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Case No: CO/4767/2022;
AC-2022-LON-003618

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 November 2023

Before :

MR JUSTICE LINDEN

- -

Between :

THE KING
(On the Application of AHMED MOHAMED ALI ADAN)

Claimant

- and -

THE SECRETARY OF STATE FOR JUSTICE

Defendant

- -
- -

Maya Sikand KC and Rosa Polaschek (instructed by Hodge Jones & Allen) for the Claimant
Mathew Gullick KC (instructed by Government Legal Department) for the Defendant

Hearing date: 23 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.45am on 29th November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE LINDEN

Mr Justice Linden:

Introduction

1. This is a claim for judicial review of a decision of the Defendant, dated 11 October 2022, to refuse the Claimant's application under section 133 of the Criminal Justice Act 1988. This section provides for the payment of compensation to a person who has been convicted of an offence where the conviction is reversed, or they have been pardoned, because a new or newly discovered fact ("fresh evidence") shows beyond reasonable doubt that they did not commit the offence.

2. The Claimant was convicted on two counts of indecent assault on 19 February 2004 and he spent 13 years and just over 8 months in prison and hospital detention before his release. On 22 September 2020, his case was referred to the Criminal Division of the Court of Appeal ("CACD") by the Criminal Cases Review Commission ("CCRC"). In a judgment of the Court which was given by Macur LJ, the reference for which is [2021] EWCA Crim 201, on 23 February 2021 the Claimant's conviction was quashed. The ground for doing so was that evidence resulting from a newly discovered match between DNA found on a mobile phone at the scene of one of the assaults and another person, ("S"), rendered his conviction unsafe.

3. The Claimant contends that the refusal of his application for compensation by the Defendant was irrational. Permission was granted on the papers by Her Honour Judge Karen Walden-Smith, sitting as a Deputy High Court Judge, on 27 February 2023.

Facts

4. The Claimant came to this country from Somalia on 2 July 2001 at the age of 17, to join his parents who were refugees living in Tooting in London.

5. In the early hours of 24 August 2001, the Claimant's parents reported to police that he was missing from the family home. He returned home at around 5am according to his father's evidence.

6. On 5 September 2001, the Claimant was arrested on suspicion of a sexual assault on JJ which had taken place shortly before midnight on 23 August 2001. He was suspected because his appearance was considered to be similar to the description of her assailant given by JJ although the details of that description are no longer available. The Claimant was bailed to return to the police station a week later.

7. When the Claimant answered his bail on 12 September 2001, he was arrested in connection with a further 5 indecent assaults which had been committed between 5 July and 30 August 2001 in similar circumstances in the Tooting area and at similar times of night. In interview the Claimant gave a mixture of denials and no comment answers through an interpreter, and his father pointed out that he had only been in this country since 2 July 2001.

8. The complainants in each of these sexual assaults gave the following descriptions of their assailant(s):

i) KF (offence committed shortly after midnight on Thursday 5 July at Tooting Grove): 5'10 ft, 20-25, thin build, dark wavy hair, dark eyes, dark olive skin, foreign accent, no facial hair.

ii) AD (offence committed at 1.30am on Thursday 26 July at Church Lane): Male, pale tanned skin, 5'10 ft / 6 ft tall, 20-30, medium build, black hair sun bleached at the top, top longer than the sides, afro style, small, neat features, brown eyes, short "tash", foreign accent.

iii) EM (offence committed shortly before midnight on Wednesday 8 August at Church Lane): Male, 20, medium build, short wavy black 1 ½' hair, round face, Mediterranean complexion, Spanish / Italian / Olive skinned, clean shaven, broken English, Italian lilt.

iv) JJ (offence committed shortly before midnight on Thursday 23 August in Seely Road): description not available

v) ZH (offence committed shortly after midnight on Friday 24 August in Church Lane) 6ft, 25, medium build, short black hair, dark skinned or Arabic.

vi) MJ (offence committed at 10.20pm on Thursday 30 August in Woodbury Street) : 5'9" / 5'10", early to mid-twenties, thickish build, short hair dark, thick wiry hair, pock marked skin olive colour, unshaven [stubble], eastern European country.

9. It appears that the features of the cases were sufficiently similar for the police to believe that the assaults had all been committed by the same person. As Ms Sikand notes, all of the five complainants whose descriptions are known said that their assailant had olive skin or a Mediterranean or Arabic appearance whereas the Claimant is of Black Somalian ethnicity and appearance. Notwithstanding this, on 31 October 2001 an identification parade was held at which the Claimant was picked out by KF and EM. JJ did not take part in the identification parade. The three other complainants took part but they made no positive identification.

10. On 5 November 2001 the Claimant was charged with two counts of indecent assault in the cases of KF and EM. There was no prosecution in the cases of the other complainants.

11. In summary, the circumstances of the offence in KF's case, which I gratefully adopt from [18] of the CACD's judgment, were that she was walking home at about 12.15am on 5 July 2001 when a "male rode past her on a mountain bike and said, "Hello darling". After attempts to evade him she had no choice but to walk past him. She "glanced" at him and said he appeared very calm. The male then grabbed her around the neck with his right arm from behind and had his left arm around her waist. She feared she was going to be raped. She said the male was holding something against her throat. He started to touch her breast and bottom. He tried to kiss her and continued to grope her. She lost her shoes. The male pulled her away from a fence that she had hold of, dragged her to some nearby bushes and forced her to the ground, face first, and continued to touch her body, breast, bottom, and leg area. She shouted for help, but the male continued to hold her tightly and tried to pin her arms to the ground. She screamed and the male then pushed her back to the ground and ran off."

12. Gratefully adopting the summary at [22] of the judgment of the CACD, again, in EM's case "she was walking home just before midnight on Wednesday 8 August 2001 when she became aware of a person on a bike directly behind her. The male rode alongside her and started saying, "Hello, how are you?" She ignored him, but the male continued to follow her. She said, "I'm fine thank you" and he then started saying, "Lovely lady". She felt a hand brush her bottom and began to walk faster, but the male kept riding along side. He then touched her bottom again and then swerved his bike across in front of her and trapped her against a hedge. The male grabbed her bottom again. She managed to get away, but the male followed her and grabbed her bottom again. She eventually managed to get away. She described the bike as a bright yellow adult mountain bike".

