to seeking to show that the claimant had a strong case and that the judges below had wrongly evaluated it. In this regard, he went so far as to assert that the claimant's own evidence was irrelevant and inadmissible. Be that as it may, in my view such points are wholly immaterial on the question of jurisdiction which initially has to be resolved. Either this court has jurisdiction to entertain this application for

permission to appeal or it does not. If it does, the question of whether there are grounds of appeal with realistic prospects of success can be determined at a later stage. If it does not, the proposed appeal cannot be entertained at all. The potential strength or weakness of a substantive appeal can have no bearing on an issue of jurisdiction such as this.

The statutory provisions

20. Section 18(1) of the Senior Courts Act 1981 provides in the relevant respects as follows:

> "18(1) No appeal shall lie to the Court of Appeal -
>
> (a) except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter;"

(It was common ground before us that no provision of the Administration of Justice Act 1960 was in point in this case.) In addition, by s.151(1) "cause" is defined to mean "any action or criminal proceedings" and "matter" is defined to mean "any proceedings in court not in a cause."

21. It is not, I think, necessary for present purposes to set out the actual terms of s.6 or s.23A of the 1985 Act.

Disposition

22. In my opinion, it is wholly plain that the judgment below was in a "criminal cause or matter". That being so, by reason of the provisions of s.18(1) of the 1981 Act no appeal lies to this court.

23. It does no harm first to view the matter without reference to authority. In the present case, there had been ongoing criminal proceedings in the Crown Court. The decision of the CPS was to discontinue those criminal proceedings. How, it may be asked, can a judgment upholding such a decision be anything other than in a criminal matter? Mr Schama could give no sensible answer.

24. Such an initial view of things is only reinforced by authority. It serves no purpose here to undertake an extensive review of the authorities: they are fully discussed in the Divisional Court in *Belhaj v Director of Public Prosecutions* [2017] EWHC 3056 (Admin), [2018] IWLR 433; in the Supreme Court in *Belhaj* [2018] UKSC 33, [2018] 3 WLR 433 (where the decision of the Divisional Court was, by a majority, reversed – the appeal from the Divisional Court, it may be noted, proceeding directly to the Supreme Court just because of s.18(1) of the 1981 Act); and in the Court of Appeal in *R (McAtee) v Secretary of State for Justice* [2018] EWCA Civ 2851. Moreover, such decisions also dispose of somewhat "tangled", and in truth sometimes conflicting, decisions of courts on earlier occasions: see the observations of Lord Neuberger in *R (Guardian News and Media Limited) v City of Westminster Magistrates Court* [2011] EWCA Civ 1188, [2011] IWLR 3253, a decision affirmed by the Supreme Court in *Belhaj*.

25. At all events, what cannot here validly be maintained is that there is no criminal cause or matter involved simply and solely because the decision under challenge is a decision

of the executive sought to be challenged on public law grounds in judicial review proceedings. Such an approach most emphatically is not the law.

26. It has been the law at least since the decision in *ex parte Woodhall* (1888) 20 QBD 832 that in such a context it is necessary to have regard to the underlying subject matter of the proceedings in question. That general approach has been recently endorsed by the Supreme Court in *Belhaj*. Thus in *Belhaj* Lord Sumption, albeit speaking specifically by reference to s.6 of the Security and Justice Act 2013, said at paragraph 15 of his judgment in the context of judicial review claims:

> "…in its ordinary and natural meaning "proceedings in a criminal cause or matter" include proceedings by way of judicial review of a decision made in a criminal cause…"

He went on to say, in general terms, in the course of paragraph 17:

> "It follows that judicial review as such cannot be regarded as an inherently civil proceeding. It may or may not be, depending on the subject matter".

27. In the present case, there can, as I see it, be no argument but that the subject-matter here is criminal: namely the continuance or discontinuance of the criminal proceedings in the Harrow Crown Court.

28. That coheres precisely with the further statements of Lord Sumption at paragraph 20 of his judgment (with which Lady Hale agreed). He there in effect aligned the position under s.6 of the 2013 Act with the position relating to rights of appeal. He stated in that regard that a "matter" was something wider than a "cause": namely a particular legal subject-matter, although arising in different proceedings. He went on:

> "That is why a "criminal cause or matter" in the Judicature Acts extends to a judicial review in the High Court of a decision made in relation to actual or prospective criminal proceedings: see *R (Aru) v Chief Constable of Merseyside Police* … The reality of the Appellants' application is that it is an attempt to require the Director of the Public Prosecutions to prosecute Sir Mark Allan. That is just as much a criminal matter as the original decision of the Director not to prosecute him…"

29. Lord Mance (who in essence agreed with Lord Sumption) likewise said this at paragraph 26:

> "A challenge by judicial review to a decision to prosecute would seem to me to fall naturally within the concept of "proceedings in a criminal cause or matter"; and so too a challenge to a decision not to prosecute, the whole point of which would lead to a prosecution."

