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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

IN THE MATTER OF AN APPLICATION BY WILLIAM McFARLAND FOR JUDICIAL REVIEW

BEFORE: CARSWELL LCJ, CAMPBELL LJ, WEATHERUP J

CARSWELL LCJ

[1] This is an appeal against a decision given by Kerr J on 12 February 2002, whereby he refused the appellant's application for judicial review of a decision by the Secretary of State for Northern Ireland refusing to grant him compensation for a period of imprisonment served by him on foot of a conviction in the magistrates' court which was subsequently quashed by a Divisional Court. At the conclusion of the argument, which we heard on 11 June, we dismissed the appeal, with reasons to be given at a future date. This judgment now contains our reasons for that decision.

[2] The facts are fully set out in the reported decision of the Divisional Court in *Re McFarland's Application* [2000] NI 403, in which the court set aside the appellant's conviction and sentence for indecent assault, on the ground that a remark by the resident magistrate who dealt with the matter had misled the appellant and his counsel and accordingly the appellant's plea of guilty had been vitiated by a lack of true consent. We do not propose in this judgment to repeat the statement of facts set out at pages 405-7 of the Divisional Court's judgment and would adopt and refer to it where required.

[3] Compensation has for many years been paid *ex gratia* in exercise of the prerogative power to a limited class of persons detained in custody as the result of a wrongful conviction. Successive Home Secretaries have followed this practice in what they classed as exceptional cases. On 29 November 1985 the then Home Secretary the Rt Hon Douglas Hurd MP made a statement in the House of Commons concerning the practice which he proposed to operate thenceforth, which sought to implement the Government's treaty obligations under the International Covenant on Civil and Political Rights (the Covenant):

"There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted free pardons by the exercise of the royal prerogative of mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application ex gratia payments from public funds to persons who have been detained in custody as a result of a wrongful conviction.

In accordance with past practice, I have normally paid compensation on application to persons who have spent a period in custody and who receive a free pardon, or whose conviction is quashed by the Court of Appeal or the House of Lords following a reference of a case by me under section 17 of the Criminal Appeal Act 1968, or whose conviction is quashed by the Court of Appeal or the House of Lords following an appeal after the time normally allowed for such an appeal has lapsed. In future I shall be prepared to pay compensation to all such persons where this is required by our international obligations. The international covenant on civil and political rights [article 14.6] provides that:

> `When a person has by a final decision 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 conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that a non-disclosure of the unknown fact in time is wholly or partly attributable to him.`

> I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.
>
> There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought."

In a written answer given on 17 June 1997 the Home Secretary the Rt Hon Jack Straw MP confirmed on behalf of the incoming administration that he would continue to be bound by the terms of the *ex gratia* scheme set out in the 1985 statement.

[4] Section 133 of the Criminal Justice Act 1988 meanwhile introduced a measure of legal entitlement to compensation, in order better to conform with the provisions of the Covenant and of the European Convention on Human Rights:

> "(1) Subject to subsection (2) below, 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 or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

(2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State.

(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.

(4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.

(5) In this section "reversed" shall be construed as referring to a conviction having been quashed –

(a) on an appeal out of time; or

(b) on a reference –

(i) under section 17 of the Criminal Appeal Act 1968;

(ii) under section 263 of the Criminal Procedure (Scotland) Act 1975; or

(iii) under section 14 of the Criminal Appeal (Northern Ireland) Act 1980.

(6) For the purposes of this section a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted.

(7) Schedule 12 shall have effect."

The extra-statutory *ex gratia* scheme continues to co-exist with the statutory entitlement, and if a claim falls outside the ambit of the latter it may still be possible for a claimant to bring himself within the terms of the scheme adopted by successive governments.

[5] It appears to us clear from the terms of section 133(5) that since the appellant's conviction was quashed by the Divisional Court, it does not come within the definition of "reversed" set out in that subsection. The appellant must accordingly rely on the terms of the extra-statutory scheme, as his counsel accepted. The terms of that scheme are, however, very similar to those of section 133, and it is of little consequence to him under which the case falls.

