IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL
FROM THE DIVISIONAL COURT

IN THE MATTER OF AN APPLICATION FOR PERMISSION TO APPEAL

Appeal No. 2019/0238

B E T W E E N :

R
(on the application of "MONICA")

Appellant

and

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

and

JAMES BOYLING

Interested Party

SUBMISSIONS OF JUSTICE PURSUANT TO
RULE 15 SUPREME COURT RULES 2009

Introduction

1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system – civil, criminal and administrative. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. Since its foundation in 1957, JUSTICE's reports have recommended some of the most fundamental structural changes to the justice system of the past sixty years to improve access to justice: the creation of the Crown Prosecution Service, the

Administrative Court, the Ombudsman System, the Criminal Cases Review Commission and the Criminal Injuries Compensation Scheme.

3. JUSTICE is also an experienced intervener and has assisted the Court in the public interest in a range of access to justice cases, including *Cadder v HM Advocate* [2010] UKSC 43; *R(Cart) v The Upper Tribunal* [2011] UKSC 28 and *Belhaj and another v Straw and Rahmatullah v Ministry of Defence* [2017] UKSC 3. Particularly relevant to this case is JUSTICE's engagement in the legislative stages of the Administration of Justice Bill in 1960: JUSTICE briefed Parliamentarians and proposed amendments to the Bill which were advanced at the House of Lords Committee Stage but did not find consensus and were withdrawn.[1]

4. JUSTICE makes submissions in this application for permission to appeal pursuant to Rule 15 of the Supreme Court Rules 2009. JUSTICE confines its submissions to the preliminary jurisdictional issue in the case, namely the operation of the s.1 Administration of Justice Act 1960 ("AJA") admissibility criteria. JUSTICE does not remark upon the merits of the substantive application and will not seek to intervene in the appeal pursuant to Rule 26 should permission to appeal be granted.

5. JUSTICE intervenes to highlight the limitation on the enjoyment of access to appeal caused by the operation of s.1 AJA. We submit that this is in violation of Article 14 of the European Convention on Human Rights ("ECHR") in conjunction with Article 6 ECHR on the grounds of the appellant's status as a complainant seeking judicial review in a criminal cause or matter compared to other appellants.

6. Complainants seeking appellate review in a criminal cause or matter suffer differential treatment in two ways: (1) as a *complainant* appealing from the High Court to the Supreme Court under s.1 AJA in comparison with a defendant or prosecutor making such an appeal; and (2) as an appellant of *criminal judicial review* proceedings in comparison with that of an appellant of civil judicial review proceedings.

[1] Hansard (HL Debates), Administration of Justice Bill, 10 May 1960, Volume 223, Cols 561-569.

7. JUSTICE submits that such difference in treatment is not justifiable under Article 14 ECHR and we urge consideration by the Court of the aims and effects of the legislation. In our submission, Parliament did not intend to limit complainants' appeals, since the only appellants foreseen by the legislators were defendants and prosecutors. Nevertheless, complainant appeal rights have been yoked to those of defendants and prosecutors, despite such lack of intent. When contrasted with other analogous litigants, it is apparent that s.1 AJA disproportionately limits complainants' access to justice.

8. As Davis, LJ commented in *Thakrar v Crown Prosecution Service* [2019] EWCA Civ 874, *obiter*, on the disparity in access to appeal with respect to s.18 SCA 1981, even without contemplating the problem status of complainant litigants:

> *This whole jurisdictional area has the potential, in some cases, to be very problematic: as the course of proceedings in* Belhaj *alone indicates. Further, whatever may have been the understandable perception of things in Victorian times, it is rather difficult, in my own view, to understand the continuing rationale for the position set out in s.18(1) of the 1981 Act (which is now itself nearly 40 years old). This is particularly so where there has in the intervening period been an ever-expanding growth in judicial review claims generally, quite a number of which have (to put it neutrally) a criminal context.* [50]

9. In these submissions we consider the following.

A. The expanded operation of s.1 AJA 1960
   i. The definition of "criminal cause or matter"
   ii. The intended litigants under the Act
   iii. The standing of complainants
   iv. The expanded usage of s.1 AJA

B. Compliance of s.1 AJA with Article 14 ECHR in conjunction with Article 6
   i. Discrimination: ambit and status
   ii. Analogous litigants

a) S.17 AJA litigants
b) Civil judicial review litigants

iii. Justification

A. The expanded operation of the Administration of Justice Act 1960

i. The definition of "criminal cause or matter"