13. KF's brother, TF, gave a statement. As noted by the CCRC, this said that in the immediate aftermath of the assault, KF told him that she had lost her shoes in the course of the attack. She had indicated a bushed area at the side of a building. He took a torch and went to the bushes looking for the shoes. A few feet off the path into the bushes he saw a mobile phone which was lying face down in the dirt and he pointed it out to police when they arrived. The phone was found to be charged and it contained text in Turkish.

14. It is apparent that the police regarded the mobile phone as potentially significant. KF's witness statement said that the police had showed her the mobile phone. *"I then realised that it must have been the male's mobile phone held against my neck, because the object felt flat and hard,"*. The police also asked the Claimant about the mobile phone on the basis that it was believed that the assailant held it against KF's neck.

15. In his interview under caution on 5 November 2001, the Claimant's solicitor said that it was not appropriate for the Claimant to answer questions owing to the fact that he had significant issues with his mental health. He was subsequently diagnosed with paranoid schizophrenia. However, a prepared statement was read which denied involvement in the two offences, said that he was willing to provide a sample of his DNA, denied that he had ever owned a mobile phone or a bike and stated that he had entered the UK on 2 July 2001 and could not speak any English on arrival. On both 5 July and 8 August he was at home with his family and would not normally leave the house without a family member.

16. A sample from the mobile phone was DNA tested but this only showed that the sample did not come from the Claimant. It did not show who the DNA did come from or could have come from.

17. The Claimant was found to be unfit to plead and a trial of the facts was held in which the issue was identification. On 16 October 2002, he was found to have done the relevant acts. A hospital order with restrictions was imposed pursuant to section 41 of the Mental Health Act 1983.

18. TF's statement was read to the jury at the trial of the facts. When KF was cross examined she said *"I don't know if it was the mobile phone. All I know is that he had something flat and hard pressed against my throat"*. When she was reminded of what she had said in her statement she said *"I assumed it was the phone when they showed it to me and it was found at the scene. I assume that's what he held against my*

throat." When told by Counsel for the Defence that the phone contained text in Turkish she accepted – *"I guess"* – that this was consistent with the appearance of the man who attacked her.

19. The Claimant's father also gave evidence that the Claimant spoke Somali and some Arabic. He had not left the family home between arriving in this country and 9 July 2001 and he was at a family get together on 8 August. On 23 August the Claimant had gone out to get some cigarettes and had got lost.

20. The judge also directed the jury that the phone appeared to have connections with someone Turkish and that there was no apparent link to the Claimant.

21. The finding that the Claimant had done the relevant acts was appealed to the CACD but leave was refused by the single judge. The application for leave was not renewed. The draft grounds of appeal contended that this was a case of mistaken identification given, amongst other things, the contrast between the descriptions of their assailant given by both women as of Mediterranean appearance and the appearance of the Claimant, the fact that no bicycle was found at the Claimant's home address and the fact that the attacker had spoken in English.

22. The Claimant's mental health subsequently improved sufficiently to stand trial and he was convicted by a jury on 19 February 2004. A further hospital order with restrictions was imposed by the Crown Court. Unfortunately, very little information is available as to what happened at the trial although the court log says that TF gave evidence. There was no appeal to the CACD.

23. The Claimant was released on 15 December 2015.

24. On 28 June 2017 the Claimant applied to the CCRC. There were various delays but, in the course of its investigation, the CCRC arranged for further DNA testing of the sample from the mobile phone found at the scene of the assault on KF. A profile was obtained which, though partial, was sufficient for submission to the National DNA Database. 34 potentially matching DNA profiles were identified. All but one of these were SGM profiles, which focus on six areas of DNA, but the one had been generated using the more discriminating SGM+ system which focusses on eleven areas. In the opinion of the reporting scientist, that profile *"appeared to be a good match"* for the partial profile obtained from the mobile phone swab and it related to S.

25. Investigations into S's background by the CCRC showed that he is Turkish and that he entered the United Kingdom in 2000. In January 2003 he was cautioned by the police for committing an act outraging public decency by behaving in an indecent manner, albeit consensually, with a sex worker. The offence was committed on Tooting Common at 10:30pm at night. Police records show that he had a mountain bike with him at the time of his arrest. There was also information which showed that he had come to the attention of the police in respect of other matters, although the CACD considered that it was unnecessary and inappropriate to refer to details of them in a public judgment.

26. As a result of S's contact with the police there was a description and a photograph of S which, in the view of the CACD, was sufficiently contemporaneous with the 2001 offences to be of interest and from which relevant comparisons could be made. S is

described as of white southern European "ethnic appearance". He is two or three years older than the appellant, of the same height, same colour eyes and same colour hair, with an "other foreign" accent. A black and white photograph taken in custody confirms most of the physical description and, most particularly, in the view of the CACD, the fact of his appearing to be of Turkish ethnic origin.

27. On the other hand, a photograph of the Claimant which was circulated in 2008 confirms his ethnic appearance as "black". In the light of this photograph the CACD did not *"consider that he could reasonably be described as having either "dark olive skin" or a "Mediterranean appearance" or as being "Spanish/Italian/olive skinned" or "olive skinned""* [27].

28. In the light of this information the CCRC referred the matter to the CACD on 22 September 2020. For reasons which will become apparent, I note that in its *"Statement of Reasons for a Reference to the Court of Appeal"* the CCRC reviewed all of the evidence which it had considered as part of its investigation and said this about the fresh evidence:

> *"Clearly, this information about Mr S does not establish that it was he who attacked KF, and it does not establish that Mr Mohammed did not attack her. Indeed, it is entirely possible that the mobile phone was not associated with the assault at all. The presence of the mobile phone so close to the scene, and its discovery so soon after the assault, may be no more than an unfortunate and potentially misleading coincidence. Mr S, if traced in time, may have been able to establish an alibi."*

29. However, the CCRC noted, correctly, that the question for the CACD would not be whether the Claimant was guilty or innocent: it would be whether his conviction was unsafe.