[6] On 25 July 2000 the appellant's solicitors wrote to the Secretary of State asking for an *ex gratia* payment of compensation in respect of the period of four months which the appellant had spent in prison. The Northern Ireland Office (NIO) replied on 21 August setting out the terms of the Home Secretary's statement and declining payment on the ground that the appellant's case did not fall within any of them. The appellant's solicitors reiterated their request in a letter of 27 October, the burden of which was that the appellant did not receive a fair trial. The NIO replied on 16 November 2000 to the effect that the case did not come within any of the specific grounds and there were no exceptional circumstances of the type which would justify payment. The correspondence continued for some time, with the appellant's solicitors advancing a number of grounds supporting their claim for payment which were subsequently argued before us and the NIO rejecting them.

[7] Following an application for judicial review which was dismissed by agreement, the Secretary of State undertook to look at the matter afresh. When he had done so Mr David Mercer of the NIO wrote to the appellant's solicitors on 22 August 2001 in the following terms:

> "On behalf of the Secretary of State the Northern Ireland Office agreed to look afresh at your client's application for compensation made following the Divisional Court's order quashing his conviction for indecent assault.
>
> Firstly, we considered the position in relation to section 133 of the Criminal Justice Act 1988. That requires compensation to be paid following the reversal of a conviction or the grant of a pardon on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice. This was not the case here.
>
> We then considered whether your client was eligible for ex gratia compensation. There are two broad categories where ex gratia compensation is available:

> (1) where the conviction had resulted from serious default on the part of the police or some other public authority;
> (2) where there were exceptional circumstances.
>
> Category (1) excludes Mr McFarland's case as a Resident Magistrate is not a public authority.
>
> Under category (2), "exceptional circumstances" includes cases where it can be shown that the applicant has been completely exonerated of the crime of which he was convicted or there has been judicial error or misconduct that so great as to give rise to exceptional circumstances.
>
> Mr McFarland has not been completely exonerated and we believe that there has not been judicial error or misconduct so great as to give rise to exceptional circumstances.
>
> We have therefore concluded that your client is not eligible for compensation. However, we remain prepared to consider any further representations you may care to make on the matter."

The appellant's solicitors replied on 6 September 2001, again setting out a number of contentions the substance of which was argued before us.

[8] The present proceedings for judicial review were commenced on 16 October 2001, challenging the validity of the Secretary of State's decision contained in Mr Mercer's letter of 22 August 2001. The grounds set out in the statement were multifarious, but the principal arguments advanced by counsel on behalf of the appellant before the judge and on appeal were in essence the following:

1. The conviction was quashed as the result of a newly discovered fact, the erroneous remark made by the magistrate to counsel.

2. The NIO was in error in failing to classify the appellant's conviction in the circumstances of the case as a miscarriage of justice.

3. The appellant did not receive a fair trial and the NIO was in error in failing to take this into account.

4. The NIO misconstrued the true reason why the appellant's conviction was quashed by the Divisional Court.

5. The NIO's conclusion that the magistrate's behaviour was not exceptional misconduct was unreasonable.

[9] The judge disposed shortly of the argument that the conviction of the appellant was quashed on the ground of a new or newly discovered fact, and we can deal with it even more succinctly. As Sir Thomas Bingham MR held in *R v Secretary of State for the Home Department, ex parte Bateman and Howse* (1994, unreported), the ground of the reversal of the conviction was not a new or newly discovered fact but a legal ruling upon facts which were known all along. We fully agree with the judge's conclusion on this point.

[10] Moreover, we consider that there was not in this case a miscarriage of justice within the meaning of the Home Secretary's statement, which has to be construed in the context of the Covenant. In reaching this conclusion we find the reasoning of the Divisional Court in *R (on the application of Mullen) v Secretary of State of State for the Home Department* [2002] EWHC 230 (Admin) persuasive. In that case the applicant was wrongfully deported from Zimbabwe to the United Kingdom, where he was put on trial for terrorist offences and convicted. It was conceded that the outcome of the trial could not in itself be challenged, since it was entirely proper. He spent ten years in prison, then successfully appealed on the ground of the newly discovered fact of his wrongful deportation. His application for compensation was dismissed on the ground that there was not a miscarriage of justice, the application being founded upon section 133 of the 1988 Act. Simon Brown LJ examined the terms of Article 14.6 of the Covenant and the Explanatory Report relating to the Seventh Protocol to the European Convention on Human Rights (Article 3 of which is in exactly the same wording as Article 14.6 of the Covenant). This Explanatory Report makes it clear that the applicant for compensation must be "clearly innocent". Simon Brown LJ stated at paragraph 26 of his judgment:

> "In short, a miscarriage of justice in the context of section 133 means, in my judgment, the wrongful conviction of an innocent accused. Compensation goes only to those ultimately proved innocent, not to all those whose convictions are adjudged unsafe."