10. The appeal route provided by s.1 AJA is not an isolated provision. It originally operated in conjunction with s.47 of the Supreme Court of Judicature Act 1873, which stipulated that appeals in "a criminal cause or matter" were excluded from jurisdiction of the Court of Appeal. Within the current legislative scheme, the bar to the Court of Appeal is now found in s.18 of the Senior Courts Act 1981 ("SCA"):

> *No appeal shall lie to the Court of Appeal—*
> *(a) except as provided by the Administration of Justice Act 1960, from any judgment of the High Court in any criminal cause or matter;*

Therefore, s.1 AJA functions as a safety valve for a limited number of cases – criminal causes and matters – which otherwise would have no appeal.

11. The phrase "criminal cause or matter" has recently been considered in depth by the Supreme Court in *Belhaj and Anor v Director of Public Prosecutions and Anor* [2018] UKSC 33. Prior to this, the interpretation of the phrase with respect to appeal routes fluctuated, with Lord Neuberger in *R (Guardian News and Media Ltd.) v City of Westminster Magistrates Court* [2011] 1 WLR 3253 referring to the case law as "confusing" [29] and "rather tangled" [43].[2]

12. This tangled interpretative history is well summarised in *R(McAtee) v Secretary of State for Justice* [2018] EWCA Civ 2851 by Sir Brian Leveson, P, Davis, LJ and

[2] In the *Guardian News* case, during extradition proceedings that were agreed to be a criminal cause or matter, an application by a third party for judicial review was made of the court's refusal to provide the press with copies of documents. This ancillary application was held *not* to be a criminal cause or matter.

Lewison, LJ. They note with hindsight that a line of interpretation which favoured a more restricted definition (which held that the word "matter" did not refer to the subject-matter of the proceeding, but to the proceeding itself) led to "a number of cases which (to put it neutrally) had a criminal context in which the jurisdiction of the Court of Appeal has been either assumed or asserted" [31].

13. When the phrase reached the Supreme Court in *Belhaj,* it did so in a case directly analogous to the current one, since the appellant was a complainant who had sought judicial review of a decision of the Director of Public Prosecutions ("DPP") not to prosecute. The Supreme Court approved the line of case law which *broadly* interpreted the phrase, and with respect to complainant judicial review of the DPP, held at [20]:

> *The reality of the Appellants' application is that it is an attempt to require the Director of Public Prosecutions to prosecute Sir Mark Allen. That is just as much a criminal matter as the original decision of the Director not to prosecute him. I find it difficult to conceive that Parliament could have intended to distinguish between different procedures having the same criminal subject-matter and being part of the same criminal process. This would have been a strange thing to do. But if the draftsman had intended it, he could have achieved it easily enough, for example by omitting the reference to a "matter".*

14. The consequence of this finding, accepted and unchallenged by all, was that, if the appeal was a criminal cause or matter, and therefore could not be appealed to the Court of Appeal *per* s.18 SCA, then the correct forum to hear any appeal was the Supreme Court. Lord Lloyd Jones added at [47] subparagraph (5):

> *Challenges by way of judicial review to decisions to prosecute or not to prosecute are heard by a Divisional Court and then, as a criminal cause or matter, any appeal lies directly to the House of Lords. (R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; R (Corner House Research) v Director of Serious Fraud Office [2009] 1 AC 756. See also R*

(Pretty) v Director of Public Prosecutions [2002] 1 AC 800.) *Although in none of these cases was any point taken on jurisdiction, this well-established usage is clearly correct.* [Emphasis added]

ii. The intended litigants under the AJA

15. JUSTICE submits that this "well-established usage" is highly relevant to the current case. This is because such usage is beyond that which was intended and stipulated by Parliament in the AJA. S.1(1) reads, with emphasis added:

> *…an appeal shall lie to the Supreme Court**, at the instance of the defendant or the prosecutor,—***
>
> *(a) from any decision of the High Court in a criminal cause or matter.*

16. Clearly, appellants such as *Belhaj* and the appellant in this matter, who judicially review DPP decisions not to prosecute, are neither defendants nor prosecutors: they are complainants.