The decision of the CACD

30. The appeal to the CACD was opposed.

31. The CACD analysed the evidence in detail and concluded as follows:

> *"45. We are satisfied that the uncertainty created by the fresh evidence related to the mobile phone and its probable user significantly weakens the reliability of KF's identification of the appellant and taints the reliability of EM's identification. That is, the similarities in the nature, timing and location of the assaults are overwhelming, and were relied on as such by the prosecution. The likelihood of different assailants being responsible for the two attacks is remote.*
>
> *46. This important evidence was not in front of the jury. Consequently, we are not satisfied of the safety of either conviction; both will be quashed.*
>
> *47. We have considered the question of retrial. We are told….that no further investigation of any of the assaults is likely to occur in the interim but, nevertheless, there is said to be a public interest in trying the appellant for the offences again. We do not agree, when seen in the light of the circumstances we describe above, the age of the offences, and the fact that, although the appellant*

was released from the restrictions of the Hospital Order made in the criminal proceedings in 2015, there are continuing welfare issues arising from his medical condition. We refuse the application." (emphasis added)

32. In coming to this conclusion, Macur LJ said that:

i) The CACD was "*struck by the great disparity between all the initial descriptions and details of the assailant in 2001 and the actual appearance of the appellant"*. There was *"certainly"* greater similarity between S's physical appearance and all of the initial descriptions provided in 2001. Moreover, ZH, who had been attacked when the Claimant was "lost" on the night of 23/24 August 2001 had not identified him as her assailant when she attended the identification parade [39].

ii) These considerations alone would not be sufficient to render the verdict unsafe and nor were they conclusive proof that S was the assailant "*However, we find it implausible to regard the question of identification as distinct from the mobile phone"* [40].

iii) The Court agreed that the location of the phone, the fact that the phone was an item which would not usually be discarded and the fact that it appeared to have been dropped at or near the time of the offence (given that it was in working order and charged) meant that it was a significant piece of evidence. The information about the gender, age and ethnic origin of its likely recent handler or user, which were not previously available, now made it *"a crucial part of the identification process"*. Had this information been available to the police at the time of their investigation the Court would have been *"astonished"* if S had not been interviewed and relevant further inquiries made [41].

iv) The information about the character of S was *"further grist to the mill of"* the appeal. The CACD made clear that it did not consider that this information of itself was determinative of S's likely involvement or propensity to commit this type of offence [42].

v) But the evidence of his caution would be admissible to rebut coincidence i.e. *"the coincidence that another man matching the description of the assailant, who in 2003 was known to have ridden a bicycle late at night in the same area of the 2001 assaults and engaged in unlawful (in that it had the tendency to offend public morality), albeit consensual, sexual activity out of doors, just happened to drop his mobile phone, at the scene of, and proximate to the time of, the assault upon KF, who accepted that the mobile phone might have been used in the assault"*. It would have *"substantial probative value"* and therefore satisfy the test in relation to the admissibility of evidence of the bad character of a non-defendants under section 100(1)(b) of the Criminal Justice Act 2003 [43].

vi) The fresh evidence was therefore admitted for the purposes of the appeal pursuant to section 23 Criminal Justice Act 1968: *"It does completely transform the landscape. The evidence that was available [at trial] is given an entirely different and fresh perspective"* [44].

Legal Framework

33. Section 133 of the Criminal Justice Act 1988 provides, so far as material, as follows:

> *"(1).....when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction… unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.*
>
> *(1ZA) For the purposes of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence… if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence….*
>
> *(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State"* (emphasis added)

34. Importantly, section 133(1ZA) was inserted into the 1988 Act by section 175 of the Anti-social Behaviour, Crime and Policing Act 2014, with effect from 13 March 2014, following the decision of the Supreme Court in *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48. *"Miscarriage of justice"* was not defined in section 133(1) as originally enacted and, in *Adams*, a 9 Justice Supreme Court was called upon to interpret this phrase. By a 5:4 majority, the Court held that, having regard to article 14.6 of the International Covenant on Civil and Political Rights 1966 which section 133 was intended to implement, *"a miscarriage of justice"* encompassed two categories of case. The first was where the fresh evidence shows clearly that the defendant is innocent of the crime of which they were convicted ("Category 1"), and the second was where it so undermines the case against them that no conviction could possibly be based on it ("Category 2"). Category 2 cases were narrower than Category 3 cases, where the fresh evidence merely rendered the conviction unsafe, and the latter did not qualify for compensation.

35. The minority of the Supreme Court Justices held that section 133 was limited to Category 1 cases, which had been the conclusion of Lord Steyn in *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2005] 1 AC 1. Lord Judge CJ, who gave the leading judgment expressing the view of the minority, pinpointed the dividing line between the majority and the minority when he said that:

> "*the principle is that section 133 is concerned with the fact rather than the presumption of innocence in the context of the administrative decision made by the Secretary of State"* [263].

36. Lord Phillips, who was in the majority, said that the primary object of section 133 was to provide entitlement to compensation to a person who has been convicted and punished for a crime which they did not commit [37]. However, at [55] he acknowledged this in relation to the Category 2 test:

> *"This test will not guarantee that all those who are entitled to compensation are in fact innocent. It will, however, ensure that when innocent defendants are convicted on evidence which is subsequently discredited, they are not precluded from obtaining compensation because they cannot prove their innocence beyond reasonable doubt."*

37. It was common ground before me that the amendment of section 133 to add subsection (1ZA) was intended to make clear that the section does not apply to the second category identified in *Adams* and is confined to the first category: see the account given by Lord Mance in *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2020] AC 279 at [18]-[19]. This was noted by the Divisional Court (Macur LJ and Foxton J) in *R (Kay) v Secretary of State for Justice* [2021] EWHC 2125 (Admin) at [26]. Referring to *Adams*, and the insertion of subsection (1ZA) by the 2014 Act, Macur LJ said:

