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Neutral Citation Number: [2015] EWCA Civ 653

Case No: T3/2013/1797

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Mr. Justice Irwin
[2013] EWHC 1579 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 June 2015

Before :

LORD JUSTICE MOORE-BICK
Vice-President of the Court of Appeal, Civil Division
LORD JUSTICE TOMLINSON
and
LORD JUSTICE UNDERHILL

- -

Between :

SALAHUDDIN AMIN	**Appellant**
- and -	
DIRECTOR GENERAL of the SECURITY SERVICE And Others	**Respondent**

- -
- -

Mr. Patrick O'Connor Q.C. and Mr. Danny Friedman Q.C. (instructed by **Bhatt Murphy**) for the **appellant**
Mr. Rory Phillips Q.C. and Mr. Jonathan Hall Q.C. (instructed by the **Treasury Solicitor**) for the **respondents**

Hearing dates : 11th & 12th December 2014

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Approved Judgment

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Lord Justice Moore-Bick :

1. This is an appeal by the claimant in these proceedings, Salahuddin Amin, against the order of Irwin J. striking out his claim against the respondents, the Director of the Security Service, the Director of the Secret Intelligence Service, the Foreign and Commonwealth Office, the Home Office and the Attorney General, for damages for personal injury caused by ill-treatment during his detention and interrogation by the Inter-Services Intelligence Agency ("ISI") in Pakistan.

2. The appellant holds joint British and Pakistani nationality and at the time of his detention had been living in Pakistan for about three years. On his own account he became of interest to the Pakistani authorities. On the advice of his uncle, a retired Pakistani Brigadier, the appellant surrendered to ISI on 3rd April 2004. Although he had surrendered voluntarily and was initially willing to co-operate, the appellant alleges that he was subsequently detained against his will until February 2005, when, contrary to his wishes, he was put on a flight to London. When the appellant arrived at Heathrow he was arrested by officers of the anti-terrorist branch of the Metropolitan Police and interviewed a number of times under caution in the presence of a solicitor. In the course of his interviews the appellant made various admissions implicating himself in a conspiracy to cause explosions in the United Kingdom. He and other conspirators were charged, tried and convicted on 30th April 2007 of conspiring to cause explosions and sentenced to life imprisonment. In the appellant's case the judge, Sir Michael Astill, directed that he serve a minimum of 17½ years in custody, reduced on appeal to 16 years and 9 months.

Background

3. In the course of his interviews the appellant said that during his detention in Pakistan he had been tortured by agents of ISI with the complicity of officers of the Security Service and the Secret Intelligence Service ("British officers"). He says that as a result he made a number of false confessions. It is not alleged that anything he had said under interrogation in Pakistan formed any part of the prosecution case against him, which was based principally on the confessions he had made in the course of his interviews in this country. However, at the trial the appellant contended that as a result of his experiences in Pakistan he had become extremely vulnerable to questioning and psychologically unable to resist giving answers which he thought the interviewing officers wanted. He said that as a result much of what he had said in his interviews was false.

4. Before the trial began the appellant applied to have the indictment stayed on the grounds that the complicity of the British officers in his interrogation and torture in Pakistan and his subsequent removal to London amounted to an abuse of executive power of sufficient gravity to render the prosecution an abuse of process. He also sought to have the evidence of his admissions in interview excluded under sections 76 and 78 of the Police and Criminal Evidence Act 1984 ("PACE"). The judge dismissed both applications and in the course of his rulings made various findings to which it will be necessary to refer in some detail at a later stage. The appellant's appeal against conviction, which was based on a number of different grounds, including the two rulings just mentioned, was dismissed in July 2008.

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5. In November 2009 the appellant began the present proceedings against the respondents claiming damages for false imprisonment and personal injuries sustained while under detention in Pakistan. In summary, he alleged that he had been unlawfully detained by ISI for ten months, during which he was tortured. Although he did not allege that any British officers had mistreated him, the appellant did allege that they had been complicit in his detention, torture and subsequent deportation to the United Kingdom as a result of their co-operation with ISI and the Pakistani interrogators. The appellant's claim against the respondents was primarily put on the basis that they were vicariously liable for the actions of the individual officers, but the appellant also sought to hold the third and fourth respondents directly liable for their failure to give proper instructions to British officers or to control their actions.

6. On 15th August 2012 the respondents applied for an order striking out the appellant's particulars of claim on the grounds that it was an abuse of the process of the court for the appellant to issue proceedings seeking to re-open issues that had been decided by the trial judge. Irwin J. allowed the application, struck out the particulars of claim and dismissed the claim. In his judgment he pointed out that complicity on the part of British officers lay at the heart of the claim, both because it was an essential element in any claim to hold the respondents vicariously liable and because it was an essential element in establishing a causative link between the personal acts or omissions of the third and fourth respondents and any harm suffered by the appellant. Having considered the allegations made in the particulars of claim and the findings made by Sir Michael Astill in his two rulings, the judge concluded that they overlapped entirely. In particular, as he pointed out, the judge had roundly rejected the allegation that British officers had been complicit in any wrongdoing by Pakistani officers. On that basis the proceedings were, in his view, an attempt to challenge the judge's rulings, and thereby the appellant's conviction, by collateral means and as such constituted an abuse of process.

7. The appellant obtained from the judge permission to appeal on three grounds:

   (i) that the judge was wrong to hold that to allow the claim to proceed could be perceived as undermining the safety of the appellant's conviction (ground 1);

   (ii) that the judge was wrong to hold that if the appellant were successful he could claim that the safety of his conviction had been undermined (ground 2); and

   (iii) that the judge failed to apply a 'broad merits-based approach' to the identification of an abuse of process as required by *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 and subsequent authorities (ground 15).