17. The interpretative provision in s.17 AJA evidences, in an exhaustive list of defendants and prosecutors, who Parliament intended to appeal under the AJA's provisions:

> *(1) In this Act any reference to the defendant shall be construed—*
>
> *(a) in relation to proceedings for an offence, and in relation to an application for an order of mandamus, prohibition or certiorari in connection with such proceedings, as a reference to the person who was or would have been the defendant in those proceedings;*
>
> *(b) in relation to any proceedings or order for or in respect of contempt of court, as a reference to the person against whom the proceedings were brought or the order was made;*
>
> *(c) in relation to a criminal application for habeas corpus, as a reference to the person by or in respect of whom that application was made,*
>
> *and any reference to the prosecutor shall be construed accordingly.*

iii. The standing of complainants

18. The fact that complainants were not anticipated is understandable; the business of the High Court has changed since 1960:
    a) Judicial review has significantly increased the courts' administrative role.
    b) The CPS, headed by the DPP, has become the public body responsible for the conduct of criminal proceedings in England and Wales, pursuant to the Prosecution of Offences Act 1985, and may take over at any time any other prosecutions instigated by another person (s.6(2) Prosecution of Offences Act 1985).
    c) The Human Rights Act 1998 has changed the basis upon which individuals can hold public bodies accountable and has extended the courts' powers in relation to such actions. This includes public bodies that prosecute criminal conduct.

19. The standing of complainants/victims has also developed, and they have received recognition as 'rights-holders'. Much of this development has happened since the legislation was last before Parliament, during the passing of the Constitutional Reform Act 2005:

    a) The European Court of Human Rights has recognised the State's positive obligation to protect the individual from other individuals, not just from state agents. The Supreme Court in *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11 considered the Strasbourg case law, including *MC v Bulgaria* [2005] 40 EHRR 20, confirming "the Strasbourg court in *MC* clearly specified that the state's duty had two aspects. The first was to enact criminal-law provisions which would effectively punish rape. The second, distinct but definite obligation was to carry out proper investigation and prosecution so that the laws could be applied effectively." [55]
    b) In the same case, on the question of a victim's standing to claim compensation, the Supreme Court held: "in order that the protective right

should be practical and effective, an individual who has suffered ill-treatment contrary to article 3 has a right to claim compensation against the state" [48].

c) The victim's right to review prosecution decisions was established in domestic law by *R v Christopher Killick* [2011] EWCA Crim 1608. This was subsequently provided for by Article 11 of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime and implemented by the DPP's Victims' Right to Review Scheme, commencing 5 June 2013.

iv. The expanded usage of s.1 AJA

20. Notwithstanding the lack of ambiguity in the legislation, the courts' "well-established" usage of s.1 AJA includes complainant judicial review appeals. This is an implicit acknowledgement of two things:
    a) First, the types of litigants who seek to appeal a "criminal cause or matter" have expanded beyond those which were anticipated by Parliament and provided for in s.1 AJA;
    b) Second, those additional appellants who are unable to access the Court of Appeal pursuant to s.18 SCA, should not be entirely barred from access to appeal from their first instance decision. JUSTICE submits that the courts have, in effect, conducted a s. 3 HRA read-in of the legislation so as to be compatible with the Convention. A complete bar to any appeal whatsoever for complainant appellants would be, we submit, a breach of Article 6 ECHR, and further or in the alternative, a certain breach of Article 14 in conjunction with Article 6.

21. While the intent of the courts is laudable, this implicit "read-in" is through established practice and not explicit legal reasoning. It has never been subject to argument nor explicitly decided upon by the courts. In JUSTICE's submission it is therefore vitally important that this Court consider the jurisdictional question posed in this appeal and provide clarity for all appellants as to whether the AJA complies with the ECHR.

22. JUSTICE submits that whilst the "established usage" alleviates a direct violation of Article 6 ECHR by ensuring there is no complete bar to appeal, the same is not true when Article 14 is considered in conjunction with Article 6. JUSTICE seeks to draw the court's attention to the difference in treatment which arises if complainants are subject to the same provision as defendants and prosecutors.

B. Compliance of s.1 AJA with Article 14 ECHR in conjunction with Article 6

23. JUSTICE submits that s.1 AJA, as it is currently applied, is not compliant with Article 14 ECHR in conjunction with Article 6 for the following reasons:
    a) As a result of being a complainant, the complainant appellant enjoys less favourable treatment in accessing appeal, which is within the ambit of Article 6.
    b) The differential treatment can be seen by comparing complainant appellants with two other analogous categories of appellants: (1) defendants and prosecutors in criminal causes or matters appealing from the High Court ("s.17 litigants") and (2) appellants in civil judicial reviews from the High Court.
    c) Such treatment is discriminatory, as it is disproportionate to the legitimate aims of the provision.

i. Discrimination: ambit and status

24. It is clear that a person's access to appeal proceedings is within the ambit of Article 6 ECHR. It is in the enjoyment of this right that the complainant is treated differently, and thus is protected by Article 14 from unlawful discrimination.

