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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE

(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY GERARD MAGEE FOR JUDICIAL REVIEW

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Before: Kerr LCJ, Campbell LJ and Sir Michael Nicholson

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Sir Michael Nicholson

Introduction

[1] This is an appeal against the judgment of Girvan J (as he then was) refusing the application of Gerard Magee ("the appellant") for judicial review of decisions made by the Secretary of State for Northern Ireland ("the Secretary of State").

Factual background

[2] On 21 December 1990 the appellant was convicted following a non-jury trial at Belfast Crown Court of a number of scheduled offences. The evidence against him consisted solely of oral admissions and a written statement allegedly made by him during police questioning in Castlereagh Holding Centre ("Castlereagh").

[3] At the appellant's trial he contested the admissibility of his written statement of admission alleging that he had suffered substantial physical ill-treatment from two of the interviewing detectives. Following a *voir dire* the trial judge rejected the appellant's allegations of ill-treatment and found that he was satisfied beyond reasonable doubt that the appellant had not been

subjected to torture, inhuman or degrading treatment. He was convicted and sentenced to concurrent terms of imprisonment amounting to an effective sentence of 20 years.

[4] The appellant appealed the conviction and sentence to the Court of Appeal and his appeal was dismissed. He then made an application to the European Court of Human Rights, making allegations of violations of Article 6 of the Convention in relation to the conduct of his criminal trial and the resulting conviction and sentence. In paragraph 40 of its judgment the European Court stated the central issue in the following terms:

> "*The court considers that the central issue raised by the applicant's case is his complaint that he had been prevailed upon in a coercive environment to incriminate himself without the benefit of legal advice.*"

[5] The European Court of Human Rights held that the circumstances of the appellant's detention in Castlereagh Holding Centre led to a violation of Article 6(1) of the European Convention read in conjunction with Article 6(3)(c) because the appellant had been denied access to a solicitor during his detention in Castlereagh. The relevant passages of the judgment state as follows:

> "43. The Court observes that prior to his confession the applicant had been interviewed on five occasions for extended periods punctuated by breaks. He was examined by a doctor on two occasions including immediately before the critical interview at which he began to confess. Apart from his contacts with the doctor, the applicant was kept incommunicado during the breaks between bouts of questioning conducted by experienced police officers operating in relays. It sees no reason to doubt the truth of the applicant's submission that he was kept in virtual solitary confinement throughout this period. The Court has examined the findings and recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") [dated July 1993] in respect of the Castlereagh Holding Centre (see paragraph 30 above). It notes that the criticism which the CPT levelled against the Centre has been reflected in other public documents (see paragraph *35* above). The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to

> breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the Court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confess to his interrogators. Irrespective of the fact that the domestic court drew no adverse inferences under Article 3 of the 1988 Order, it cannot be denied that the Article 3 caution administered to the applicant was an element which heightened his vulnerability to the relentless rounds of interrogation on the first days of his detention.
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> 1. In the Court's opinion, to deny access to a lawyer for such a long period and in a situation where the rights of the defence were irretrievably prejudiced is — whatever the justification for such denial — incompatible with the rights of the accused under Article 6 (see, *mutatis mutandis,* the John Murray judgment cited above, p. 55, § 66).
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> 2. It is true that the domestic court found on the facts that the applicant had not been ill-treated and that the confession which was obtained from the applicant had been voluntary. The Court does not dispute that finding. At the same time, it has to be noted that the applicant was deprived of legal assistance for over forty-eight hours and the incriminating statement which he made at the end of the first twenty-fours of his detention became the central platform of the prosecution's case against him and the basis for his conviction.
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> 3. Having regard to the above considerations, the Court concludes that there has been a violation of Article 6 § 1 of the Convention taken in conjunction with Article 6 § 3(c) thereof as regard the denial of access to a solicitor."

[6] Following the decision of the European Court of Human Rights the Criminal Cases Review Commission referred the appellant's case back to the Court of Appeal under section 10 of the Criminal Appeal Act 1995. The Court

of Appeal found that the appellant's conviction was unsafe and quashed it on the grounds that the ECtHR had made a direct finding on the facts of the case that the denial of access to a solicitor, against the background of the conditions in Castlereagh; constituted a violation of Article 6(1) in conjunction with Article 6(3)(c) of the Convention.