30. That approach and those statements are directly in point here. They are fatal to the argument that this court has jurisdiction. Mr Schama in fact realistically accepted that a decision under s.23A of the 1986 Act to discontinue an ongoing prosecution cannot

be differentiated, for these purposes, from a decision not to prosecute: indeed it is if anything, as Mr McGuinness QC observed, a fortiori.

31. Mr Schama nevertheless boldly sought to say that the decision in *Belhaj* was obiter in this respect. He said that the actual decision in *Belhaj* was as to the meaning and effect of s.6 of the 2013 Act, not of s.18 of the 1981 Act. That is in one sense true. But it is not a tenable objection. It is not tenable because the reasoning of the majority with regard to s.6 of the 2013 Act is directly founded on their reasoning as to the ambit of the phrase "criminal cause or matter" as used in the Judicature Acts (and latterly the 1981 Act) with regard to routes of appeal. It was thus held that the phrase "proceedings in a criminal cause or matter" as used in s.6 of the 2013 Act had the same breadth of meaning as the words used in the Judicature Acts relating to routes of appeal. That reasoning thus is a necessary and fundamental part of the ultimate conclusion with regard to s.6 of the 2013 Act.

32. To the extent that Mr Schama also sought to rely on the reasoning of the minority in *Belhaj* that does not assist him either. For, leaving aside the obvious point that that was a minority judgment, the dissenting judges in fact *endorsed* the general approach of the majority with regard to the meaning of "criminal cause or matter" relating to routes of appeal: see paragraphs 48 and 50 of the judgment of Lord Lloyd-Jones (with whom Lord Wilson agreed). Their point was a quite different one (and was in line with the approach taken in the Divisional Court): that the position became different when one has regard to the special context of the 2013 Act.

33. Mr Schama also somehow sought to say that the decision in *Belhaj* was per incuriam. To the extent that I understood the argument, I reject it. He at all events could cite to us no case directly in point on this issue which was overlooked in *Belhaj*. To the extent that he referred to various cases (debatably involving a criminal cause or matter) where jurisdiction had been assumed by the court to be available without argument on the point, that leads nowhere, for the reasons discussed in *McAtee.*

34. I in any event might add that a conclusion that this was a criminal cause or matter would, in my view, be inevitable even without the decision in *Belhaj*. *Belhaj* simply operates to confirm the outcome in this particular case.

35. Mr Schama however, as an alternative argument, then sought to invoke the provisions of CPR r. 52.8(5). He said that, instead of giving permission to appeal, the Court of Appeal could give permission to apply for judicial review. That, he said, would remove any jurisdictional obstacle.

36. If that were right, it would render the entire argument by reference to s.18 of the 1981 Act and *Belhaj* otiose. It also would potentially have very significant implications for other cases. But it is not right.

37. Rule 52.8(5) provides as follows:

> "52.8(5). On an application under paragraph (1) or (2), the Court of Appeal may, instead of giving permission to appeal, give permission to apply for judicial review."

It is to be noted that the sub-rule is prefaced by the words "On an application under paragraph (1) or (2)." Rule 52.8(1) provides that where permission to apply for judicial review has been refused at a hearing in the High Court an application for permission to appeal may be made to the Court of Appeal. It follows that the Court of Appeal may only exercise its power under CPR r. 52.8(5), as an alternative to granting permission to appeal, if there first has been an application for permission to appeal; and that necessarily must connote an application for permission to appeal which the Court of Appeal has jurisdiction to entertain. Consequently, if the Court of Appeal has no jurisdiction to grant permission to appeal then it also has no jurisdiction instead to grant permission to apply for judicial review under sub-rule (5). That is the short answer to that point.