25. The basis of such discrimination falls within the "other status" category listed in Article 14 ECHR. The European Court of Human Rights has defined "other status" as "differences based on an identifiable, objective, or personal characteristic, or "status", by which individuals or groups are distinguishable from one another."

(*Novruk and Others v. Russia*, App Nos 31039/11 and others, 15 March 2016). The Supreme Court finding that an extended licence prisoner held "other status" in comparison to an early release prisoner, confirmed a broad approach in *R (on the application of Stott) v Secretary of State for Justice* [2018] UKSC 59:

> *Firstly, the opening words of the relevant phrase, "on any ground such as", are clearly indicative of a broad approach to status. Secondly, there is ample authority in the ECtHR, the House of Lords and the Supreme Court to support the view that the words "any other status" should not be interpreted narrowly. Thus, in Clift (HL) para 48, Lord Hope of Craighead stated that "a generous meaning" should be given to the words "or other status" while recognising that "the proscribed grounds are not unlimited". Similarly, in R (RJM) v Secretary of State for Work and Pensions [2009] AC 311 ("RJM"), Lord Neuberger of Abbotsbury at para 42 spoke of "a liberal approach" to the grounds on which discrimination was prohibited. In Clift (ECtHR), paras 55 and 56, the ECtHR spoke of the listed examples of status as being "illustrative and not exhaustive" and suggested that a wide meaning be given to the words "other status".* (Lord Hodge at [185])

26. JUSTICE submits that the status of being a complainant seeking judicial review in a criminal cause or matter is an identifiable, objective characteristic by which they can be distinguished from others. It does not matter that it is not an "innate" quality like sex, race, or sexual orientation, since Article 14 also includes acquired statuses such as marital or nonmarital status, habitual residence or extended licence prisoner (see *Stott* at [209]). As such, a complainant litigant is clearly a "status" pursuant to Article 14.

ii. Analogous litigants

27. Complainants appealing from the High Court to the Supreme Court under the AJA are in an analogous position to defendants and prosecutors (as defined in s. 17) appealing from the High Court to the Supreme Court pursuant to the same provision. The courts' established usage of s.1 AJA to provide an appeal route for

these complainants, despite their not being specified in the statute, is evidence of the acceptance of their analogous situations. However, in JUSTICE's submission, complainants are not similarly treated, as a result of their distinct status.

a) S.17 litigants

28. The litigants identified in s.17(1) have the following access to appeal:

a. The first type of s.17 litigant is the defendant or prosecutor in the High Court "in relation to proceedings for an offence" (s.17(1)(a)). Proceedings for an offence do not commence in the High Court. Therefore, whilst their appeal to the Supreme Court must be certified pursuant to s.1(2), this would be their *second* appeal, having already appealed to the High Court by way of case stated from either a magistrates' court (s.111 Magistrates Court Act 1980) or the Crown Court (not on indictment) (s.28 SCA).

b. The second type of s.17 litigant applies "for mandamus, prohibition or certiorari in connection to proceedings for an offence" (s.17(1)(a)). Whilst such applications are heard in the High Court at first instance, the AJA notably states such applications are specifically "in connection with … proceedings [for an offence]" and the litigant is "the person who was or would have been the defendant [or prosecutor] in those proceedings". These applications[3] are therefore sought by a litigant in relation to criminal proceedings in which they would also have standing. They must also satisfy the s.1(2) certification requirement to appeal to the Supreme Court, but this is therefore *in addition to* their standing and appeal routes in the substantive criminal proceedings with which the application for a mandatory, prohibiting or quashing order is connected.

c. The third type of litigant, at s.17(1)(b), is a defendant or prosecutor who appeals in contempt of court proceedings (pursuant to s.13 AJA). The test

[3] In 1960 they were for the prerogative writs of mandamus, prohibition or certiorari, the current equivalent of which is a mandatory, prohibiting or quashing order, as renamed by s.29 SCA 1981.

and the certification requirement at s.1 applies to these appeals, including from the High Court to the Supreme Court, *unless* the High Court was the court of first instance. In that case, the s.1(2) certification requirement *does not* apply (s.13(4)).

d. Finally, the fourth type of litigant, at s.17(1)(c), is a defendant or prosecutor who appeals "a criminal application for habeas corpus" (pursuant to s.15 AJA). Again, the test and the certification requirement at s.1 applies to these appeals, including from the High Court to the Supreme Court, *unless* the High Court was the court of first instance. In that case the s.1(2) certification requirement *does not* apply (s.15(3)).