> *"Category 2 covered those cases where a new or newly discovered fact so undermined the evidence at trial that no conviction could be based upon it. As a result of that statutory reversal, the Claimant's application for compensation depended on establishing a Category 1 miscarriage of justice."*

38. At [66] and [67] she added:

> *"66. The statutory scheme is strictly and unequivocally defined. It permits no element of discretion regardless of the privations and traumatic consequences of the conviction upon the claimant; ...for compensation to be payable, the newly discovered fact admitted into the appeal proceedings must positively disprove the commission of the offence beyond reasonable doubt, and not merely undermine the safety of the conviction.*
>
> *67. Appeals against conviction allowed based on newly discovered DNA, scientific or technical evidence which positively exonerates the Claimant, or independent alibi evidence prompted by news of a conviction which may do so, will be few and far between….only five successful applications in the five years to 2018/19 underlines this point. These are the 'extreme cases' as described by the Court of Appeal in Ali."*

39. This caused the Divisional Court to reject a challenge to a decision of the Secretary of State to refuse compensation in a rape case where the issue was consent. The newly discovered fact, that the complainant had edited Facebook messages between her and the claimant so as to omit friendly exchanges between them after the alleged offence, undermined her veracity and therefore rendered the conviction unsafe. But this did not demonstrate beyond reasonable doubt that the complainant had not been raped:

> *"the complainant's lack of credibility on the Facebook record did not of itself establish what happened on the evening in question"* [31].

40. As Macur LJ put it at [32]:

> *"This is not one of those "extreme" cases in which the effect of the newly discovered fact is not simply to establish that the conviction is unsafe, but where there is "only one rationally correct conclusion as to the result of the application*

of the statutory test", namely that the defendant is innocent beyond reasonable doubt. (See R (Ali) v Secretary of State for Justice [2014] 1 WLR 3202, [27] and [28])."

41. On the pleadings and skeleton arguments there was said to be a dispute between the parties as to the scope of the Secretary of State's inquiry when deciding whether the test under section 133(1) of the 1988 Act is satisfied. This arose because Mr Gullick KC took the position, in the Detailed Grounds of Defence, that Ms Sikand KC's arguments in the Statement of Facts and Grounds proceeded from the false premise that, in considering an application under section 133, the Secretary of State is obliged to conduct a re-trial of the criminal case. Ms Sikand agreed that there was no requirement of a re-trial of the case and denied that this was the premise of her case. After probing of both sides at the hearing, however, the dispute seemed more apparent than real or, at least, to be a distraction from the real issue in the case.

42. Mr Gullick took me to passages from *Hallam* in the Divisional Court ([2015] EWHC 1565 (Admin) per Burnett LJ at [49]) and in the Court of Appeal ([2016] EWCA Civ 355, [2017] QB 571 per Lord Dyson MR at [48]-[49] and [64]-[67] which emphasise that under the statute *"The Secretary of State is only required to look at whether the new or newly discovered fact (and nothing else) shows beyond reasonable doubt that the person did not commit the offence"* (per Lord Dyson at [48]). But these passages were written in the context of a dispute as to whether section 133 was compatible with the presumption of innocence under Article 6.2 of the European Convention on Human Rights ("ECHR"). Their Lordships were seeking to emphasise that section 133 did not require the applicant to prove their innocence generally and therefore a refusal of compensation did not cast doubt on their innocence generally. The Court was not deciding an issue as to the limits of the materials or evidence which the Secretary of State is required to consider when determining whether the fresh evidence establishes that the applicant for compensation did not commit the offence.

43. Similarly, Ms Sikand took me to the dissenting judgment of Lord Reed in the Supreme Court in *Hallam* (supra at [184] - [186]) in which he said that he regarded the distinction between a requirement that innocence be established and a requirement that it be established by a new or newly discovered fact as *"unrealistic"* [185] and pointed out that "*Normally, at least, the significance of a new piece of evidence can only be assessed in the context of the evidence as a whole."* [185]. Again, however, Lord Reed's focus was on the distinction drawn by the Divisional Court and the Court of Appeal for the purposes of deciding whether section 133 was incompatible with Article 6.2 ECHR. He was not seeking to define the limits of the Secretary of State's inquiry when considering an application under section 133.

44. In my view the position is straightforward and, as I understood them, ultimately Ms Sikand and Mr Gullick agreed with the following. The Secretary of State has to reach his own conclusion as to whether the test under the section is satisfied. He is therefore required to consider whether the new or newly discovered fact which was the ground on which the applicant for compensation was pardoned, or the conviction reversed, shows beyond reasonable doubt that the applicant did not commit the offence. So the focus is on what the new or newly discovered fact shows. That question obviously requires a wider consideration of the case so as to understand the context and the significance of the fresh evidence but it does not involve a re-trial based on all of the evidence in the case (see e.g. *Kay* supra at [35], rejecting the argument at [28(iv)]).

45. As Maurice Kay LJ said in *R (Ali) v Secretary of State for Justice* [2014] EWCA Civ 194, [2014] 1 WLR 3202 at [27]:

> *"the Secretary of State is required to make a decision by applying the statutory test…. to the facts of the particular case, which can include events which post-date the quashing of the conviction in the event that further facts of relevance to the application of the statutory test arise. He may come to his own view, having regard to the terms of the CACD's judgment quashing the conviction, and provided the decision does not conflict with that judgment. The decision is then amenable to judicial review on conventional grounds of challenge, not merely because the court would have reached a different view. Save in exceptional circumstances, it should not be necessary for the court to engage in a detailed review of the facts."*

46. So the decision making process undertaken by the Secretary of State (including the scope of inquiry), and the outcome of the application for compensation must be in accordance with public law principles. Whether the decision is consistent with these principles will depend on the circumstances of the particular application for compensation which is under consideration and the Secretary of State's approach to that particular application.