38. Mr Schama did also at one stage faintly complain (referring to some observations in the decision of the Divisional Court in *R (Purvis) v Director of Public Prosecutions* [2018] EWHC 1844 (Admin), [2018] 4 WLR 118) that the decision below was not made by a Divisional Court. Many of the practitioners' books, it is true, indicate that the general practice is that cases involving a criminal cause or matter will generally be heard by a Divisional Court. I will come on in my concluding remarks to say more about this. But the point here affords no ground of challenge – if one was maintained, and I am not sure that it was – because there is no requirement, whether by statute or rule, for a Divisional Court to hear a case such as this. It cannot be argued that Cheema-Grubb J was lacking in jurisdiction to hear and decide the matter. She plainly did have such jurisdiction, under the rules. I also add, by way of comment, that there is no indication that the claimant's legal team below had ever requested a two-judge court for the purposes of the renewed oral hearing.

Conclusion

39. For these reasons, the application for permission to appeal is to be refused on the ground that the Court of Appeal has no jurisdiction to entertain it.

General observations

40. This case would nevertheless suggest that there are still some ongoing difficulties with regard to appeals from judgments in criminal causes or matters. I therefore add some wider observations.

41. As pointed out in *McAtee* (at paragraph 42) it is salutary that there should not be an over-expansive interpretation of the phrase "criminal cause or matter". In some (and perhaps most) cases – and the present is one – the position is clear-cut. In others, however, the position may be less obvious and will need to be determined by reference to the true subject-matter of the proceedings. But the point remains that where a decision of the High Court is in a criminal cause or matter the only route of appeal is, with leave, to the Supreme Court and in circumstances where a point of law of general public importance must be certified. Moreover, there is not even that potentiality of seeking to appeal to the Supreme Court where the High Court has on a renewed application refused permission to apply for judicial review: cf. *re Poh* [1983] 1 WLR 2. Thus the appeal route, overall, is very significantly more restricted in this kind of case than is the position in civil matters.

42. It is no doubt primarily for this reason that substantive claims for judicial review in a criminal cause or matter – I say nothing about statutory appeals or appeals by way of case stated – are ordinarily, as a matter of practice (though not as a matter of jurisdictional requirement), heard by a Divisional Court of the High Court, comprising usually two judges.

43. However there can, as I see it, be no objection to an application for permission to apply for judicial review (as opposed to the substantive claim itself) in a criminal cause or matter being dealt with by a single High Court Judge on the papers, in accordance with the rules and the general practice applicable in the Administrative Court in judicial review cases. This is because either permission to apply will be granted or, if it is refused, a renewed application to an oral hearing may be made: so the matter will then at least have been considered twice judicially.

44. There is likewise no necessary reason why (as, indeed, occurred here) the renewed application at an oral hearing in such a case should not also be heard by a single judge. Nevertheless, consideration should normally then be given as to whether a Divisional Court would be appropriate for the hearing of a renewed application in a case involving a criminal cause or matter, especially where the case may be of potential importance or complexity. If necessary, the applicant can lodge with the Administrative Court brief written submissions seeking a Divisional Court hearing for the renewed application: and the supervising judge can then give any appropriate direction.

45. If permission to apply is given at the oral hearing in a criminal cause or matter, that necessarily connotes that the case is properly arguable: and the substantive hearing in such circumstances should ordinarily be heard by a Divisional Court, as is current general practice. If, on the other hand, permission to apply is refused at the oral hearing that is the end of the matter.

46. In cases where a single judge of the Administrative Court refuses permission to apply on the papers and also certifies as totally without merit that entirely precludes the right to a renewed oral hearing: CPR r. 54.12(7). That, in a civil case, does not however preclude an application for permission to appeal to the Court of Appeal under CPR r. 52.8. But in a criminal cause or matter such an application to the Court of Appeal *is* precluded: just because of s.18(1) of the 1981 Act. It is not necessarily a comfortable position that a legal proceeding by way of a judicial review claim can be conclusively determined by way of only one stage of judicial decision making (and which, indeed, may be on the papers only): and thus I would suggest that, in a criminal cause or matter, a single judge in considering an application for permission to apply on the papers should be particularly chary in certifying as totally without merit.

47. If, in a criminal cause or matter, the single judge in the Administrative Court decides to refer the matter to an oral hearing, without himself or herself adjudicating on whether or not permission to apply should be given, it would be convenient if the single judge gave a direction or recommendation as to whether the application for permission should be heard by a Divisional Court. Such a direction should certainly normally be given where the single judge in a criminal cause or matter directs a "rolled up" hearing: that is, a hearing which will decide whether permission to apply is to be given and (if it is) for the substantive hearing of the judicial review claim itself to follow immediately

thereafter. And, as I have said, it is any event open to an applicant to make representations, in any given case, that the matter be heard by a Divisional Court.