We agree with the decision in *Mullen* and do not find anything in what we said in *R v Gordon* [2001] NIJB 50 to be inconsistent with it. The latter case was concerned with the setting aside of a conviction on appeal, not the grant

of compensation, and the concept of a miscarriage of justice is different in each context.

[11] These conclusions would accordingly be sufficient to rule out the appellant's claim if, contrary to our opinion, it fell within section 133 of the 1988 Act. It also follows that the grounds for payment of compensation based on the terms of Article 14.6 of the Covenant do not apply. The appellant therefore has to bring himself within one of the other grounds set out in the Home Secretary's statement, namely, serious default on the part of a public authority or exceptional circumstances outside the previously recited categories.

[12] In the court below Mr Valentine argued on behalf of the appellant that the magistrate was a "public authority" for the purposes of this jurisdiction. On appeal before us Mr Larkin QC did not attempt to advance this argument, we think rightly in view of the English decisions in *Ex parte Bateman and Howse* and *R v Secretary of State for the Home Department, ex parte Garner* (1999, unreported).

[13] It was not suggested in argument that the appellant had been completely exonerated by any facts that had emerged in the proceedings before the magistrate or in the Divisional Court. Mr Mercer adverted to this point in paragraph 6 of his affidavit sworn on behalf of the Secretary of State. We consider that he was correct in concluding that this ground for payment of compensation was not applicable on the facts of the case.

[14] The gravamen of the case advanced on behalf of the appellant was that the magistrate's conduct was such as to constitute exceptional circumstances which would justify the payment of compensation. Mr Larkin argued that the Secretary of State and the judge had misconstrued the reasoning of the Divisional Court and that the conviction should properly be regarded as having been quashed by reason of misconduct on the part of the magistrate, not merely because he had made an error in respect of his jurisdiction and had misled the appellant thereby.

[15] Mr Mercer dealt with the classification of the circumstances and whether they were exceptional in paragraph 7 of his affidavit:

> "Under the second limb of the statement compensation may also be payable in cases where judicial error or misconduct has been so great as to give rise to exceptional circumstances. To attract compensation a judicial error must be exceptional within a class of what will already be serious and unusual defaults by the Judge or Magistrate involved. My approach to the term exceptional in

> this context was that a circumstance need not be unique or unprecedented or very rare but it cannot be one which is regularly or routinely or normally encountered. In considering this aspect of the case I had regard to the remarks of the Lord Chief Justice in the Divisional Court case about the conduct of the Resident Magistrate. In particular, I noted the Lord Chief Justice's view that the Resident Magistrate had misapprehended the extent of his powers to refer the Applicant's case to the Crown Court for sentence. I also noted that the Lord Chief Justice's view was that the plea of guilty of the Applicant was vitiated by a lack of true consent brought about by misapprehension stemming from the Magistrate's discussion with Counsel. Additionally I noted that the Lord Chief Justice's view was that the Applicant did not have his will overborne by pressure. In the context of the totality of the Lord Chief Justice's judgment I formed the view that the Magistrate's conduct or error was not so great as to give rise to exceptional circumstances within the meaning of the second limb of the statement."

[16] The burden of Mr Larkin's argument was that the appellant's plea of guilty was brought about by misconduct on the part of the magistrate. We are not able to accept that his conduct was the basic cause of the appellant's pleading guilty. The Divisional Court held that his will was not overborne, but he decided on his plea of his own free will. The reason why his conviction was set aside was because he was misled by the advice given by his counsel, which was in turn based on the magistrate's remark made to him in chambers. The court held that the plea was a nullity because of the misleading nature of the advice which the appellant received, as it was vitiated by the lack of true consent. That is a very different thing from his will being overborne. It appears clear from paragraph 7 of Mr Mercer's affidavit that he understood this very well, as did the judge in the court below (see pages 17-18 of his judgment).