47. The public law principle which is said to have been infringed in the present case is the requirement that the Secretary of State's decision is rational. Again, there was some difference of emphasis between the parties as to what this requirement entails. But it appeared to be common ground that I should apply the following statement in the judgment of the Divisional Court (Leggatt LJ and Carr J) in *R (Law Society) v Lord Chancellor* [2018] EWHC 2094 (Admin), [2019] 1 WLR 1649 at [98]:

> *"This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic Wednesbury formulation it is "so unreasonable that no reasonable authority could ever have come to it…Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker…The second aspect of irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it-for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."*

48. Ms Sikand relied on [31]-[33] of the judgment of Saini J in *R (Wells) v Parole Board* [2019] EWHC 2710 (Admin) and, in particular, his statement that the simple question *"was the decision irrational?"* was *"crude and unhelpful"*. A more nuanced approach to the question of irrationality in modern public law is:

> *"..to test the decision-maker's ultimate conclusion against the evidence before it and to ask whether the conclusion can (with due deference and with regard to the Panel's expertise) be safely justified on the basis of that evidence, particularly in a context where anxious scrutiny needs to be applied."* [32].

49. I do not disagree but note the particular context in which Saini J said this and, more importantly, that he emphasised, in [33], that this was simply another way of applying the *Wednesbury* test of whether a reasonable body could have come to the decision in question. He added, at [33]:

> *"but it is preferable in my view to approach the test in more practical and structured terms on the following lines: does the conclusion follow from the evidence or is there an unexplained evidential gap or leap in reasoning which fails to justify the conclusion?"*

50. In other words, he was advocating a more structured approach than simply asking whether the decision was irrational, and he was saying no more than that there may be irrationality in the decision making process if the conclusion does not follow from the premises. The same sort of point was made by Leggatt LJ and Carr J (as they then were), in the passage from the *Law Society* case which I have cited above, when they gave as examples of irrationality, decisions where *"there was no evidence to support an important step in the reasoning, or..the reasoning involved a serious logical or methodological error"*.

The decision under challenge

51. The application for compensation was made by the Claimant's solicitors on his behalf on 12 July 2021. A decision was communicated by the Defendant on 9 May 2022 but this was challenged by way of a letter before action on 20 June 2022 and the decision was withdrawn. The decision making of the Defendant in relation to the decision under challenge is evidenced by an Assessment and Checklist document dated 13 July 2022. This was completed by a Ms Clare Timmins who I will refer to as "the decision maker". The decision was not communicated to the Claimant's solicitors until 11 October 2022 for reasons which are unexplained but which do not matter for present purposes.

52. The Assessment and Checklist document set out the background before going on to summarise the CCRC investigation and findings. In this section it was noted that the DNA taken from the mobile phone was a good match to S and that:

> *"18. The CCRC discovered that Mr S was Turkish and had been cautioned for committing an act outraging public decency on Tooting Common at 10:30 at night. Police records show he had a mountain bike and had come to their attention in respect of other matters, although he was never questioned regarding these two or the other four offences for which Mr Adan was arrested."*

53. The CACD decision was then considered and the decision maker noted that the basis of the appeal was that:

> *"20……'fresh' DNA evidence called into question the prosecution's case which was built on the identification of Mr Adan by KF and EM….."*

54. The decision maker went on to note that:

> *"22. The further DNA evidence reinforces that the phone was not connected to Mr Adan but rather Mr S. It would not have been possible at that time to match*

the DNA with Mr S as his DNA profile would not appear on the data base until 2003.

23.The prosecution agree that the phone found at the scene has now been linked to Mr S. However, it remains that KF (and EM) had independently identified Mr Adan from the identity parade and convinced two juries of the reliability of their identification. (emphasis added)

24.The Court of Appeal were satisfied that the 'uncertainty created' by the new evidence related to the DNA profile of the swab from the mobile phone and it's (sic) probable user and that the evidence has not been before a jury, thus left them considering the convictions unsafe and thus they were quashed.

25.No retrial was ordered as no further investigation would take place in the interim, the age of the offences and the fact that Mr Adan had been released in 2015 from the restrictions of his Hospital Order made in the Criminal Proceedings."

55. In the section of the Assessment which addressed the question whether the conviction was *"reversed on the basis of a new or newly discovered fact?"* the decision maker decided that it was. The uncertainty as to the safety of the conviction resulted from the fresh DNA evidence:

"28. It was already known that the DNA was not Mr Adan's but the further testing and a rerunning of the result through the National DNA Database, led to a match to Mr S. It was this further fact that led the court of appeal to quash the convictions."

56. However, the answer to the question whether the newly discovered fact showed beyond reasonable doubt that the applicant did not commit the offence was:

. *"30. No.*

31. Whilst the court of appeal thought the conviction unsafe, it does not demonstrate for the purposes of s133 that Mr Adan did not commit the offences.

32.Both KF and EM identified Mr Adan as their attacker in independent identity parades.

33.KF has never been certain that the item held to her throat during her attack was a mobile phone, only assuming so once the police asked her if it was as the phone had been found near the scene of her attack."

57. Similarly, the relevant part of the decision letter of 11 October 2022 states:

"Mr Ahmed Mohamed Ali Adan was identified by the victims in independent identity parades. It is also worth noting that one of the victims, KF, has never been certain that the item held to her throat during her attack was a mobile phone, and only made that assumption when the police told her that the phone had been found near the scene of her attack. It is accepted that had the DNA evidence found on the mobile phone been available at the time of the investigation, it would have led to further enquiries being made with Mr S.

> *However, the Secretary of State does not consider that the fresh evidence following the enhanced DNA testing, demonstrates beyond a reasonable doubt that Mr Adan did not commit the offences and thus the application does not meet the statutory test as set out in s133 of the Criminal Justice Act 1988."*

The arguments of the parties

For the Claimant

58. Ms Sikand argued that the decision maker failed properly to assess the effect of the CACD's judgment and to give proper weight to the overall impact of the newly discovered evidence on the remaining evidence, wrongly focussing, instead, on isolated strands of evidence.