Decisions of the Secretary of State

[7] The appellant applied to the Secretary of State for compensation under section 133 of the Criminal Justice Act 1988 and his application was refused. The Secretary of State also refused to pay compensation under an *ex gratia* scheme.

Section 133 Criminal Justice Act 1988

[8] Section 133 of the Criminal Justice Act was passed in order to give effect to the Government's obligations under Article 14(6) of the International Convention on Civil and Political Rights.

[9] The Secretary of State rejected the appellant's application under section 133 on the following grounds:

(i) The grounds on which Mr Magee's conviction was quashed do not reflect any "new or newly discovered fact", rather his conviction was quashed because of a breach of Article 6 of the Convention and the Court of Appeal's assessment that his conviction was unsafe.

(ii) A "miscarriage of justice" within the meaning of section 133 occurs only when an innocent accused person is wrongly convicted.

Ex Gratia Scheme

[10] Compensation is also payable in exceptional circumstances under an *ex gratia* scheme where a person has spent time in custody following a wrongful conviction. The Secretary of State has given as examples of exceptional circumstances.

"1. Where the conviction had resulted from serious default on the part of the police or some other public authority.

2. … Exceptional circumstances include cases where it can be shown that the applicant for compensation has been completely exonerated of the crime of which he was convicted or there has been judicial error or misconduct that is so great as to give rise to exceptional circumstances. There is no exhaustive definition of exceptional circumstances …

In the instant case the Secretary of State has determined that the appellant is not entitled to an *ex gratia* payment because his conviction "did not result from serious default on the part of the police or other public authority" and has stated that this conclusion is central to his determination of the appellant's application.

Decision of Trial Judge

[12] Girvan J found against the appellant on two grounds. Girvan J concluded firstly that:

> "I would hold against the applicant on the ground that he has not established that he was a victim of a miscarriage of justice attributable to any failure in the judicial process." [paragraph 7 of his judgment].

[13] He then went on to conclude that:

> "The applicant must point to a reversal of his conviction on the ground of the discovery of a new or newly discovered fact. The ground of the Court of Appeal reversal of his conviction was not the discovery of a new or newly discovered fact but was the result of a legal ruling on facts which had been known all along … the critical ingredient in the present case was the absence of access to a legal adviser. This did not constitute a new or newly discovered fact. It was a given in the course of the trial. The European Court ruling (which led to the Court of Appeal reversing the convictions on the reference) was a legal ruling on facts known all along." [paragraph 18 of his judgment].

Miscarriage of justice

[14] The meaning of the term "miscarriage of justice" within section 133 of the Criminal Justice Act 1988 was considered, but not conclusively determined, by the House of Lords in *R (Mullen) v Secretary of State for the Home Department*[2005] 1AC 1. This is expressly acknowledged by the trial judge in his judgment in which he states:

> "Lord Bingham and Lord Steyn took different views on whether an applicant for compensation would need to prove his innocence before the case established an entitlement to compensation. Reading the speeches of the Law Lords together it is difficult to say that the House has reached a considered view on that issue. The majority were content to found the decision on the proposition that there had been no failure of the judicial process." [paragraph 7]

[15] The appellant in *ex parte Mullen* had argued that "any defendant whose conviction is quashed" is in effect automatically entitled to payment of compensation. The House of Lords conclusively rejected that argument.

[16] There was nonetheless a divergence of opinion as to the precise meaning of the term "miscarriage of justice", a matter not strictly necessary to the determination of the case. In summary, Lord Bingham rejected the argument advanced by the Secretary of State in identical terms to the reasoning of the Secretary of State in the instant case that "only when a defendant, finally acquitted in circumstances satisfying the statutory conditions, is shown beyond reasonable doubt to be innocent of the crime of which he had been convicted." He favoured a more expansive meaning of "miscarriage of justice to encompass "failures of the trial system." By way of contrast Lord Steyn concluded that:

> "the autonomous meaning of the words 'a miscarriage of justice' extends only to 'clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent."

Lord Rodger expressed a preference for Lord Steyns's reasoning. Lords Scott and Walker declined to express a considered view. All three took the view

that it was unnecessary on the facts of the case to reach a conclusive view on the meaning of "miscarriage of justice" under s.133.