[17] The appellant's counsel further suggested that it appears from paragraph 8 of Mr Mercer's affidavit that in considering the issues in order to give his advice to the Secretary of State he failed to have proper regard in any real sense to the factors which he there mentions. He submitted that in referring to these factors he merely brought them to mind but then ignored them, whereas he was bound to decide upon their validity: cf *Re Hegan's Application* [2000] NI 461 at 469, per Kerr J. As the judge pointed out, however, at page 18 of his judgment, the averments in paragraph 8 were

made in order to rebut the suggestion that the Secretary of State had left these factors out of account. They were not the actual conclusions which he had to reach. Those conclusions were, as Mr Mercer set out in his letter of 22 August 2001, that the appellant had not been completely exonerated and that there had not been judicial error so great as to give rise to exceptional circumstances. He states that in reaching those conclusions he did take into account the factors set out in paragraph 8. In that important respect this case differs from *Re Hegan's Application*, where the assessment of compensation was to be analogous to the evaluation of damages for civil wrong. In those circumstances the assessor was obliged not only to bear in mind the common law principles for assessing damages but actually to apply them. The remarks of Kerr J in that case have to be read in that context.

[18] We consider accordingly that the Secretary of State through his adviser Mr Mercer was not in error in the matters to which he was obliged to have regard in reaching his conclusions.

[19] The final argument presented on behalf of the appellant was that the decision of the Secretary of State was unreasonable in the *Wednesbury* sense, in that the only rational conclusion which he could have reached was that the magistrate had been guilty of such misconduct that the circumstances were so exceptional as to justify payment of compensation. The Divisional Court accepted in *Ex parte Garner* at page 21 of its judgment that it was possible in principle that judicial misconduct could be so gross as to give rise to exceptional circumstances for the purpose of the Home Secretary's consideration of compensation, although Rose LJ observed that it would no doubt be a very rare case indeed. In the subsequent case, however, of *R (on the application of Tawfick) v Secretary of State for the Home Department* (2000, unreported) the Divisional Court held that observations by the judge in the course of a trial, which the Court of Appeal had regarded as inexcusable, constituted such a rare case and that the Secretary of State's refusal of compensation could not be supported and must be quashed, the case being remitted to him for reconsideration. On this issue the judge held at page 13 of his judgment that it was quite impossible to say that the decision of the Secretary of State in the present case lay outside the range of reasonable responses to the question to be decided.

[20] We agree with the learned judge's conclusion. We accept the appellant's proposition that the magistrate should not have invited counsel into chambers and entered into his discussion of the strength of the prosecution case, which would have been likely to give the impression that he was encouraging the appellant to change his plea to one of guilty. It is right, however, to point out that the guidelines for seeing advocates in chambers now current had not then been promulgated. He undoubtedly misapprehended the extent of his powers and misinformed counsel on that point. The Secretary of State was, however, entitled to bear in mind, in

determining the issue that this judicial conduct, albeit unfortunate, did not overbear the appellant's will, even if it had the effect of vitiating his plea because of his lack of true consent. When he weighed up these factors the Secretary of State was in our view quite entitled to reach the conclusion that this case did not fall within the very rare class of cases qualifying for compensation on account of judicial misconduct. This ground of appeal also must fail.

[21] Before we conclude this judgment we must advert to the submission advanced by Mr Larkin that the appellant's conviction constituted a breach of Article 6 of the European Convention on Human Rights, which played quite a prominent part in his argument. We should observe, first, that the Human Rights Act 2000 had not come into force at the time of the appellant's conviction. Secondly, we agree with the conclusion expressed by the Divisional Court at pages 17-18 of its judgment in *Ex parte Garner* that where procedures at a trial have infringed Article 6(1) and the conviction is subsequently quashed on appeal, it does not follow that there is an unremedied breach of Article 6 unless and until compensation is paid in respect of the original conviction.

[22] Mr Mercer averred in paragraph 8 of his affidavit that he did have in mind and take account of whether the appellant had a fair trial and whether he had been deprived of the rights conferred upon him by Articles 5 and 6 of the Convention. As we have noted, this averment was made to rebut the suggestion that he took no account of these factors. It should be clearly understood, however, that his task was to determine whether there had been a miscarriage of justice (although he had previously concluded, as he states in paragraph 4(i), that there was no new or newly discovered fact) and whether the case fell within the exceptional class of cases justifying the payment of compensation. He could if he chose take into account whether the procedure at the appellant's trial constituted a breach of Article 6(1), but this was only one factor and not something on which he was required to reach a conclusion in order to make a valid decision. To that extent accordingly Article 6 was not a central issue either in the Secretary of State's determination or the question to be decided by this court.

[23] For the reasons which we have set out in this judgment we held that the appellant had not made out any of the grounds of appeal on which he relied and we dismissed the appeal.