59. She also criticised the failure of the Assessment and Checklist document to refer to three matters:

i) KF and EMs' initial evidence about the ethnic appearance of their attacker and the CACD's stated concern about the discrepancy between those descriptions and the appearance of the Claimant.

ii) The CACD's comments about the necessary link between the phone evidence and the identification evidence and, in particular, its observation at [40] that it was implausible to regard the question of identification as distinct from the evidence about the mobile phone.

iii) When stating the reasons why no retrial was ordered, the CACD's reference to *"the circumstances we describe above"*, i.e. the CACD's analysis of the evidence, as a reason to refuse the application for a retrial.

60. Ms Sikand said that the starting point was the judgment of the CACD. She argued that, in contrast to the position in other unsuccessful challenges to section 133 decisions, the CACD had concluded that the case against the Claimant had been *"demolished"* as opposed to the conviction merely being unsafe. She placed particular reliance on the reasoning of the CACD which I have highlighted at [31]-[32(vi)] above, emphasising the unequivocal or emphatic language which the CACD used and highlighting the question posed by the CACD at [43] of its judgment (cited above at [32(v)]) as to whether the presence of the phone at the scene could be a coincidence bearing in mind the other features of the case as identified by the Court. She recognised that the task of the CACD was merely to decide whether the conviction of the Claimant was unsafe, rather than whether he was innocent (*R v Pendleton* [2001] UKHL 66 at [19]). But she said that the CACD had come as close as it was possible to come to finding that the fresh evidence established that the Claimant was not involved in the offending. Given the *Pendleton* principle, the fact that the CACD did not say this in terms did not carry any particular implication (see *Hallam* in the Supreme Court at [33]).

61. In addition to the CACD's reasons Ms Sikand emphasised the importance of the evidence about the mobile phone which, she said, *"was the only explicable object that could have been held to KF's throat"*. She also emphasised what was now known about S which, she said, fitted with the descriptions given by the complainants and

with the circumstances of the offences, whereas this was not so in the case of the Claimant. She said that the positive identification of the Claimant by KF and EM did not have any greater significance than the evidence about the mobile phone, particularly when it was considered that three of the six initial complainants failed to identify him at the police identification procedure.

62. Ms Sikand's position as to whether the Defendant should have been sure that S had attacked KF and EM required clarification in the course of the hearing. Her Statement of Facts and Grounds pleaded, at [62], that *"Taken in total, the evidence is overwhelming that S was involved in the offending and thus that the Claimant was not"*. In response Mr Gullick pleaded, at [43] of the Detailed Grounds of Defence, that her case was now that the only rational conclusion open to the Defendant was to make a positive finding that the offences had been committed by S and that the Claimant's argument was on analysis unsustainable. Rather than confirm that this was her case and contend that it was eminently sustainable, at [67] of her skeleton argument Ms Sikand responded:

> *"There is no invitation in the SFG to make any actual finding about Mr S: the coincidences between Mr S and the current offending are striking.. and looking at the evidence as a whole, he was much more likely to have carried out the offending than the Claimant.., but whether or not he is guilty of criminal conduct is a matter outside the scope of these proceedings"* (emphasis added)

63. This passage appeared to me to "sell the pass", as Mr Gullick in effect contended in his skeleton argument. Firstly, it appeared to disavow a positive case that S was the assailant whereas my provisional view was that logically that had to be the Claimant's case if his application for compensation was to have any prospect of being granted. Second, the suggestion that S was *"much more likely to have carried out the offending than the Claimant"* fell short of the standard of proof required under section 133. Third, if my provisional view was right, for the challenge to the Defendant's decision to succeed, the Claimant had to satisfy me that the only conclusion which was rationally open to the Defendant was that the Claimant did not commit the offences, S did. It would not be enough for such a conclusion to be one which the Defendant merely could have reached.

64. I therefore asked Ms Sikand to clarify her position. Having initially replied that the Defendant "could" have decided that he was sure that S committed the offences, she submitted that this was the only decision open to the Defendant on the evidence. This was broadly consistent with her Statement of Facts and Grounds and it was how the Defendant originally understood her pleaded case, as I have noted. Presumably for this reason, Mr Gullick did not object to the case being argued in this way.

For the Defendant

65. Mr Gullick emphasised the distinction between *Adams* Category 1 and Category 2 cases. His fundamental argument was that the highest which the case could be put on behalf of the Claimant was that it fell within Category 2 or, at least, it was not irrational for the Defendant to conclude that it did not fall within Category 1. He made a comparison with the analysis of the facts in *Hallam* at [49] of the judgment of Burnett LJ in the Divisional Court:

> *"The case of Mr Hallam well illustrates the difference between proof of innocence in a general sense and that a new fact proves (or does not prove) innocence. His conviction rested upon the identification evidence of two witnesses. He had an alibi which the Crown suggested was false and in respect of which they said he was lying. The alleged lie relating to his alibi was relied upon by the prosecution to augment the identification evidence, which on its own would have been inadequate to support a conviction. The new evidence did not prove that his alibi was true and that he could not have been at the scene of the crime. It did not prove that the identification evidence was wrong. However, it provided cogent evidence to suggest that there may have been an innocent explanation for his being mistaken about where he was at the time of the crime. By contrast, if the new fact had established (to the necessary standard) that he could not have been at the scene of the crime, for example because he was in a different country or city, it would have established that he did not commit the crime. Similarly, there have been examples of cases with new DNA analysis which has shown beyond doubt that the convicted person could not have committed the crime in question."*

66. Mr Gullick's submission was that, similarly, the new evidence in the present case had not proved that the identification of the Claimant by KF and EM was wrong.

67. Mr Gullick also submitted that, given the requirement under section 133 to show that the applicant for compensation did not commit the offence, it was difficult to see how the Claim could succeed unless the Court concluded that the only rational conclusion open to the Defendant was that the fresh evidence demonstrated beyond reasonable doubt that S committed the offences. In this connection, he took me to the Claimant's application to the Defendant of 12 July 2021 which argued that it was clear from the analysis in the CACD's judgment that the new evidence *"demolished the prosecution case"* but did not assert that S, rather that the Claimant, committed offences. He submitted, in effect, that taken at its highest the application was contending that this was a Category 2 case. Moreover, any criticism of the reasoning of the decision-maker based on a failure to consider whether, or conclude that, S was the perpetrator was misplaced. It could not be irrational to fail to consider a case which was not being advanced.