8. The appellant seeks permission to appeal in relation to the remaining 13 grounds of appeal and we decided that it would be convenient to hear argument on all matters before deciding whether to extend the grant of permission beyond that given by the judge.

9. Before turning to the principles on which this appeal turns, I think it worth emphasising the limited scope of the issues we have to decide. The question before Irwin J., and now before us on this appeal, was not whether the appellant was tortured while in detention in Pakistan or, if so, whether British officials were complicit in that torture. Rather, it is whether he is entitled to pursue those allegations again in these

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proceedings despite the fact that they have already been considered and rejected both in the course of his trial in the Crown Court and on his subsequent appeal. For the reasons which follow I do not consider that he is. Only in very special circumstances, which are not present in this case, is a person entitled to ask one court to decide again questions which have already been investigated and decided by another court in proceedings to which he was a party; all the more so when that decision has been the subject of an unsuccessful appeal.

Abuse of process - principles

10. There are many reasons why it is considered to be in the public interest that there should be finality in litigation. Among them is the recognition that to allow litigants to re-open questions that have been finally determined by a court of competent jurisdiction encourages the proliferation of proceedings, undermines the certainty which a final decision should bring and risks undermining confidence in the administration of justice generally. That is especially true when the original decision was made in criminal proceedings in which the standard of proof is high and conviction on indictment depends on the decision of a jury. The appropriate way in which to challenge a conviction is by appeal, not by bringing civil proceedings which, if successful, would cast doubt upon its reliability. In *Hunter v Chief Constable of the West Midlands Police* [1982] A.C. 529 Lord Diplock at page 536C-D described the court's power to control abuse of its process as

> " . . . the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

11. *Hunter's case* is of particular significance in the present context because, as in this case, the original decision was made by a trial judge on a voire dire in criminal proceedings. In that case the accused, who were being tried for murder, sought to exclude evidence of their confessions on the grounds that they had been obtained by violence on the part of the police. After hearing evidence the judge was satisfied to the criminal standard that the police had not assaulted the defendants and ruled that the confessions were admissible. The confessions formed the main plank of the prosecution case and in due course, although they gave similar evidence before the jury in an attempt to undermine them, the accused were convicted. They subsequently brought proceedings against the Chief Constable claiming damages for injuries which they alleged had been inflicted by the police, relying on the same allegations of assault as those on which they had relied at trial. Lord Diplock, with whom the other members of the House agreed, said at page 541B:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the

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> intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

12. It is quite true, as Mr. O'Connor submitted, that it will not invariably be an abuse of process to bring proceedings challenging a previous decision, even where that decision was made by a criminal court. Thus, in *Walpole v Partridge & Wilson* [1994] Q.B. 106 the plaintiff's claim alleging that his solicitors' negligence caused him to lose his right to appeal against his conviction by the magistrates of obstructing a veterinary officer in the execution of his duty was not struck out. The case differs from the present, however, because the point of law which formed the ground of appeal was accepted to be at least arguable and because the right of appeal was regarded as part and parcel of the criminal process. Furthermore, the court did not regard the decision of the magistrates as "final" in the sense in which that term had been used by Lord Diplock in *Hunter's case*. In my view *Walpole v Partridge & Wilson* was an exceptional case and provides no support for the appellant's argument.

13. In *Hunter's case* their Lordships were in no doubt that the whole purpose of the civil proceedings was to undermine the appellants' convictions with a view to putting pressure on the Home Secretary to release them, but it has since been established that an improper motive is not necessary in order for subsequent proceedings to constitute an abuse of process. In *Smith v Linskills* [1996] 1 W.L.R. 763 the claimant, who had been convicted of an offence of aggravated burglary, brought proceedings against his solicitors seeking damages on the grounds that their negligent preparation of his defence had resulted in his conviction. As in the present case, the claimant contended that the issues raised by his claim were different from those that arose at his trial, but that did not prevent the proceedings from constituting an abuse of process. Sir Thomas Bingham M.R. giving the judgment of the court said at page 768H:

> "Mr. Andrew Nicol, for Mr. Smith, argues that the issue in the present proceedings is not the same issue as was decided in the Crown Court. To an extent this is so. In the Crown Court the question was whether, applying the criminal standard of proof, Mr. Smith was shown to have committed the crime with which he was charged. In the present proceedings the issue is whether his former solicitor handled his defence negligently. It is, however, plain that the thrust of his case in these proceedings is that if his criminal defence had been handled with proper care he would not, and should not, have been convicted. Thus the soundness or otherwise of his criminal conviction is an issue at the heart of these proceedings. Were he to recover substantial damages, it could only be on the basis that he should not have been convicted. Even if he were to establish negligence, he could recover no more than nominal damages at best if the court were to conclude that even if his case had been handled with proper care he would still have been convicted. It follows, in our judgment, that these proceedings do involve a collateral attack upon the decision of the Crown Court. We understand Lord Diplock, by "collateral," to have meant an attack not made in the proceedings which gave rise to the decision which

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> it is sought to impugn; not, in other words, an attack made by way of appeal in the earlier proceedings themselves."

14. As to the claimant's motive for bringing the proceedings, Sir Thomas said at page 771D:

> "The rule with which we are here concerned rests on public policy. The basis of that public policy, further considered below, is the undesirable effect of relitigating issues such as this. We cannot see how those undesirable effects are mitigated by the motive of the intending plaintiff to recover damages rather than simply to establish the unsoundness of the earlier decision."