48. Such matters are to an extent already covered by what is set out in the Administrative Court Judicial Review Guide. No doubt that will continue to be reviewed and updated in these respects in the light of *Belhaj* and of continuing developments in this area.

49. It also follows from all the foregoing that it is the responsibility of the parties to judicial review proceedings to identify at an early stage whether a criminal cause or matter is or may be involved and to identify the potentially applicable appeal routes: and that Administrative Court judges, as well as the Administration Court office, should themselves be alert to the position.

50. Finally, I would add this. This whole jurisdictional area has the potential, in some cases, to be very problematic: as the course of proceedings in *Belhaj* alone indicates. Further, whatever may have been the understandable perception of things in Victorian times, it is rather difficult, in my own view, to understand the continuing rationale for the position set out in s.18(1) of the 1981 Act (which is now itself nearly 40 years old). This is particularly so where there has in the intervening period been an ever-expanding growth in judicial review claims generally, quite a number of which have (to put it neutrally) a criminal context. Not only can such a situation give rise to difficulty, in at least some cases, in determining the true route of appeal; but also, and no less importantly, it may mean that deserving cases, otherwise worthy of at least passing the test for permission to appeal to the Court of Appeal, can attract no appeal from the High Court at all because a point of law of general public importance cannot properly be certified: see also the observations to this effect in *McAtee* at paragraph 42 of the judgment. It is not at all easy to see why judicial review cases involving criminal causes or matters should, in modern times, be treated in terms of appeal so much more restrictively than the general body of civil cases in this respect.

51. In *R (Aru) v Chief Constable of Merseyside Police* [2004] EWCA Civ 199, [2004] IWLR 1697, the Court of Appeal declined to hear an appeal challenge, by way of judicial review, to the issuing by the police of a formal caution. It was held that it was precluded from doing so as that was a criminal matter. At paragraph 14 of his judgment, Maurice Kay LJ (with whom Longmore LJ and Waller LJ agreed) said this:

> "In my judgment, neither section 18(1) of the Supreme Court Act 1981 nor recourse to Convention law confers on this court jurisdiction to entertain an appeal. I would dismiss the appeal from the order made by Master Venne. Because of the constraints upon any appeal to the House of Lords, it follows that the decision of Elias J is, for practical purposes, unappealable. Leaving aside the present case, in which any appeal would have faced mountainous difficulties in any event, there may well be cases where that would be regrettable. For example, where the judgment in the High Court may be afflicted by legal error, but not one raising a point of law of public importance. In such circumstances, perhaps the better course would be for amending legislation to provide an appellate route from a criminal cause or matter in the Administrative Court to the Court of Appeal

> (Criminal Division) rather than to the House of Lords or to this court. However, that is for others to consider."

These remarks, as it seems to me, have even more point nowadays, in view of the increasing growth of judicial review claims in criminal causes or matters and given the ongoing problems which continue to be experienced. It may be that the observations of Maurice Kay LJ were indeed considered and that it has been consciously decided to retain the present system. If so, so be it. But if not, then my own view is that such a consideration of the position would indeed be desirable.

Lord Justice Irwin

52. I agree with my Lord, Davis LJ, and with the reasons he has given for rejecting the application. In particular there can, in my view, be no argument but that a decision not to prosecute concerns a criminal cause or matter. Further, whatever confusion may have been thought to arise in the past, the decision in the Divisional Court in *Belhaj*, for the reasons given, upheld the appeal route from the High Court to the Supreme Court in such a case. The ratio of that decision was to seek to distinguish the meaning of the phrase "criminal cause or matter" in the specific context of the Justice and Security Act 2013. That decision ran directly counter to the Applicant's argument, not in favour of it. The decision in the Supreme Court, whether one considers the judgments of the majority or the minority, upheld that.

53. For the reasons given by my Lord, I also consider that it is unarguable that the analysis of the phrase by the majority constituted *obiter dicta*, and the suggestion that the analysis was reached *per incuriam* is fanciful.

54. Hence, the application must be dismissed.

55. I would also wish to associate myself with my Lord's observations in paragraphs 40 to 51 of his judgment. His remarks as to the practice which should be adopted will go some way to reduce the effect of over-restrictive appeal rights arising from s.18(1) of the 1981 Act. I also agree that, in the context of current practice, it is hard to see why such restricted rights of appeal are justified in cases of judicial review involving criminal causes or matters.

Permission to cite this decision is given.