68. In his skeleton argument Mr Gullick also pointed out the position which Ms Sikand had taken at [67] of her skeleton argument, which I have highlighted above. He submitted, in effect, that this was fatal to the claim for judicial review. In response to Ms Sikand's clarification of her position, he submitted that the decision making of the Defendant could not be criticised and his conclusion was not irrational. The CCRC, which investigated the matter fully, had also taken the view the that evidence did not establish to the criminal standard that S had committed the offences (see [28], above). If Ms Sikand was right, that view was also irrational. The CACD had not concluded that the case against the Claimant had been *"demolished"* but, even if it had, this would not be sufficient to satisfy the section. This was not one of the *"extreme"* cases, referred to by Macur LJ in *Kay*, in which the only answer rationally open to the Defendant was that the Claimant had not committed the offences in question.

Discussion and conclusions

69. I make clear, as Mr Gullick did, that nothing which is said in this case to justify or explain the decision of the Defendant is intended to, or has the effect of, questioning or undermining the decision of the CACD that the conviction of the Claimant was unsafe.

70. I did not find the debate about whether or not the CACD found that the fresh evidence *"demolished the prosecution case"* to be illuminating. That is not one of the legal questions which I am required to answer and it tends to obscure those questions. Indeed, on one understanding of the phrase, even if *"demolition"* is established this merely shows that the case falls into *Adams* Category 2 or 3, which is not enough. Nor, for that matter, am I required to decide whether the case is or is not *"extreme"*, as Mr Gullick acknowledged. Macur LJ was merely emphasising, at [32] of her judgment in *Kay*, that successful applications under section 133 are unusual because of the strictness of the statutory test and the limited scope for a challenge to a decision under section 133.

71. I accept Mr Gullick's submission that, in the circumstances of the present case, the only realistic way in which the Claimant could meet the requirements of section 133 of the 1988 Act was by satisfying the Defendant that the newly discovered facts about the DNA on the mobile phone showed, beyond reasonable doubt, that S committed the sexual assaults on KF and EM. There was no question that the assaults had taken place. The only issue was: who had carried them out? The fresh evidence meant that the Claimant was able to cast further doubt on the prosecution case against him but this, in itself, would only give him the prospect of bringing his case within *Adams* Category 2. It would establish the presumption but not the fact of innocence. The fresh evidence did not open up the possibility of showing that the perpetrator must have been someone other than S. So the only route available to the Claimant to establish the fact of his innocence was to argue that the fresh evidence showed to the criminal standard that the assailant must have been S and therefore was not the Claimant.

72. I accept that the application form submitted by the Claimant to the Defendant appeared to be put as a Category 2 case or, at least, did not specifically assert that the assailant could not have been the Claimant because it was S. But Mr Gullick's argument that this provides an answer to the Claimant's case is a bad point. As Ms Sikand pointed out, it is perfectly clear that the Defendant understood that the application could only succeed if he was sure that S committed the offences. As I have pointed out, that is the only logical analysis of the case and it is why the Defendant said, in the original decision letter of 9 May 2022, that *"although the [CACD] indicated that the DNA would have provided a new angle on the overall material under consideration, it did not state that it was conclusive proof that S was responsible for the assaults and/or that your client did not commit the offence"*. Moreover, the Claimant's solicitor's challenge to this point, in the pre-action letter dated 20 June 2022, said that the fact that the role of the CACD was limited to determining whether the conviction was *"unsafe"* meant that its failure to state that the DNA evidence was conclusive proof that Mr S was responsible for the offences, or that the Claimant did not commit them, was unsurprising and indeed expected. As I have noted above, the original decision was then withdrawn and re-made.

73. As for Ms Sikand's criticisms of the Checklist and Assessment document, again there were pleading issues. A fair reading of the Statement of Facts and Grounds suggests

that the challenge is based on the contention that the decision itself was irrational i.e. outcome irrationality. Consequently the relief sought is the quashing of the decision and a mandatory order that compensation be paid to the Claimant. There are criticisms of omissions from the Checklist and Assessment document but these are not pleaded as failures to take into account relevant considerations, possibly because it was considered that there would be difficulties with the contention that the specified matters were not taken into account. Instead, the case was argued on the basis that the decision was irrational on the basis that the approach identified by Saini J in *Wells* permits the court to find that the conclusion is not justified by the evidence.

74. Again, I do not consider that this wrinkle affects the outcome of the case. I also accept that the criticisms of the Assessment and Checklist made by Ms Sikand were adequately pleaded. I will therefore deal with them on their merits.

75. Taking Ms Sikand's three points in ascending order in terms of their cogency, in my view there is nothing in the complaint that the decision maker, when summarising the reasons why the CACD refused a retrial, failed to refer to the words *"when seen in the light of the circumstances we describe above"* in [47] of the CACD's judgment. The omission was immaterial. These words went no further than to refer to the basis on which the CACD had allowed the appeal which, as discussed above, did not include a finding that S, rather than the Claimant, must have committed the offences. They did include an account of the weaknesses in the case against the Claimant but the decision-maker had read this account and was therefore well aware of it. Indeed, if the CACD had thought that the weakness of the case against the Claimant was, of itself, such that there should be no re-trial it would have said so and might not have felt it necessary to rely on the additional matters to which it referred.

76. Secondly, there is nothing in the complaint that the decision maker failed to refer to the CACD's observations about the necessary link between the issue of identification and the evidence about the mobile phone. As I have pointed out, at [20] of the Assessment and Checklist document the decision maker said that the basis of the appeal was that *"fresh' DNA evidence called into question the prosecution's case which was built on the identification of Mr Adan by KF and EM....."*. She was well aware that the significance of the mobile phone evidence was that it undermined the evidence of the identification of the Claimant by KF and EM. This is also apparent from the Assessment and Checklist document read as a whole.