[17] The appellant contended before us that Lord Bingham's approach is to be preferred and that the term "miscarriage of justice" attracts a broader meaning than cases in which an appellant can demonstrate "beyond a reasonable doubt" that he is innocent of the charges for which he was convicted. In advancing this argument the appellant relied in the first instance upon the interpretative obligation contained in section 3 of the Human Rights Act 1998 which, it was argued, must inform the manner in which section 133 of the Criminal Justice Act 1988 is interpreted. It was contended that interpreting the term "miscarriage of justice" the interpretation must be informed by the European Court of Human Rights' approach to the entitlement to a "fair trial" within the meaning of Article 6 of the Convention. Specifically it was argued that a person who has been denied a "fair trial" within the meaning of Article 6, has sustained a "miscarriage of justice" within the meaning of section 133 of the Criminal Justice Act 1988.

[18] Thus the appellant contended that the term "miscarriage of justice" has a broader meaning than that ascribed to it by the Secretary of State, and sufficiently broad to encompass the facts of the appellant's case for the following reasons:

(i) Following the passage of the Human Rights Act 1998 and the interpretative obligation contained in section 3 thereof, section 133 of the Criminal Justice Act 1988 must be interpreted in a manner consistent with Convention rights. In consequence it was submitted that the phase "miscarriage of justice" must be interpreted in a manner consistent with the appellant's Article 6 rights. In those circumstances it was urged upon us that a person who has been denied a "fair trial" within the meaning of Article 6, has sustained a "miscarriage of justice" within the meaning of section 133 of the Criminal Justice Act 1988.

(ii) All of the Law Lords accepted that the meaning of s. 133 of the Criminal Justice Act was informed by the meaning of Article 14(6) of the ICCPR, as Lord Bingham noted:

> "Article 14(6) of the ICCPR is the provision of that instrument which is directed to ensuring that defendants shall be fairly tried. Despite differences of

wording, and substance, it matches art 6 of the European Convention."

Thus, it was argued, a finding by the ECtHR of a violation of Article 6 of the Convention must inform the meaning of "miscarriage of justice" within s. 133 of the Criminal Justice Act 1988 and the term must be sufficiently broad to encompass a finding that the appellant did not have a fair trial.

(iii) In circumstances where: the only evidence against the appellant was a confession made by him under conditions described variously as:

"oppressive"; "intimidating"; or "psychologically coercive"; and, where he was subject to a "prolonged and intensive interrogation conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent", it was contended that there had been a "miscarriage of justice" within the meaning of s. 33 of the Criminal Justice Act 1988.

(iv) Following the ruling by the European Court of Human Rights that the appellant had been denied a fair trial (within the meaning of Article 6) and the ruling by the Court of Appeal that his conviction was 'unsafe', the appellant was entitled to the presumption of innocence. In these circumstances the determination by the Secretary of State that the appellant was not an "innocent person ... wrongly convicted" violated Article 6(2) of the European Convention on Human Rights and was in breach of his obligations under section 6 of the Human Rights Act 1998.

(v) The judicial process failed the appellant in that, despite the fact that the circumstances in which his confession was obtained amounted to a breach of the entitlement to a fair trial, the trial judge in his criminal trial who had a discretion to refuse to admit the appellant's confession, failed to exercise that discretion. Given that the only evidence against the appellant was his own confession, the discretion exercised by the trial judge resulted directly in his conviction in breach of his entitlement to a fair trial. There was in consequence a clear failure of the judicial process. Girvan J was in error in refusing to make such a finding.

[19] The respondent contended that the appellant's case did not satisfy 'the majority of the House of Lords' test of demonstrated evidence of innocence, did not satisfy Lord Bingham's test of a "failure of the trial process"; did not satisfy either test beyond reasonable doubt in any event.

New or Newly Discovered Fact

[20] Girvan J also found against the appellant in concluding that the appellant had failed to establish the existence of a new or newly discovered fact leading to the reversal of his conviction.

[22] In *Re McFarland* No. 2 [2004] 1 WLR 1289 the House of Lords addressed the interpretation to be applied to a "new or newly discovered fact". In that case the House rejected the submission that "the content of the conversation between the appellant's counsel and the resident magistrate in chambers" constituted a "new or newly discovered fact". Rather the House concluded that:

> "the ground of the reversal was not ... the discovery of a new or newly discovered fact but a legal ruling on facts which had been known all along."