15. In *Arthur J S Hall & Co v Simons* [2002] 1 A.C. 615 their Lordships were concerned with the question whether the advocate's immunity from suit should be retained. Since immunity applied to criminal as well as civil proceedings, it was appropriate to consider the extent to which the principle in *Hunter's case* provided an adequate safeguard against actions for negligence against their lawyers by those convicted of criminal offences. None of their Lordships doubted the correctness of the principle in *Hunter's case* and it is worth noting that Lord Hoffmann, with whom Lord Browne-Wilkinson, Lord Hutton and Lord Millett agreed, thought that when considering abuse of process there was a relevant distinction between criminal and civil proceedings resulting from the scope and application of the procedures for challenging decisions reached at trial. He said at page 706A:

> "It follows that in my opinion it would ordinarily be an abuse of process for a civil court to be asked to decide that a subsisting conviction was wrong. This applies to a conviction on a plea of guilty as well as after a trial. The resulting conflict of judgments is likely to bring the administration of justice into disrepute. The arguments of Lord Diplock in the long passage which I have quoted from *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 , 222-223 are compelling. The proper procedure is to appeal, or if the right of appeal has been exhausted, to apply to the Criminal Cases Review Commission under section 14 of the 1995 Act. I say it will ordinarily be an abuse because there are bound to be exceptional cases in which the issue can be tried without a risk that the conflict of judgments would bring the administration of justice into disrepute. *Walpole v Partridge & Wilson* [1994] QB 106 was such a case."

16. In the present case the appellant did appeal against his conviction on the grounds (among others) that the judge was wrong not to have stayed the indictment as an abuse of process and wrong also to have allowed the appellant's confession to be admitted in evidence. In support of each of those grounds he relied on the same allegations of detention and torture and the complicity of British officers in his ill-treatment as those on which he had relied before the judge. Both grounds of appeal were rejected.

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17. *Johnson v Gore Wood & Co* was a very different case. The principle that a party should not be allowed to re-litigate an issue that has been determined against him in previous proceedings had been recognised over a century and a half earlier in *Henderson v Henderson* (1843) 3 Hare 100. It is broader than that of issue estoppel and may extend to questions that were not, but could reasonably have been expected to have been, decided in the earlier proceedings. Lord Bingham, with whom the other members of the House agreed, put the matter as follows at page 31A-D:

> " . . . *Henderson v . Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

18. This formulation of the principle clearly owes much to the particular context of civil litigation. For reasons which were identified in *Smith v Linskills* other factors are likely to assume importance in cases where the former decision was made in criminal proceedings.

19. *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321, [2004] Ch. 1 is another case in which the question of abuse of process arose in a purely civil context. Having considered the line of authority to which I have referred Sir Andrew Morritt V.-C. said:

> "38. In my view these cases establish the following propositions:

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> (a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court. (b) If the earlier decision is that of a court exercising a criminal jurisdiction then, because of the terms of ss. 11 to 13 Civil Evidence Act 1968, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. (It is not necessary for us to express any view as to whether the evidence to displace such presumption must satisfy the test formulated by Earl Cairns in *Phosphate Sewage Co. Ltd v Molleson*, cf the cases referred to in paragraphs 32, 33 and 35 above.) (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."

20. Mr. O'Connor submitted that the status of a decision of a criminal court on a voire dire has been diminished by the decision of the House of Lords in *R v Mushtaq* [2005] UKHL 25, [2005] 1 W.L.R. 1513. However, that case was not concerned with abuse of process, but with the direction that should be given to the jury when the accused by whom a confession had been made gave evidence that it had been obtained by coercion after the judge had found following a voire dire that it had not. The House held that, if after hearing evidence the jury were satisfied that the confession had been, or might have been, obtained by coercion, they should disregard it altogether. Mr. O'Connor submitted that the fact that it was open to the jury to reach a decision diametrically opposed to that of the judge on the basis of the same evidence demonstrated that inconsistent decisions were not liable to bring the administration of justice into disrepute.

21. In my view no assistance is to be derived from the decision in *Mushtaq*, the circumstances of which were different from those in *Hunter's case* or those of the present appeal. One critical distinction between the decision made by the judge and that made by the jury lies in the fact that the judge determines admissibility (a question of law), whereas the jury determines reliability and weight (questions of fact). Equally important, perhaps, is the fact that these potentially conflicting decisions form an integral part of the trial process, in which the jury return a general verdict without having to make specific findings about issues which go to the weight of different aspects of the evidence. *Hunter's case* is authority for the proposition that the decision of the trial judge on a voire dire is a decision of a court of competent jurisdiction for the purposes of the principles of abuse of process. In that case, as in the present case, the judge found as a fact that the confession had not been induced by

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violence, but it remained open to the accused to put the same evidence before the jury and invite them to reach a different conclusion. As Lord Diplock observed at page 542F-H:

> The fact that the whole matter of the circumstances in which the confession was obtained was gone into a second time before the jury and that the jury, in view of the judge's direction to them, must clearly also have been satisfied beyond reasonable doubt that Hunter's account of the assaults upon him by the police was a fabrication does not affect the finality of the judge's ruling, though it would exacerbate the public scandal to the administration of justice that would be involved if Hunter, by changing the form of the proceedings to a civil action, were to be permitted to set up in that action the same case that must have been decided against him not only once but twice, even though technically it was only the first of those decisions that eventually qualified as the final decision against him by a competent court upon the very question that he seeks now to raise.

