



4 December 2020

PRESS SUMMARY

R (on the application of Gourlay) (Appellant) v Parole Board (Respondent)
[2020] UKSC 50
On appeal from [2017] EWCA Civ 1003

JUSTICES: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lady Arden, Lord Leggatt

BACKGROUND TO THE APPEAL

This appeal raises a question concerning the role of the Supreme Court in relation to the principles governing the award of costs in lower courts.

The Appellant, Mr Gourlay, is a prisoner serving a life sentence, the minimum term of which has expired. In 2014, the Parole Board decided not to direct his release on licence and not to recommend his transfer to open prison conditions. Mr Gourlay challenged those decisions on a claim for judicial review. The Parole Board did not take part in the proceedings. The High Court decided that the Parole Board's decision not to recommend Mr Gourlay for transfer to open conditions was unlawful.

Upon his success, Mr Gourlay applied for an order requiring the Parole Board to pay the costs he incurred in bringing his claim for judicial review. The High Court decided not to make such an order, following the practice described in *R (Davies) v Birmingham Deputy Coroner* [2004] 1 WLR 2755 (“*Davies*”): that, if a court or tribunal adopts a neutral stance in proceedings in which its decision is challenged, it will not be liable for the costs of the claim, unless there are exceptional circumstances. The Court of Appeal upheld the High Court's decision not to make an award of costs.

Mr Gourlay appealed to the Supreme Court. He argued that the approach described in *Davies* is no longer correct, that it was wrongly treated by the Court of Appeal as a binding precedent, and that it does not apply to the Parole Board in any event.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Reed gives the sole judgment, with which the other Justices agree.

REASONS FOR THE JUDGMENT

Section 51 of the Senior Courts Act 1981 provides that the High Court and the Court of Appeal have discretion as to the award of costs, subject to the rules of court [21]-[22]. The rules of court include the general rule that, if the court decides to make an order about costs, the unsuccessful party will be ordered to pay the costs of the successful party [23]. The rules of court do not, however, set out a comprehensive code [24]. It is also important that the appellate courts establish principles upon which the courts'

discretion as to the award of costs may, within the framework of the Senior Courts Act 1981 and the rules of court, be exercised [24]. Responsibility for the development of those principles falls principally upon the Court of Appeal [24]. Generally, such principles are matters of practice, rather than matters of law [24].

The Supreme Court will ordinarily be slow to intervene in matters of practice, including guidance given by the Court of Appeal as to the practice to be followed by lower courts in relation to the award of costs [36]. This is because the Supreme Court is generally less well placed to assess what changes in practice can appropriately be made [36]. The Supreme Court can intervene where there has been an error of law, but, bearing in mind the discretionary nature of decisions on costs, and the rarity of their raising any question of law of general public importance, appeals solely on costs are not ordinarily appropriate [36].

The counterpart of this restraint on the part of the Supreme Court is that the Court of Appeal must fulfil its primary responsibility for monitoring and controlling developments in practice [37]. In order to fulfil that responsibility, decisions on matters of practice should not be treated as binding precedents [37]. Otherwise, any departure from a previous decision could only be brought about by an appeal to the Supreme Court [37], and the Court of Appeal would be unable to respond flexibly to unusual situations, and reach a just result in each individual case [38]. Instead, it is appropriate for decisions of the Court of Appeal on matters of practice to be open to review by the Court of Appeal itself [39]. To avoid repeated arguments, potentially divergent decisions, and the attendant risk of inconsistency and incoherence, such decisions should be reviewed only where there is sufficient reason to do so: for example, where there has been a material change of circumstances [40].

In the present case, the High Court took full account of the arguments made on behalf of Mr Gourlay, and reached a decision which reflected established practice [44]. The question of whether the Parole Board falls within the scope of the practice described in *Davies* is itself a matter of practice: it is not determined abstractly or on the basis of definitions used for other purposes, such as the meaning given to the expression “court or tribunal” in the European Convention on Human Rights [44]. There is nothing in the Judge’s reasoning which was erroneous in law, or with which the Supreme Court would consider it appropriate to interfere as a matter of practice [44].

The Court of Appeal also did not commit any error of law [45]. In particular, its approach was not inconsistent with the rules of court [46]. The choice of a judicial or quasi-judicial body to take a neutral position in court proceedings accords with principles of judicial independence and impartiality, and this cannot be what the framers of the rules of court had in mind when they referred to an unsuccessful party [46]. In addition, the Court of Appeal correctly recognised that the fact that a party is in receipt of legal aid cannot affect the principles on which the discretion to award costs is normally exercised [47]-[48]. It also did not incorrectly treat itself as bound, as a matter of precedent, to follow the decision in *Davies* [42], [45]. The Court of Appeal could have proceeded on the basis that there was no good reason to review its recent decisions on this issue [42], [45]. Nonetheless, the Court considered Mr Gourlay’s submissions in full and gave detailed reasons for rejecting them on their merits [42], [45]. Insofar as the decision whether to award costs against the Parole Board turns on matters of practice, it would not be appropriate for the Supreme Court to impose on the Court of Appeal its own assessment of the merits of the parties’ arguments [49]. Mr Gourlay’s appeal must therefore be dismissed [50].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>