Birnberg Peirce Press briefing: Armani Da Silva v the United Kingdom

This case concerns the decision by the Director of Public Prosecutions not to prosecute any police officers for any crime arising from the killing of Jean Charles de Menezes, by Metropolitan police officers on 22 July 2005.

The claim was first lodged in the European Court of Human Rights in January 2008, over seven years ago. The case has been internally referred to the Grand Chamber of the European court, by way of relinquishment, for a decision on merits and admissibility. Only exceptional cases are referred in this way and they only arise if the case raises a serious question affecting the interpretation of the Convention or if there is a risk of inconsistency with a previous judgment of the Court.

The Applicant is Patricia da Silva, a cousin of Jean Charles de Menezes, who was living with him in London at the time of his death. She represents the family of the deceased who have striven, since his death, to obtain justice and accountability. The facts surrounding the shooting of Jean Charles, a Brazilian electrician mistaken for a terrorist suspect, on a London tube carriage are well known and have been widely publicized and examined through a prosecution of the police under the Health and Safety Act 1974 and through an inquest which took place in the autumn of 2008.

The particular issue which is under challenge arises from a decision made on 17 July 2006 by the Crown Prosecution Service not to prosecute any individual police officer for the deliberate killing of Jean Charles. The Applicant challenged that decision by way of an application for judicial review which was rejected by the Divisional Court in December 2006. An application for permission to appeal the decision of the Divisional Court was refused by the Supreme court in July 2007. Having exhausted in country remedies, this application was then lodged on date, but it has taken over seven years to be listed for a hearing. Judgment may not be delivered for a further six months of more.

In essence the Applicant argues that there was evidence available, if put to a jury, that could have resulted in the conviction for murder or manslaughter of a number of possible police officers, including the two firearms officers who shot Jean Charles, as well as senior officers in command of the operation. The CPS decision not to bring any prosecution was based on their assessment of the evidence that there was effectively a less than 50% chance of conviction. It is argued that this test is not compatible with Article 2 of the convention.

In making their decision in July 2006, the CPS complied with the guidelines set by the Code for Crown Prosecutors. This sets out an evidential test that the prosecutor must consider there is sufficient evidence for a “realistic prospect of conviction” by a jury which actually means that there must be a more likely than not chance of conviction before a prosecution will proceed. This test is too high. It means that cases in which the chance of conviction is up to 49% will not go to trial. Applied at this early stage, when the prosecutor has not seen the witnesses give oral evidence, that test will prevent homicide offences from being punished.

Secondly, when considering if self defence arose, the prosecutor applied the current test under the criminal law (in contrast to that under the civil law). The officers who shot Jean Charles have a defence if they had an honest belief that they were under imminent threat, even if they were mistaken and their mistake was wholly unreasonable.

Finally, we argue that that the approach taken by the Divisional Court who considered the Applicant's original judicial review of the decision was also incompatible with European, in that the standard of review applied by the court when considering the lawfulness of the prosecutor's decision, applied too high a threshold.

The application examines some of the known and explored facts surrounding the shooting and takes into account the critical verdict delivered by the inquest jury in December 2008. In particular, we show that the jury did not accept the whole of the accounts given by the two officers who shot Jean Charles, known as C2 and C12. For example, it is implicit in their verdict that this was not a lawful killing, that the jury decided the officers probably did not honestly believe they were under imminent threat. Further, the jury did not accept that a warning of 'armed police' was shouted before Jean Charles was shot dead. It is also argued that the use of lethal force was excessive and unreasonable, as objectively, even if the officers held the mistaken belief that Jean Charles was a terrorism suspect, there was no evidence that he at that time posed any threat. Thus there was evidence available from which a jury could have concluded that the officers did not have an honest belief in the necessity for lethal force, and further evidence that even if the belief was honest (but mistaken), that their actions in the circumstances were not reasonable.

It is also argued that there was evidence upon which a jury could have concluded that the Gold Commander, DAC McDowell, the Designated Senior Officer, Cressida Dick, and the two tactical advisers, Chief Inspector Esposito and DCI Purser, could have been charged with gross negligence manslaughter. The question as to whether the negligence of the command operation was so serious that it could be considered criminal, was 'supremely a jury question'.

The main question to be determined by the Grand Chamber is whether the test used by Crown prosecutors in the UK is compatible with Article 2 of the European Convention on Human Rights which imposes an obligation on all contacting states to protect the right to life. In considering this question the court's attention will be drawn to other jurisdictions where the test for bringing a prosecution is different to that applied by the UK. In many other European countries the test for bringing a prosecution is essentially on the basis that there is sufficient evidence that a conviction could result, but not such a high threshold if 'it is more likely than not' a conviction will follow. It is true that many of those countries have a civil law jurisdiction (where there may be no jury involved in the final decision), however even in other common law jursidictions such as New Zealand and Canada, the threshold for bringing a prosecution is lower than that in the UK.

The Grand Chamber have additionally accepted evidence by way of a third party intervention from the Equality and Human Rights Commission. They have produced

evidence showing the failure of the UK criminal justice system to convict any police officers for crimes arising from the killing of a member of the public.

The killing of Jean Charles de Menezes, a totally innocent man who was given no chance to surrender before being shot nine times in the head, caused great public concern, as has the fact that no officer was prosecuted or even disciplined for any offence arising from the tragic circumstances surrounding his death. The failure to hold any individual to account in relation Jean Charles' killing and the unlawful killings of other members of the public has arguably led to a crisis in confidence that state agents in the UK who abuse their power will not be held to account.

It is thus argued by the Applicant that the current evidential test used by the Crown Prosecution Service in making decisions as to whether or not to bring a prosecution is not compatible with Article 2 and 3 of ECHR. A more compatible test, and one consistent with many other jurisdictions, would be to apply the equivalent of the Galbraith test, as used in criminal trials. That test in essence requires that there is substantial, admissible and reliable evidence upon which a jury could come to a well founded conviction.

A further obstacle to ensuring Article 2 compliance is that where a prosecutor's decision is challenged by way of judicial review, the court will only intervene where it finds the decision of the prosecutor is irrational ("Wednesbury unreasonable"). Thus even where another prosecutor may have exercised his or her discretion differently, the court will not intervene despite there being evidence of the possibility of a conviction.

Finally, the prospects of a decision to prosecute are further reduced, where the test for self defence is that the police officers had an honest belief that Jean Charles was an imminent threat to themselves and other members of the public. Prosecutors may consider that a jury would be less likely to consider police officers were lying, even where their belief, taking into account the objective facts, might seem unreasonable.

The hearing before the Grand Chamber of 17 judges in Strasbourg will take place at a two hour heaing starting at 9.15 on 10 June 2015. The Applicant is or has been represented by Hugh Southey QC, Henrietta Hill QC, Michael Mansfield QC and Adam Straw, instructed by Birnberg Peirce solicitors

Harriet Wistrich
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