22. That mirrors the present case in which the appellant sought, but failed, to persuade the jury that his confessions were unsound because of his experiences in Pakistan.

The findings of the trial judge

23. The trial judge had before him a series of documents which had been provided by the Crown by way of disclosure. For the purposes of the application he treated the contents of those documents as tantamount to admissions by the prosecution.

24. At this point it is necessary to return to the findings made by the trial judge on the voire dire.

(a) The application to exclude the appellant's confessions

25. The application to exclude the appellant's confessions was the subject of a ruling delivered on 23rd February 2006. In the course of that ruling the judge recorded that the appellant's evidence had been that the British officers who had questioned him in Pakistan had treated him with proper courtesy and respect.

26. Mr. O'Connor, who represented the appellant at the trial, argued that the treatment received by the appellant during his detention in Pakistan affected the interviews in this country so that his confessions had been obtained by oppression or by things said or done which were likely to render them unreliable and therefore inadmissible under section 76(2) of PACE. As the judge held, that depended on the nature of the previous conduct and its effect on the appellant's ability to give an account of his actions uninfluenced by it. It followed that the truthfulness of the appellant's account of his detention and ill-treatment was fundamental to his case for excluding the confessions.

27. Having heard the evidence, the judge accepted that the appellant had been treated in a manner wholly unacceptable in this jurisdiction and had been threatened from time to time. However, he did not accept the appellant's account of the severity of his

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treatment for a variety of reasons. They included the fact that, although his uncle, the retired Brigadier, was said to have been a personal friend of the interrogator known as the "Manipulative Colonel", the appellant never complained to him of his treatment. The judge thought it unlikely that the Pakistani authorities would have seriously ill-treated the nephew of a senior retired officer whom they knew well and there were no signs of injury apparent to the doctor who examined the appellant shortly after his return to London.

28. The judge therefore rejected the appellant's claim that his treatment in Pakistan had been as severe as he claimed, but accepted that it amounted to oppression for the purposes of section 76 of PACE. However, having considered all the evidence, including the recordings of the interviews conducted in this country, the judge was satisfied beyond reasonable doubt that the confessions had not been obtained by oppression and were therefore admissible. It also follows from the fact that he held them to be admissible that he was satisfied beyond reasonable doubt that they had not been rendered unreliable by reason of the appellant's experiences in Pakistan. The judge also rejected a submission that the confessions were the direct or indirect product of ill-treatment in Pakistan and had therefore been obtained unfairly.

(b) The application to stay the indictment

29. Both orally in the course of his interviews in this country and in a handwritten note handed to the police the appellant alleged that he had been ill-treated while in detention in Pakistan and subsequently put on board a flight to the United Kingdom against his will. That formed the basis of his application to stay the indictment. Both the appellant and his uncle gave evidence in support of the application. It is unnecessary to recite the judge's summary of the appellant's evidence, which is reflected in some detail in the particulars of claim in these proceedings. In due course it will be necessary to consider that document in a little more detail. However, it is worth noting that the appellant said that he had been questioned by two British officers, who had treated him well and used no violence against him, although he did say that one of them had threatened him with being sent to Cuba. He said that he had been brought to those interviews hooded, blindfolded and shackled. Although he described an occasion on which a British officer had threatened him, he said that overall the British had been respectful towards him and that it had been a relief to see them. On one occasion they asked him how he was being treated; he said 'OK', because he thought he might suffer reprisals if any complaints got back to ISI. He said that by the time he saw the British officers he had been badly beaten, but although he did not attempt to hide his injuries, he did not talk about them. He thought that the British had taken advantage of his torture by the Pakistanis. It is worth reiterating that, after the appellant had made the allegations of ill-treatment, he was examined by a doctor who could detect no signs of any injuries, new or old.

30. Before Sir Michael Astill Mr. O'Connor had argued that both grounds of abuse had been made out, i.e., (i) that the complicity of British officers in the appellant's detention, ill-treatment and forced return to the United Kingdom amounted to egregious misconduct on the part of the executive which made it unfair to try him and (ii) that because of his detention and ill-treatment the appellant could not receive a fair trial. Sir Michael found that the appellant had surrendered to ISI voluntarily. However, the appellant admitted that he had surrendered voluntarily to ISI on the advice of his uncle and there was, in the judge's view, no evidence to suggest that

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there had been any complicity by the United Kingdom authorities in his unlawful detention or any ill-treatment to which he may have been subjected. The judge found that the appellant's ability to seek access to the British consul was limited by the fact that he was of dual nationality. He was satisfied that the United Kingdom authorities had played no part in his detention, having done nothing to assist or encourage the Pakistani authorities. In the judge's view the detention of the appellant and the circumstances under which he had been detained were wholly under the control of the Pakistani authorities.

31. The judge rejected the contention that the United Kingdom authorities had connived at or manipulated the appellant's return to London.

(c) Summary

32. The judge's findings can therefore be summarised as follows:

i) the appellant surrendered voluntarily to ISI, but at some point was detained against his will;

ii) the appellant was threatened by the Pakistani interrogators and was subjected to treatment of a kind that would constitute oppression for the purposes of section 76 of PACE, but he was not tortured and did not suffer ill-treatment of the severity he had described;

iii) there is no evidence that British officers were complicit in his detention, the circumstances in which he was detained or the manner of his treatment;

iv) the United Kingdom authorities were not complicit in the appellant's return to London;

v) the appellant's ability to give truthful answers to questions put to him in interviews in this country was not undermined by his experiences in Pakistan.