[23] Counsel for the appellant argued that in the instant case the appellant's conviction was quashed as a direct consequence of the conclusion of the European Court of Human Rights that there had been a violation of his right to a fair trial. The conclusion that the appellant had been denied a fair trial was informed by two matters:

(i) The conditions pertaining to the Appellant's detention in Castlereagh Police Station, conditions described by the European Committee for the Prevention of Torture, Inhuman or Degrading Treatment or Punishment ("CPT"):

> "109. ... Even in the absence of overt acts of ill-treatment, there is no doubt that a stay in a holding centre may be — and is perhaps designed to be — a most disagreeable experience. The material conditions of detention are poor (especially at Castlereagh) and important qualifications are, or at least can be, placed upon certain fundamental rights of persons detained by the police (in particular, the possibilities for contact with the outside world are severely limited throughout the whole period of detention and various restrictions can be placed on the right of access to a lawyer). To this must be added the intensive and potentially prolonged character of the interrogation process. The cumulative effect of these factors is to place persons detained at the holding centres under a considerable degree of psychological pressure. The CPT must state, in this connection, that to impose upon a detainee such a degree of pressure as to break

his will would amount, in its opinion, to inhuman treatment."

(ii) The denial to the Appellant of access to a solicitor, despite requests for access to a solicitor.

[24] It was contended on behalf of the appellant that the following can be characterised as new or newly discovered facts within the meaning of section 133:

(i) The conclusion by the CPT that the material conditions in Castlereagh Police Station coupled with the intensive and prolonged character of the interrogation process placed persons detained therein under a "considerable degree of psychological pressure" which if sufficient to break the will of a detainee would amount to "inhuman treatment". The appellant's contention that this was a new or newly discovered fact was not addressed in the judgment of the trial judge.

(ii) The decision of the European Court of Human Rights that the appellant' s Article 6 rights had been violated and that he had not had a "fair trial" was addressed by the trial judge and he concluded that the judgment of the Court was not a new or newly discovered fact but rather a legal ruling on the facts as known. The judgment however ignored the fact that at the time of the appellant's conviction it was believed by all concerned, including the trial judge, that the procedures adopted were in accordance with, rather than in breach of, Article 6 of the European Convention on Human Rights. The new or newly discovered fact was the combination of the conditions in Castlereagh, the denial of access to a solicitor and, the Article 3 caution which constituted a breach of the appellant' s fair trial rights protected by Article 6 of the Convention.

(iii) The decision by the ECtHR that the conditions in Castlereagh constituted an "intimidating atmosphere specifically devised to sap [the Appellant's] will and make him confess to his interrogators" did not feature in the appellant's original trial.

[25] In reply, counsel for the respondent argued that the critical ingredient in the instant case was the absence of a legal adviser which formed the sole basis of the Court of Appeal's decision to quash the convictions. This was a fact known throughout the history of the proceedings. The ECtHR made a legal ruling upon facts which were known all along. They did not find that the conditions at Castlereagh constituted "inhuman treatment". They accepted that the admissions of the appellant were voluntary as found by the original trial judge. The third, fourth and fifth of the qualifying conditions under section 133 were (c) a new or newly discovered fact (d) showing

beyond reasonable doubt (e) that there has been a miscarriage of justice. These had not been fulfilled.

Ex Gratia Scheme

[26] As an alternative to s. 133 of the Criminal Justice Act compensation is also payable in exceptional circumstances under an *ex gratia* scheme where a person has spent time in custody following a wrongful conviction. As set out above, the Secretary of State has given as examples of exceptional circumstances:

> "I. Where conviction has resulted from serious default on the part of a member of a police force or some other public authority.
>
> II . . . . Exceptional circumstances include cases where it can be shown that the applicant for compensation has been completely exonerated of the crime of which he was convicted or there has been judicial error or misconduct that was so great as to give rise to exceptional circumstances. There is no exhaustive definition of exceptional circumstances."

[27] Girvan J ruled on this issue as follows:

> "On the question whether the applicant should have succeeded under the ex gratia scheme the conclusion of the Secretary of State that the conviction did not result from serious default on the [part] of members of the police force or any other public authority could not be considered to be Wednesbury unreasonable. The relevant statutory provisions relating to a detained person's rights of access to solicitors were properly complied within the then prevailing circumstances. It was open to the Secretary of State to conclude that the decision to operate the conditions at Castlereagh . . . was not the product of serious default on the part of members of the police force. Even if the conditions did not comply with the Convention, at the time there was no breach of domestic law." [paragraph 9]

[28] The appellant pointed to the fact that Lord Scott when considering the differences in the approach of Lord Bingham and Lord Steyn to the meaning of the term "miscarriage of justice" stated that:

> "In most, if not all, of the miscarriage of justice cases in which Lord Steyn would refuse but Lord Bingham would allow a s. 133 claim, the facts would be likely to be such as to attract a discretionary payment of compensation by the Home Secretary. So I doubt whether there would be much practical difference in result between the two rival views."

