Victim status under the Human Rights Act 1998 (R (Reprieve and others) v Prime Minister)

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Public Law analysis: Reprieve, a legal action non-governmental organisation, and two MPs judicially reviewed the Prime Minister's decision not to hold a public inquiry into the alleged complicity of British state agents in the unlawful rendition, detention, and mistreatment of individuals by other states in the years following the attack on New York in September 2001. The Court of Appeal held that the claimants were not victims within the meaning of the Human Rights Act 1998 (HRA 1998) and that Article 6(1) of the European Convention on Human Rights (ECHR) therefore did not apply to the claim. It further decided that the claimants were not entitled to disclosure in accordance with the standard set in SSHD v AF (No 3). Written by Jonathan Lewis, barrister at Henderson Chambers.

R (on the application of Reprieve and others) v Prime Minister [2021] EWCA Civ 972

What are the practical implications of this case?

The importance of 'the right to the truth' in the context of allegations of breaches of Article 3 ECHR is beyond doubt. However, the HRA 1998, the vehicle through which such rights are enforced domestically, does not confer that right as 'an enforceable right on the public at large' (at para [48]). Rather, it confers that right on the victim of the alleged breach, and only such a victim.

This decision sounds a warning that public interest bodies and human rights organisations should carefully consider their standing to bring human rights challenges in their own name. The fact that they are acting in the public interest alone is insufficient. Such organisations might therefore be restricted to aiding actual victims in bringing claims and/or intervening in those claims. Where the victims cannot bring a claim themselves, it might be that their rights cannot be vindicated.

What was the background?

In July 2010, the then Prime Minister announced that Sir Peter Gibson would chair an independent inquiry to investigate the allegations of mistreatment described above. It would not be fully public because some information would need protection, but it would be able to consider all the relevant material. In January 2012, the Metropolitan Police announced a criminal investigation into allegations concerning the rendition and mistreatment of two Libyan nationals. The Lord Chancellor and Secretary of State for Justice then announced that the inquiry could not start until the end of the police investigation. The government made a similar statement and invited the Intelligence and Security Committee of Parliament (the ISC) to investigate issues raised in Sir Peter's report. In October 2018, the ISC published two reports. In July 2019, the Minister for the Cabinet Office, announced that the government had decided not to hold an inquiry because the various steps which had been taken had led to improved policies and practices.

The claimants challenged that decision, arguing that failing to hold an inquiry breached the positive procedural obligation arising out of Article 3 ECHR to hold an effective independent investigation into allegations of torture and ill-treatment. In defence, the Prime Minister wished to rely upon material which could not be disclosed without damaging the interests of national security.

What did the court decide?

Logically, the first question for the court to determine was whether the claimants could rely upon Article 3 ECHR (at para [36]). To do so, they had to show that they were 'victims' for the purposes of Article 34 ECHR. In order to see why, it is necessary to set out the provisions of the HRA 1998.

HRA 1998, s 1(1) defines the 'Convention rights' which are set out in HRA 1998, Sch 1. HRA 1998, s 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right. HRA 1998, s 7(1) enables a person to bring proceedings against a public authority or to rely on the Convention rights in any legal proceedings, but 'only if he is (or would be) a victim of the unlawful act'. HRA 1998, s 7(3) provides that if proceedings are brought on an application for judicial review, 'the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act'. By HRA 1998, s 7(7), a person is a victim of an unlawful act 'only if he would be a victim for the purposes of Article 34 of the Convention…'. Article 34 ECHR sheds little light on the meaning of 'victim', simply imposing the requirement.

The Court of Appeal noted that 'Convention rights are not free-floating entities which are available to and enforceable by anyone who disagrees with a decision of a public authority on the grounds that it breaches, or may breach, somebody's Convention rights' (at para [39]) and that the clear purpose of HRA 1998, s 7 is to permit only a victim to bring proceedings in respect of an alleged breach of Convention rights. Further, it is only if the litigant is a victim that the Convention right in question can arguably be a 'civil right' of his for the purposes of Article 6(1) ECHR.

The Court of Appeal noted that there are two broad groups of cases in which the European Court of Human Rights (ECtHR) has decided that a person who had not personally and directly suffered a breach of a Convention right could nevertheless bring a claim (at para [40]). The first group are cases concerning secret surveillance (at para [41]) which provide little assistance in this context. The second group consists of three sub-groups: (a) direct victims who have died in circumstances which engage Article 2 ECHR (the right to life) in which others, such as their close relatives, can bring a claim; (b) applicants who have died during proceedings; and (c) claims brought by a representative organisation on behalf of actual or likely victims (at para [43]).

After considering some ECtHR jurisprudence, particularly *Centre for Legal Resources on behalf of Valentin Campeanu v Romania* (2014) 37 BHRC 423, the Court of Appeal held that to recognise the claimants as victims would mark a 'significant development' of the ECtHR case law and, as such, was not a step that it should take (at para [46]). In any event, it was unlikely that the ECtHR would recognise these claimants as victims as to do so would 'introduce a right of private individuals and organisations to bring claims in the public interest, something that the court has set its face against save in very limited circumstances' (at para [46]).

The court therefore concluded that the claimants were not victims such that, by virtue of HRA 1998, s 7(1), they could not bring a claim their claim (at para [47]). By virtue of HRA 1998, s 7(3), in so far as the judicial review rested upon the breach of Article 3 ECHR, the claimants did not have standing to bring it. As they were not victims, the claim would not decide whether they have suffered the statutory tort of a breach of HRA 1998, s 6(1) and an Article 3 investigation would not itself determine any civil rights or obligations (at para [49]). In determining the claimants' public law irrationality challenge, the court would not be making any determination of their 'civil rights and obligations'.

The Court of Appeal went on, obiter, to decide whether, if Article 6 ECHR applied, disclosure was necessary in line with the standards of *SSHD v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269, noting that this case was as much about seeking to force the government to disclose publicly the closed material as it is about the decision under challenge itself (at para [53]). It held that the purpose of *AF (No 3)* disclosure is to enable a claimant to give effective instructions to Special Advocates so that the most effective challenge can be made to the allegations which underlie (usually) a particular 'coercive measure' (such as a control order) and that that purpose did not apply in this case (at para [55]). Hence, disclosure of the sort envisaged in *AF (No 3)* would not be necessary even had the proceedings been governed by Article 6 ECHR.

Case details

- Court: Court of Appeal, Civil Division
- Judge: Lord Burnett, Chief Justice, Lord Justice Stuart-Smith and Lady Justice Elisabeth Laing
- Date of judgment: 30 June 2021

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