The nature of the appellant's claim

33. In his particulars of claim the appellant describes in some detail the way in which he says he was treated while under detention in Pakistan. In summary he alleges

i) that he surrendered to ISI because he was willing to co-operate with them for a short period, but had subsequently been detained against his will between April 2004 and February 2005;

ii) that during his detention he was hooded and handcuffed and placed in a room from which he could hear the screams of other prisoners being tortured;

iii) that he was subjected to dazzling light which he could not control and was prevented from sleeping;

iv) that he was beaten with two rubber lashes on his head, back, shoulders, arms and thighs and subjected to aggressive swearing and accusations of lying;

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v) that his interrogators pretended that they were about to assault him with an electric drill (although he accepts that he suffered no physical harm);

vi) that he was subjected to violent interrogations over many months, during which he was beaten with lashes, slapped and punched;

vii) that he was threatened with being sent to Cuba (i.e. Guantanamo Bay), with being skinned alive and with being sexually assaulted with the wooden handle of a lash;

viii) that he saw and heard other prisoners being tortured and constantly feared that he would be subjected to similar treatment;

ix) that he was kept in a small, dark cell with no furniture other than a bed roll in extremes of heat and cold, with bad food and no opportunity for exercise.

34. The appellant also alleges that British officers were well aware that ISI detained suspects unlawfully and subjected them to torture of the kind just described, but despite that they had involved themselves in his detention and ill-treatment in the following ways:

i) by enabling ISI to locate and identify him and by procuring and encouraging his detention, although they knew that it was unlawful;

ii) by failing to seek any protection for him and by failing to procure, or by actively preventing, consular access to him, which would have led to his early release;

iii) by providing information and suggesting lines of questioning to the Pakistani interrogators;

iv) by participating in several interviews in the presence of a Pakistani interrogator at times when the appellant's legs were shackled;

v) by collaborating closely with the Pakistani interrogators (as evidenced, he says, by the fact that on one occasion they questioned him in premises displaying the flags of both the United Kingdom and Pakistan), sharing information and pursuing lines of enquiry which they knew the Pakistani interrogators had initiated;

vi) by suggesting lines of questioning to United States agents for use in their joint interrogations with Pakistani agents, even after becoming aware that grave threats had been made against the appellant on such occasions, and by conducting one joint interrogation with United States agents;

vii) by maintaining the deception concerning the appellant's brother;

viii) by co-operating with the Pakistani authorities to prevent his release; and

ix) by conniving with them in his removal to London against his will.

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35. The appellant contends that, as a result of their complicity in the wrongdoing of the Pakistani authorities, the British officers are liable to him in tort in respect of his detention and the injuries he suffered during that period and that the respondents are vicariously liable in respect of their acts and omissions. The appellant also contends that the third and fourth respondents are directly liable to him in tort for permitting British officers to act in the way he describes and for failing to issue proper instructions or guidance to officers dealing with foreign agencies likely to violate human rights about the legal boundaries within which their actions must be confined.

Submissions

36. Mr. O'Connor submitted that the test for abuse of process is objective. He laid much emphasis on Lord Diplock's reference in *Hunter's case* to "right-thinking people" and submitted that the claim for damages which the appellant seeks to pursue could not properly be regarded as inconsistent with his conviction or with the decision of Sir Michael Astill on the voire dire. Irwin J. was wrong in paragraph 65 of his judgment to pose the question whether, if the action succeeded, there was anything to prevent the appellant from claiming that his conviction was tainted by mistreatment in which British officers were complicit. That is not the right test. The risk of ignorant posturing of that kind can never be wholly excluded and cannot be sufficient to render the proceedings an abuse of process.

37. In support of this part of his submissions Mr. O'Connor drew our attention to *R v Ahmed* [2011] EWCA Crim 184, a case which has some similarity to the present. Ahmed was prosecuted for terrorist offences. At his trial he applied for a stay of the indictment on the grounds that it would be an abuse of process to try him having regard to serious misconduct on the part of the executive. His case was that after the dates of the alleged offences, but before the trial, he had been arrested in Pakistan and detained for over a year, during which he had been tortured. He alleged that the British authorities had been complicit in his ill-treatment. The judge refused to stay the indictment and Ahmed was convicted. His appeal was dismissed on the grounds that, whatever had happened in Pakistan, it had not affected the trial process. Hughes L.J. explained the position as follows:

> "24. There is no doubt about the jurisdiction to stay for abuse of process. It applies where the trial process will be internally unfair (*Attorney-General's Reference No 1 of 1990* (1992) 95 Cr App R 296), but it is not limited to such cases. It may be exercised also where, by reason of gross executive misconduct manipulating the process of the court, the defendant has been deprived of the protection of the rule of law and it would as a result be unfair to put him on trial at all. That was clearly established by *R v Horseferry Rd Magistrates Court ex p Bennett* [1994] 1 A.C. 42 and *R v Mullen* [1999] 2 Cr. App. R. 143. In both cases the defendant had been kidnapped abroad and brought into this jurisdiction by an unlawful rendition, to which the British authorities were party. In both those cases, however, there was a clear link between the abuse of power on the part of the executive/prosecution and the trial; the trial was the very

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> object and result of the unlawful abuse of power. Thus in those cases it is properly said that not only is the misconduct of the executive an affront to the public conscience, but also, and critically, that the trial itself is such an affront. The first is not a sufficient ground for a stay, but the second is; the jurisdiction does not exist to discipline the police or other executive arms of the State (although of course it will incidentally do so), but rather to protect the integrity of the processes of justice."