Comparison with complainant

29. In this case, the complainant's access to appeal is comparatively restricted as follows:
    a. The High Court is her court of first instance unlike defendants or prosecutors who come to the High Court by way of case stated.
    b. She does not have nor will she have standing in any criminal proceedings with which a High Court application is connected.
    c. As a result, unlike a defendant or prosecutor applying for a mandatory, prohibiting or quashing order (or any other High Court order for that matter) in connection to proceedings for an offence, she has no route of appeal in the substantive proceedings to the Court of Appeal (Criminal Division).
    d. She has significantly narrower access to appeal from a decision at first instance in the High Court than a defendant or prosecutor in contempt of court matters or in a criminal application for habeas corpus. Unlike them, she must provide a certificate from the High Court that her appeal from a first instance decision features a point of law of general public importance, whilst that requirement is specifically disapplied for defendants and prosecutors where the High Court sits as the court of first instance (see ss. 13(4) and 15(3)).

30. The comparison illustrates that the complainant is in a far less favourable position than the litigants defined in s. 17. This is unsurprising because the AJA clearly did not foresee complainant litigants.

b) Civil judicial review litigants

31. Complainants are also in a less favourable position in bringing judicial review of the DPP compared with bringing judicial review of another public body not in a criminal cause or matter.

32. The broad categories of civil litigants and criminal defendants were found not to be analogous in *R v Dunn* [2010] EWCA Crim 1823. In that matter the Court of Appeal was interpreting s.33(2) Criminal Appeal Act 1968, which contains the same certification requirement, but for second appeals, namely those to the Supreme Court from the Court of Appeal. The Court was unconvinced with the argument advanced that there had been a violation of Article 14 ECHR, finding that "there is a difference in the nature of criminal and civil justice." [35]

33. However, this finding can be distinguished when the analogous situation of judicial review litigants is considered, and the specific difference in treatment between a complainant judicial review of a DPP decision compared with an applicant in a "civil" judicial review. In JUSTICE's submission these categories cannot be cleanly dismissed as being different in nature, as was the case in *Dunn*. Both are public law proceedings in which the court provides the same function: a legal check on the power of the executive.

34. The comparison of an action against the DPP and an action against the Independent Office for Police Conduct ("IOPC") arising from the same conduct is an apt example:

a) In both judicial reviews, the complainant would seek to challenge a public body's failure to instigate proceedings against a police officer accused of criminal conduct.
b) The challenge to the IOPC's failure to recommend or direct disciplinary proceedings could be premised on the same factual behaviour by the officer towards the complainant.
c) Both proceedings would be heard by the High Court and litigated in accordance with the Civil Procedure Rules, up until the point of the High Court decision.
d) At the point of the High Court decision, the challenge against the DPP would be a "criminal cause or matter" whilst the IOPC judicial review would continue as a civil matter.
e) As a result, the application against the IOPC's decision could be appealed to the Court of Appeal from the High Court, under s.16 SCA 1981. Upon an application for permission to appeal, the High Court would consider if the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard (CPR 52.6).[4] If refused, the appellant could repeat the application to the Court of Appeal (CPR 52.3) which would apply the same test. This has successfully rectified incorrect decisions in the High Court, such as in *R (On the Application Of Miah) v The Independent Police Complaints Commission & Anor* [2017] EWCA Civ 2108 in which the complainant's initial judicial review of the IPCC was unsuccessful but was successfully appealed to the Court of Appeal (Civil Division).
f) There would also then be a further appeal route from the Court of Appeal to the Supreme Court under s.40 of the Constitutional Reform Act 2005. Permission could be sought from the Court of Appeal and from the Supreme Court itself.

Comparison with complainant

[4] The Civil Procedure (Amendment No. 3) Rules 2016, S.I. 2016/788, pursuant to s.1, Civil Procedure Act 1997.

35. Conversely, the judicial review of the DPP's decision not to prosecute would be restricted to the admissibility criteria set out in s.1(2) AJA: not only would she require a point of law of general public importance as a prerequisite, but in addition, the role of certifying that point of law would be at the sole discretion of the court of first instance.

36. JUSTICE accepts the well-established principle that the High Court will rarely intervene in the prosecutorial decision-making process and that a significant margin of discretion is given to prosecutors, including in victim review challenges (e.g. *L v Director of Public Prosecutions and Another* [2013] EWHC 1752 (Admin)).

