13 November 2019

PRESS SUMMARY

R v Reeves Taylor (Appellant)

[2019] UKSC 51

On appeal from: [2018] EWCA Crim 2843

JUSTICES: Lady Hale (President), Lord Reed (Deputy President), Lord Wilson, Lord Hodge, Lord Lloyd-Jones

BACKGROUND TO THE APPEAL

The appellant was arrested in the United Kingdom in 2017 and charged with one count of conspiracy to commit torture and seven counts of torture, contrary to section 134 of the Criminal Justice Act 1988 ("CJA"). The charges relate to events in the early stages of the first Liberian civil war in 1990 when an armed group, the National Patriotic Front of Liberia ("NPFL"), took control of parts of Liberia. Its leader, Charles Taylor, subsequently became President of Liberia in 1997.

The point of law raised in the appeal, and certified by the court below, relates to the correct interpretation of the term "person acting in an official capacity" in section 134(1) of the CJA.

The prosecution maintained that at the time and place of the alleged offences, the NPFL was the de facto military government with effective control of the relevant area. Charles Taylor and those acting for and with him, including the appellant, were therefore acting in an official capacity for, and on behalf of, the NPFL. The appellant denied involvement in the offences and asserted that at no time did she act in an official capacity for the NPFL, nor was the NPFL the de facto government authority in the relevant locations.

The appellant made an application to dismiss the charges. The judge concluded that section 134 applies not only to entities tolerated by or acting under the authority of a government but also, in situations of armed conflict, to individuals who act in a non-private capacity as part of an authority-wielding entity. Accordingly, the judge ruled that there was a case to answer on all counts. The appellant appealed to the Court of Appeal, which dismissed the appeal, holding that section 134 CJA is not confined to individuals acting on behalf of a State. It held that section 134 covers any person who acts otherwise than in a private and individual capacity for or on behalf of an organisation or body which exercises or purports to exercise the functions of government over the civilian population, whether in peace time or during armed conflict. The appellant appealed the decision to the Supreme Court.

JUDGMENT

By a majority, the Supreme Court substantially agrees with the conclusion of the Court of Appeal, but because of further evidence from the prosecution's expert produced after the judgment of the Court of Appeal, it allows the appeal to the limited extent of remitting the matter to the judge for further consideration in the light of that further evidence and the judgment of this court. Lord Lloyd-Jones gives the majority judgment, with which Lady Hale, Lord Wilson and Lord Hodge agree. Lord Reed delivers a dissenting judgment.

REASONS FOR THE JUDGMENT

Section 134 CJA implements in domestic law certain obligations of the United Kingdom pursuant to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ("UNCAT") **[16]**. Accordingly, the wording of section 134 CJA must bear the same meaning as in article 1 UNCAT. The principles governing the interpretation of treaties are to be found in articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 ("VCLT") **[23]**. The ordinary meaning of the words describes a person performing official administrative or governmental functions and provides no suggestion that those functions must be performed on behalf of the government of a State **[25]**. The object of UNCAT was not to outlaw torture but rather to strengthen the prohibition that already exists in international law **[27]**. The drafting history indicates that torture committed by public officials for purposes connected with their public functions was considered different in nature from, and inherently more serious than, that inflicted by a private person. The conduct of rebels exercising governmental functions over the civilian population of territory under its control is properly the concern of the international community and falls within this rationale **[36]**.

The appellant's suggested reading gives rise to a number of anomalies concerning issues of recognition of States and governments. The offence applies without distinction between recognised and unrecognised States. Similarly, resort to State practice in the recognition or non-recognition of governments cannot provide a uniform standard by which the Convention can be applied **[56]** – **[59]**.

The majority concludes that "a person acting in an official capacity" in section 134(1) CJA includes a person who acts or purports to act, otherwise than in a private and individual capacity, for or on behalf of an organisation or body which exercises, in the territory controlled by that organisation or body and in which the relevant conduct occurs, functions normally exercised by governments over their civilian populations. Furthermore, it covers any such person whether acting in peace time or in a situation of armed conflict **[76]**. The exercise of a governmental function, which is a core requirement, must be distinguished from purely military activity not involving any governmental function **[77]** – **[78]**. It is necessary to look at the reality of any particular situation. The question is whether the entity has established a sufficient degree of control, authority and organisation to become an authority exercising official or quasi-official powers, as opposed to a rebel faction or mere military force **[79]**.

In the light of further evidence from the prosecution's expert witness regarding the nature of the NPFL's control over the relevant territory, it is necessary for this matter to be remitted to the judge to reconsider whether there is sufficient evidence to enable a properly directed jury to conclude that the appellant was acting in an official capacity **[80]**.

Lord Reed dissents from the majority's reasoning and finds the appellant's arguments more persuasive **[82]**. The ordinary meaning of the phrase does not extend to a member of an insurgent group engaged in armed insurrection against the government of the country. The core idea is that the person is acting on behalf of the State **[83]**. The reference to "lawful sanctions"

later in article 1 supports the view that it is concerned with conduct for which the State bears responsibility **[84]**. If torture carried out by insurgents in territory under their de facto control falls within the scope of article 1, then article 2(1) UNCAT, which requires each State Party to take measures to prevent acts of torture in any territory under its jurisdiction, imposes an obligation with which States cannot comply, since they cannot take effective measures in relation to territory they do not control **[85]**. The problem which UNCAT was intended to address was the reluctance of states to investigate and prosecute torture in which their authorities were themselves involved **[87] – [88]**. A number of States Parties have adopted a definition in their domestic law based on the understanding that article 1 is confined to situations where the responsibility of state authorities is engaged **[90]**. In relatively recent times, there appears to have been a development in the CAT's interpretation of article 1. Accordingly, even if article 1 might now be interpreted as extending to the actions of non-state entities, it does not follow that it should be interpreted in the same way when considering the criminality of actions that took place in 1990 **[95] – [98]**. Finally, criminal legislation whose meaning is unclear should be given a restrictive rather than an expansive interpretation **[98]**.

References in square brackets are to paragraphs in the judgment