38. Later he said:

> "39. . . . The judge was right to hold that what is required for its exercise is a connection between any alleged wrongdoing and the trial. Since no evidence which was the product of any torture (or indeed other ill-treatment) that there might arguably have been was adduced at the trial and since the judge held, after full enquiry, that neither had it impacted upon the trial by way of informing the investigation, he was right to refuse to stay the prosecution. . . ."

39. Mr. O'Connor submitted that in the light of the decision in *Ahmed* the appellant would never have had an arguable ground of appeal based simply on his ill-treatment in Pakistan, since it had had no bearing on the trial. Moreover, although the particulars of claim as originally served contained allegations of complicity by British officers in the return of the appellant to London against his will (which might have provided grounds for seeking a stay), that part of his case has since been abandoned. Mr. O'Connor therefore submitted that, even if he were to succeed in his present claim, no right-thinking person could possibly think that his conviction was unsafe, so that there was no risk of bringing the administration of justice into disrepute.

40. Apart from that, Mr. O'Connor submitted that the judge had been wrong to hold that there was a complete overlap between the claim and the rulings made by the trial judge on the voire dire. He submitted that the issues raised in the particulars of claim were much broader than those raised by the applications made at trial and that therefore it was not an abuse of process for the claim to be pursued. He pointed out that the claim based on vicarious liability for the acts and omissions of British officers involves allegations that those officers had deliberately or recklessly exposed the appellant to the risk of ill-treatment and had failed to take reasonable steps to protect him from harm. The acts and omissions of the respondents that are relied on as giving rise to direct personal liability on their part are knowingly permitting the officers to behave as they did, failing to give them proper instructions or guidance and (in the case of the third defendant) failing to secure access to the British consul. None of those issues, he submitted, arose in the applications made at trial and no findings were made in relation to them. The appellant might succeed on some issues and not others without bringing the administration of justice into disrepute.

41. Mr. O'Connor submitted in this context that "complicity" is not a term of art. It was an appropriate term to be used in the context of the issues that had to be decided on the voire dire, which was concerned with the question whether British officers were

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"parties to" the detention and ill-treatment of the appellant, in the sense of being accomplices of the Pakistani agents. It is also a suitable term to use in the context of an allegation of involvement of a broader kind that will support claims in negligence and misfeasance in public office. These were not questions which it was necessary for the judge to consider on the voire dire.

42. Mr. O'Connor developed that submission by reference to various passages in the disclosure material, which, he submitted, made it necessary to understand the judge's findings of fact in rather broader terms than those in which they were expressed. For example, he submitted that in the course of ruling on the application for a stay the judge had said that there was "no evidence to suggest that there was any complicity in unlawful detention or ill-treatment." He submitted that the judge cannot have intended that finding to be understood literally. Several other examples may be given.

43. Mr. Phillips Q.C. submitted that the issue of abuse of process had to be approached more broadly than Mr. O'Connor had suggested. In reality it was clear that the appellant's allegations of unlawful detention, torture and transfer to London were identical to those which had been considered and determined in the criminal proceedings, as was the allegation that British officers had been complicit in the actions of the Pakistani authorities. Accordingly, if the present proceedings were allowed to continue the court would be invited to make findings of fact different from, and in some respects diametrically opposed to, those made in the criminal proceedings. Whatever the appellant's motive for bringing these proceedings, that constituted an attempt to challenge the conviction by collateral proceedings and would undoubtedly bring the administration of justice into disrepute. There was nothing to support the conclusion that British officers had colluded with the Pakistani authorities in the unlawful detention, torture or transfer alleged by the appellant.

Discussion

44. I agree that the question whether subsequent proceedings amount to an abuse of process is to be determined objectively in the sense that, like the man on the Clapham omnibus, the reference to the right-thinking person is simply a means of describing what is in fact an objective assessment of the position. However, I am unable to accept that in cases where the former decision was made in criminal proceedings it is appropriate simply to compare the particular issues, whether of fact or law, which arise in the subsequent proceedings with those that arose in the former, as Mr. O'Connor suggested. Even in cases where the former decision was made in civil proceedings the approach of the courts is not as mechanistic as that, requiring, as Lord Bingham said in *Johnson v Gore Wood*, a broad merits-based approach. If the former decision was made in criminal proceedings leading to a conviction, it is proper to focus attention on the question whether the later proceedings, if successful, would in substance undermine the conviction. The differences between civil and criminal proceedings, to which Lord Hoffmann drew attention in *Arthur J S Hall & Co v Simons*, explain the difference in approach. Accordingly, although I accept that many of the individual issues to which the particulars of claim give rise are different from those which the judge had to decide on the voire dire, I consider that it is necessary to take a broader view of the matter.

45. Mr. O'Connor submitted that Sir Michael Astill's findings, especially his finding that the appellant was subjected to treatment that amounted to oppression, are not

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sufficiently explicit to exclude ill-treatment of a relatively modest kind that would be sufficient to support liability in tort. The appellant should therefore be allowed to pursue his claim so that more detailed findings can be made. However, in my view that is to view the matter too narrowly. Two central allegations lie at the heart of the present claim: (i) that the appellant was detained against his will and tortured (no lesser word will do); and (ii) that British officers and the respondents were in one way or another complicit in his detention and torture by procuring it, encouraging it or failing to take steps that would have prevented or curtailed it. However one defines "complicity" in the context of the different causes of action, unless both allegations are established the claim will fail. As Irwin J. pointed out, save for the claim for false imprisonment the appellant must prove ill-treatment and complicity in order to found a claim for damages; and even in relation to false imprisonment he must establish complicity on the part of the respondents or those for whom they are responsible. In order to determine the applications before him it was necessary for the judge to make findings about the detention of the appellant and the treatment to which he had been subjected. The judge accepted that the appellant had been detained and subjected to some threats, but found that he had not been tortured. He also found that British officers had not been complicit in the detention of the appellant. As a result, the indictment was not stayed, the trial proceeded, the appellant's confessions (which constituted almost the entirety of the evidence against him) were admitted in evidence, his attempt to undermine them by giving evidence of ill-treatment in Pakistan was rejected by the jury and he was convicted.