37. However, this high threshold must not be conflated with access to appeal. Access to appeal exists because first instance courts sometimes, unfortunately, make mistakes. The availability of permission to appeal provides for scrutiny of first instance decision making. The complainant in a DPP judicial review is no more insulated from judicial error than the IOPC complainant. Indeed, the fact that there is such a high threshold for judicial review in DPP challenges means it is all the more important that the first instance tribunal has some level of scrutiny.

38. However, there is no judicial scrutiny of the first instance decision for DPP judicial reviews; they can be heard, refused, and barred from any appeal all by the same first instance court.

iii. Justification

39. Given the above difference in treatment, JUSTICE submits it is clear that any complainant in the appellant's position is discriminated against in violation of Article 14 ECHR in conjunction with Article 6 ECHR in her access to appeal, on account of her status as a complainant seeking judicial review in a criminal cause or matter.

40. The difference in treatment must be evaluated against whether it is objectively and reasonably justifiable, and

> "*[t]he existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration … A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised*." (*Belgian Linguistic case (No. 2*) (1968) 1 EHRR 252 at [B10]).

41. JUSTICE accepts that restricting access to appeal can be pursuant to the legitimate aims of the fair administration of justice, control of the courts' workload and the need for finality in criminal proceedings. Notwithstanding, the effect of the difference in treatment must still be proportionate to the aim.

42. JUSTICE submits that s.1 AJA, taken with s.18 SCA, disproportionately impacts complainants' access to appeal. Unlike defendants and prosecutors in the High Court appealing under s.1 AJA, or civil judicial review litigants appealing to the Court of Appeal, the appellant has:
    a. no standing in any substantive criminal proceedings and therefore no access to the appeal routes therein;
    b. no appeal from a first instance decision other than on a point of law of general public importance; and
    c. no consideration of that appeal test by any other court than the court of first instance.

43. Whilst the Court may consider the aims of Parliament in the fair administration of justice to be justifiable in applying various combinations of the above three restrictions on litigants' access to appeal from the High Court generally, **only criminal complainants are subject to all three.**

44. These three restrictions in combination produce a particularly onerous restriction on such litigants, resulting in what JUSTICE submits is an unnecessary and disproportionate limitation on access to justice. Furthermore, there was no Parliamentary intention to affect complainant appeals in this way, since they were

not the intended litigants under the AJA. The intention of Parliament toward complainants is unknown and the Court cannot therefore look to whether the policy is justifiable by way of their identifiable status.

F. Conclusion

45. JUSTICE welcomes the important opportunity this case presents for the Court to consider access to justice for litigants in the appellant's position.

46. The jurisdictional issue it raises illustrates that actions such as the appellant's – a complainant judicial review of a prosecuting public body – do not fit comfortably within the bipartite legislative scheme for civil and criminal appeals. Instead, complainant judicial reviews are caught in a lacuna of the law, their access to appeal falling far short of other litigants' in analogous situations. This is not as a result of any direct aim of Parliament to stymie the appellant's access to appeal, but rather it is a consequence of the, rightly, developing causes before the High Court outgrowing the legislative provisions in place for appeal.

47. For the reasons set out above, JUSTICE submits that:

    (1) Parliament did not intend the Administration of Justice Act 1960 to provide appeal rights to complainants in judicial review proceedings;

    (2) The extension by the courts of the AJA to complainants is an indirect attempt to read in appellate rights;

    (3) Nevertheless, complainants seeking to appeal a refusal of judicial review in a criminal cause or matter have inadequate appeal rights as compared to both defendants and prosecutors in criminal cases or other matters under the AJA (habeas corpus and contempt of court) AND appellants in civil judicial review proceedings, which may be borne out of the same facts but against a different authority;

(4) Therefore, complainants in judicial review proceedings raising a criminal cause or matter who seek to appeal are treated less favourably in violation of Article 14 ECHR in conjunction with Article 6 ECHR and that treatment is disproportionately discriminatory.

48. In light of the access to justice issues highlighted in this application for permission to appeal, JUSTICE respectfully invites the Court to pay close scrutiny to the question of its jurisdiction and the operation of the legislative framework providing for a complainant's right of judicial review and appeal before determining permission in this appeal.

JODIE BLACKSTOCK
ELLEN LEFLEY
21.02.2020

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PURSUANT TO RULE 15

SUPREME COURT RULES 2009

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