In the instant case the Secretary of State determined that the appellant was not entitled to an *ex gratia* payment because his conviction "did not result from serious default on the part of the police or other public authority."

[29] The respondent argued in reply that the appropriate legal touchstone was that of Wednesbury irrationality and that the Secretary of State's decision was, on the material before the court, unchallengeable in this respect. What constitutes "serious default" is a matter for the Secretary of State. Lord Scott stated in *re McFarland*:

> "Provided the Secretary of State avoids irrationality in his decisions about who is and who is not to receive ex gratia payments, and provided the procedure he adopts for the decision-making process is not unfair, I find it difficult to envisage circumstances in which his decision could be held on judicial review to be an unlawful one."

[30] Girvan J also considered in the alternative whether the Appellant fell within the "exceptional circumstances" argument for the payment of compensation under the ex gratia scheme and concluded as follows:

> "in relation to the wider "exceptional" circumstances argument for the payment of compensation under the ex gratia scheme that limb of the policy requires the Secretary of State to exercise a discretion Lord Bingham pointed out in *Mullen* that the Secretary of State must enjoy some latitude in the administration of the ex gratia scheme so long as he acted fairly, rationally, consistently and in a way which did not defeat legal expectations. These are essentially matters for a decision by the Secretary of State. He was entitled to conclude that the applicant had not been exonerated of the crime. He had confessed to crimes and the court had justifiably concluded that the confession was not obtained in circumstances that it should not be treated as voluntary. The Secretary of State was entitled to conclude that there had been no judicial error or misconduct giving rise to exceptional

> circumstances. Indeed the trial judge was bound to apply domestic laws [that] then stood and reached a decision which was entirely consistent with the domestic law." See para 10 of his judgment.

[31] Counsel for the appellant contended that the Secretary of State and Girvan J were public authorities, bound by the obligations of section 6 of the Human Rights Act 1998 not to act in a manner incompatible with the appellant's Article 6 rights. Girvan J was also bound to "take into account" a judgment of the European Court of Human Rights, in this instance the judgment involved this appellant in the case of *Gerard Magee v UK*. The Court of Appeal took the judgment into account in concluding that the appellant's conviction was unsafe. Girvan J failed to take the judgment into account, as required by section 2 of the HRA and erred in failing to do so.

[32] In response counsel for the respondent cited Lord Bingham's remarks in *Baleman and Howse* [1994] 7 Admin LR 175 at 184C:

> "It was essentially a question for the Secretary of State as to what he regarded as exceptional circumstances. It is difficult to imagine circumstances in which this court could properly interfere with a judgment by him that a case was not so exceptional as to justify special treatment."

Our conclusions

[33] Even if one applies the wider meaning of "miscarriage of justice" urged by Lord Bingham for section 133 of the Criminal Justice Act 1988 we consider that the appellant has not satisfied us that he was a victim of a miscarriage of justice. There was in our view no failure of the judicial process. Deferment of access to legal advice was part of the domestic law at the time of trial. The Human Rights Act was not then in force. The appellant received a fair trial in accordance with the domestic laws applicable at the time. The appellant did not dispute before the European Court that his statements of admission were true. The court did not dispute the trial judge's finding that the confessions were voluntary. The court took issue with the absence of legal advice for 48 hours. The Court of Appeal in Northern Ireland quashed the conviction on that ground alone, recognizing that at the time of trial the trial judge could not take that into account because of the emergency legislation. The fact that the regime in Castlereagh was oppressive was known to all. It was designed to be oppressive in order to deal effectively with the interrogation of terrorist suspects. The European Court did not find that the treatment of the appellant was "inhuman". There were no new or newly found facts. Girvan J examined carefully the judgment of the European Court. In our view there was, therefore, no breach of section

133. Although the decision of the Secretary of State was made in 2002 all the events occurred before October 2000.

[34] As to the question of an ex gratia payment we consider, as Girvan J did, that it would be inappropriate for us to interfere with the exercise of the Secretary of State's discretion in the absence of evidence that he acted unfairly, irrationally or inconsistently.

[35] Accordingly the appeal must fail.