46. Viewed objectively, whatever the appellant's actual motivation, his attempt to establish that he was detained and tortured in Pakistan with the complicity of British officers does in my opinion constitute a collateral attack on his conviction. It is unnecessary and inappropriate for this purpose to debate the nuances of the judge's findings in the light of the disclosure material. What matters is whether the essential elements of the case which the appellant now seeks to pursue were adjudicated upon. If his evidence that he had been tortured with the complicity of the British officers had been accepted by the judge it is possible, perhaps even likely, that the judge would have been satisfied on the balance of probabilities that British officers had also been complicit in returning him to the United Kingdom. In those circumstances the court might have concluded, as in *R v Horseferry Road Magistrates' Court Ex parte Bennett* [1994] A.C. 42 and *R v Mullen* [1999] 2 Cr. App. R. 143, that the indictment should be stayed. Similarly, if the appellant had persuaded the judge that he had been, or might have been, tortured in Pakistan in the manner he described, the judge would have had to consider whether he could be sure that the confessions were not rendered unreliable as a result, since, if he could not be sure of that, he would have had to rule them inadmissible. Accordingly, although success in the current proceedings would not lead to the conclusion that the outcome of the trial must inevitably have been different, it would seriously undermine the reliability of both rulings and thereby the safety of the appellant's conviction. In my view that is sufficient to render the present proceedings an abuse of process in accordance with the principle in *Hunter's case*. That is all the more so given that the appellant has already had an opportunity to challenge the judge's ruling on appeal and has done so.

47. It is right to record that Mr. O'Connor sought to distinguish *Hunter's case* on a number of grounds. He submitted that, unlike *Hunter's case*, the appellant's claim does not involve a direct challenge to the basis of his conviction, which depended not

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on what occurred in Pakistan but on the confessions he made in this country. That is only partly true, however, because the appellant sought to prevent his confessions going to the jury on the grounds that he had been induced to make them by his ill-treatment in Pakistan. Then he pointed out that in *Hunter's case* the Crown had borne the burden of proving that the confessions were voluntary, whereas in the present case the appellant bore the burden of proving executive misconduct of a kind that would justify a stay. The risk of bringing the administration of justice into disrepute is greater, he suggested, where the Crown bears the burden of proof. In my view, however, the burden of proof has little, if anything, to do with it, and in any event in this case the burden was on the Crown to satisfy the judge that the appellant's confessions were voluntary and not rendered unreliable by what he said had been done to him in Pakistan; and the Crown succeeded in discharging that burden. Next Mr. O'Connor submitted that whereas in *Hunter's case* the court had unequivocally rejected the allegations of police violence, in this case the judge had accepted some of the appellant's allegations of ill-treatment, although he had rejected others. Moreover, whereas the jury in *Hunter's case* had rejected the very allegations on which his subsequent claim was based, in this case the basis of the appellant's conviction was the confessions he had made in this country. However, neither of those submissions really addresses the issue which lies at the heart of the question we have to decide.

48. As Mr. O'Connor's submissions show, it is possible to identify differences between the present case and *Hunter's case*, but none of them in my view affects the issues that arise on this appeal. Since, for the reasons given earlier, I do not think that it is appropriate to examine the present claim issue by issue in order to determine whether any specific question was or was not determined by the trial judge, I do not think it necessary or appropriate to identify in detail the issues of law which would arise if the present proceedings were to go to trial.

49. The judge rejected the submission that the concessions made by the Crown amounted to an acceptance of complicity in unlawful detention and ill-treatment of the appellant and in my view he was right to do so. I accept that, because the appellant now seeks to establish liability on the part of the respondents in respect of acts committed by persons other than themselves, these proceedings inevitably give rise to issues of law which did not arise in the criminal proceedings, for example, those relating to the principles of joint liability in tort. However, for the reasons I have given I do not think that provides an answer to the respondents' argument. What ultimately matters is whether the present proceedings are properly to be viewed as constituting an impermissible collateral challenge to the appellant's conviction; or, to put it more bluntly, whether it is an improper use of the court's process for the appellant to attempt in these proceedings to obtain findings about the circumstances of his detention and alleged ill-treatment which are contrary to those made in the criminal proceedings. The judge's assessment was that it did and although the question is ultimately one for this court, his assessment is entitled to particular respect: see *Aldi Stores Ltd v WSP Group Plc* [2007] EWCA Civ 1260, [2008] 1 W.L.R. 748, paragraph 16. In my view it was correct, because the allegations of detention and torture and of the complicity of British officers in them were fundamental to the applications made and rejected in the criminal proceedings, just as they are fundamental to the present civil proceedings. The question which the judge posed in paragraph 65 of his judgment as to whether, if the action succeeded, there was anything to prevent the appellant from claiming that his conviction was tainted by

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mistreatment in which British officers were complicit, is properly to be regarded as part of his reasoning rather than as a test for the existence of abuse of process.