77. There is more substance to the complaint that the decision maker did not specifically refer to the initial descriptions of their assailant which were given by KF and EM. The point about this evidence was not just that it was inconsistent with the attacker being the Claimant, and therefore undermined the identification of him by KF and EM (as the CACD said at [39]); it was also that the descriptions which they, and indeed three of the other complainants, gave lent additional support to the view that the attacker was S. Moreover, I did not accept or, indeed, fully understand Mr Gullick's submission that this evidence was not even arguably a relevant consideration. Insofar as he was arguing that it was not relevant because, under section 133, the Defendant was only concerned with whether the newly discovered facts showed that the Claimant did not commit the offences, I disagree. It seems to me that section 133 does, in principle, permit an applicant for compensation at least to argue that when the fresh evidence is added to existing evidence which points to the attacker being someone else it shows that the attacker was indeed someone else.

78. However, in my view Mr Gullick was on stronger ground when he submitted that the decision maker can be taken to have had the point in mind given that it is clear on the face of the CCRC Statement of Reasons for the referral to the CACD and the judgment of the CACD, both of which she had read. In any event the failure to mention it in the Assessment and Checklist document is not of such significance as to render the decision irrational either on the basis that there was a failure to take into account a relevant consideration, or on the basis of the approach in the *Wells* case. This is not a case where there is a gap between the reasoning and the conclusion of the decision maker: at best it is one where there was an arguable failure to take into account a relevant consideration.

79. I accept that the Assessment and Checklist document could have said more and could have engaged in a more detailed analysis. It did not deal specifically with the significance of the descriptions given by the victims, their dissimilarity to the appearance of the Claimant and their greater similarity to the appearance of S, as Ms Sikand points out. Nor did it grapple directly with the question, as framed by the CACD, of whether it could have been a coincidence that a mobile phone with S's DNA on it was found at the scene of one of the assaults. But in my view these criticisms did not render the decision irrational.

80. A fair reading of the Assessment and Checklist document is that the decision maker was not sure that the attacker was S or that it was not the Claimant. Although the fresh evidence made it more likely that this was the case, it was not without significance that the KF and EM had both independently picked the Claimant out in a valid identification procedure. Although their identification of him was further undermined by the information about S which was now available, the evidence about the mobile phone was not such as to establish to the requisite standard that the attacker was S rather than the Claimant. This was not a case in which, for example, KF had said that the attacker had a knife which he had held to her neck and a knife had subsequently been found at the scene with S's DNA on it. It was a case in which KF had not actually seen her assailant with a mobile phone and it was only an assumption on her part that the hard flat object which was held to her throat was a phone/the phone. There was therefore a reasonable doubt about the involvement of the mobile phone in the commission of the offence and about how it came to be where it was found. That being so, there was a reasonable doubt about whether the attacker was S.

81. Putting the drafting of the Assessment and Checklist document to one side, I have also stepped back and asked whether, on the evidence before her, the decision maker could reasonably have come to the conclusion that there was a reasonable doubt as to whether the attacker was S and not the Claimant. In my view she could, essentially for the reasons which she gave. As she points out, there were two, independent, positive identifications of the Claimant to support the view that he was the attacker. Notwithstanding the evidence that he was not, and that S was the attacker, unless the mobile phone evidence showed that the identification of the Claimant was wrong, the decision maker was entitled to take it into account as at least pointing to it being him.

82. The decision maker was also entitled to take the view that because she could not be sure that the mobile phone was used in the attack or was in the possession of the attacker, or how, or precisely when, it came to be at the location, she could not be sure that the attacker was S and that the identification of the Claimant was wrong. It is worth noting that all that was established was that S's DNA was on the phone. It

would also be unusual for a mobile phone to be used as a weapon although, of course, the attacker may have been using it to give the impression that he has a weapon. The fact that the phone was charged tended to indicate that it had been dropped recently but how recently was not known. Nor was it known for sure that S had dropped it. He had committed a sexual offence but that was in 2003 and, as the CACD held, the circumstances of the offence were not sufficiently similar to establish that he had a propensity to commit sexual assaults. There was no evidence of sexual assaults being committed by him. S's offence was committed in Tooting and he had a mountain bike with him at the time of his arrest, but these features of the case fell significantly short of being conclusive. Tooting is densely populated. Many people have mountain bikes. There was no evidence that it was the same bike.

83. In the course of his submissions I asked Mr Gullick what reasonable, as opposed to fanciful (see *R v Majid* [2009] EWCA Crim 2563 at [12]), explanation of the DNA/mobile phone evidence might have caused a member of the jury at a prosecution of S to find him not guilty on the evidence currently available, including the descriptions of the assailant. He declined to speculate. I am not sure that he was right that it was inappropriate to answer my question but he was entitled to say that the hypothetical jury member could rationally have concluded that without knowing more about the case they were not sure: the evidence against S was cogent but not sufficiently cogent, there were too many unanswered questions and the case had not been proved to the requisite standard. By the same token, it seems to me that the Defendant could rationally come to the same view.

84. I add that my question was not necessarily a difficult one to answer. One does not know what S might have said if he had been asked but, for example, he might have said that the phone was not owned by him: there was an explanation for how his DNA came to be on it, such as that it belonged to a family member or friend and he had touched it for one reason or another. He might have said that it was his phone but given a plausible account to explain how it came to be where it was found - for example, that he had dropped it or he had been mugged a couple of days before the incident - and he might have been able to support his case by other evidence about his movements on the nights in question. Indeed, it might well have been sufficient for him to establish that he had an alibi in one of the two cases given that they were treated as having been committed by the same person. These possibilities, added to the fact that the known evidence falls short of being conclusive, tend to confirm that it would not be irrational to consider that the possibility of a credible, or at least better than fanciful, explanation or defence could not be ruled out if S had been prosecuted.

Conclusion

85. With some regret, then, I dismiss the Claim. Ultimately I consider that Ms Sikand was right when she said in her skeleton argument that the newly discovered facts in this case showed that S was *"much more likely to have carried out the offending than the Claimant"*. But that is not enough to satisfy section 133 of the Criminal Justice Act 1988 and it falls well short of establishing that it was irrational for the Defendant to conclude that the test under the section was not satisfied.

86. I therefore dismiss the claim.