Fresh evidence

50. Mr. O'Connor submitted that fresh evidence has now become available which justifies a departure from the trial judge's ruling on complicity. It takes the form of a report by Mr. Ali Dayan Hasan, whom the appellant called in support of his applications before the trial judge and whom he would seek to call as an expert witness in these proceedings. Since the trial Mr. Hasan has continued to gather information on the ill-treatment of prisoners by ISI and the alleged complicity of the United Kingdom authorities in that practice. He was the author of a report entitled *Cruel Britannia: British Complicity in the Torture and Ill-treatment of Terror Suspects in Pakistan* published by Human Rights Watch in 2009, which, while accepting that there was no evidence that British officers had participated directly in torture, drew the inference that the United Kingdom authorities were aware that detainees were routinely tortured by ISI and were therefore complicit in their ill-treatment. The report also states that certain unidentified Pakistani agents had confirmed that the appellant's account of his ill-treatment was substantially true.

51. It has long been recognised that it may not be an abuse of process to re-open issues that have been the subject of a previous decision if fresh evidence has come to light which fundamentally changes the shape of the case. In *Phosphate Sewage Co. Ltd v Molleson* (1878-79) L.R. 4 App. Cas. 801 a question arose whether the existence of fresh evidence was sufficient to overcome a plea of res judicata. Earl Cairns was prepared to accept that it might do so (page 814), but only if the fresh evidence "entirely changed the aspect of the case and could not by reasonable diligence have been obtained before." The *Phosphate Sewage* test, as it has become known, was approved by Lord Diplock in *Hunter's case*. It is true, as Mr. O'Connor submitted, that he described it as "perhaps a little stronger than that suggested by Denning L.J. in *Ladd v. Marshall* [1954] 1 W.L.R. 1489 , 1491", but he made it clear a little later in his speech that he regarded it as a distinctly more rigorous test, appropriate to a collateral attack in a court of co-ordinate jurisdiction.

52. Mr. O'Connor sought to persuade us that subsequent developments in the law, in particular in *Arthur J S Hall & Co v Simons* and *R v Mushtaq*, justify the courts in taking a more relaxed approach than previously to fresh evidence, but I am unable to accept that submission. There is a strong public interest in finality in litigation, which is important both for those who are affected by the decisions of the courts and for the administration of justice in general. If a person in the appellant's position is to be allowed to challenge a settled decision in collateral proceedings, it is essential that there be compelling grounds for doing so. In my view it would be inappropriate and indeed dangerous to accept that evidence whose cogency fails to satisfy the *Phosphate Sewage* test can provide sufficient grounds for doing so, even if it were open to us so to hold. In fact, however, I do not think it is. The *Phosphate Sewage* test has been approved and applied on many occasions since *Hunter's case*, including by the House of Lords in *Arthur J S Hall & Co v Simons* and by the Privy Council in *Hurnam v Kailashing Bhola* [2010] UKPC 12. If the appellant considers that the evidence of Mr. Hasan undermines the judge's rulings and thereby his conviction, the right course is for him to place it before the Criminal Cases Review Commission with a view to having his case reconsidered by the Court of Appeal.

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53. In any event, I am far from persuaded that the fresh evidence does entirely change the aspect of the case. The suggestion that the United Kingdom authorities were aware, at least in a general way, that ISI routinely tortured detainees was put forward at the trial, and the only aspect of Mr. Hasan's evidence that could be described as in any sense new is his assertion that certain Pakistani agents told him that the appellant's account of being tortured was true. The judge rejected it as untrue, however, mainly because there was no evidence that he had suffered any injuries consistent with his description of how he had been treated.

54. Mr. O'Connor pointed out that very little evidence had been called by the Crown on the voire dire. He submitted that in civil proceedings the respondents would be taking a grave risk if they failed to call more of the witnesses at their disposal, since the court might well be willing to draw inferences against them. It was likely, therefore, that at the trial of the appellant's present claim the court would have the advantage of hearing much more evidence and would be far better placed to reach a just decision. As I have said, I do not think that the latest evidence from Mr. Hasan entirely changes the aspect of the case. Moreover, I am unable to accept that the Crown's choice of evidence on which it wished to rely has any bearing on whether the present attempt by the appellant to re-open issues determined in the earlier proceedings amounts to an abuse of process. What evidence a party chooses to call will depend on the nature of the issues to which the proceedings give rise and its perception of what is necessary to enable it to succeed. There is no suggestion that information was wrongly suppressed or that the Crown was not entitled to choose the evidence on which it wished to rely. The question remains whether the issues which the appellant now seeks to litigate were determined in the former proceedings, not whether different evidence or evidence of better quality could have been adduced. For the reasons I have given, I am satisfied that they were.

Disposal

55. Grounds of appeal 3 to 10 and 14, in respect of which the judge refused permission to appeal, are closely linked to grounds 1 and 2. They were fully argued before us and I have dealt with them, so far as necessary, in this judgment. In those circumstances there is nothing to be gained by setting them out in detail here. I would give permission to appeal in respect of them. Grounds 11 to 13 concern the fresh evidence. I would not give permission to appeal in relation to them because I do not think that there is or ever was any real prospect that the appeal would succeed on those grounds. Ground 16 adds nothing to the other grounds.

56. In those circumstances I would give permission to appeal in relation to grounds 3 to 10 and 14, but would dismiss the appeal.

Lord Justice Tomlinson :

57. I agree.

Lord Justice Underhill :

58. I also agree.