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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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Magee's Application [2013] NIQB 59

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QUEEN'S BENCH DIVISION

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

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STEPHENS J

Introduction

[1] The applicant, Gerard Magee, challenges a decision of 8 March 2012 taken by the Department of Justice in Northern Ireland not to re-open or reconsider an earlier decision of the Secretary of State taken in 2002 to refuse him compensation under section 133 of the Criminal Justice Act 1988 for the compensation of people who spent time in custody following a wrongful conviction.

[2] Section 133(1) & (2) of the Criminal Justice Act 1988 provide:

> "(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 before the end of the period of 2 years beginning with the date on which the conviction of the person concerned is reversed or he is pardoned."

[3] By virtue of Article 6(3) and schedule 6 of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 any reference to the Secretary of State in section 133 is to be read as a reference to the Department of Justice in Northern Ireland. Accordingly the application to reconsider was an application to the Department of Justice in Northern Ireland to reconsider the 2002 decision of the Secretary of State.

[4] In their letter dated 9 June 2011 to the Department of Justice in Northern Ireland the solicitors for the applicant stated that the proper interpretation of a miscarriage of justice had been a matter of "difficulty and doubt." That on 15 May 2011 and as a result of the decision of the Supreme Court in R (Adams) v Secretary of State for Justice: Re MacDermott and McCartney [2011] UKSC 18 that was no longer the position, definition having been brought to the correct legal interpretation. That on the basis of that interpretation the applicant did suffer a miscarriage of justice. They requested that:

> "his application should be reconsidered against the appropriate legal framework."

It is submitted by the applicant that his application in 2002 had not been considered against the appropriate legal framework and that the Department of Justice in Northern Ireland has the power and the duty to reconsider his 2002 application for compensation.

[5] By its decision letter of 8 March 2012 the Department of Justice in Northern Ireland declined to re-open the application for compensation. The letter stated:

> "The Minister of Justice, David Ford MLA, has considered carefully your request that Mr Magee's application be re-opened. However, the Minister has concluded that, Mr Magee's application having been decided upon in 2002, the Department has *no powers* to entertain a re-application, or the re-opening of an old application, on his behalf. The decision of the Secretary of State that Mr Magee is not eligible

> for compensation therefore still stands." (emphasis added)

[6] In this challenge the applicant requests the court:

> "to decide and declare that the Department of Justice in Northern Ireland cannot simply refuse to engage in a reconsideration of the Applicant's application for compensation as it has attempted to do in the impugned decision."

The applicant contends that the Department of Justice in Northern Ireland not only has the power to reconsider the 2002 decision but also has a duty to do so. Accordingly the applicant seeks an order of certiorari quashing the decision of the Department of Justice in Northern Ireland of 8 March 2012 whereby it refused to reconsider the applicant's application for compensation and an order of mandamus requiring that the Department of Justice in Northern Ireland consider the question of the applicant's entitlement to compensation.

[7] The respondent contends that:

> "the main issue for consideration in these judicial review proceedings is whether the Department of Justice in Northern Ireland is correct in law in asserting that it does not have power in the circumstances to now consider and decide upon again whether the applicant is entitled to compensation."

[8] Those are the main issues between the parties but there is also a further issue. Section 61 of the Criminal Justice and Immigration Act 2008 amended section 133 with effect from 1 December 2008. The amendment imposed a time limit for the making of an application for compensation. Section 133(2) provides that no payment for compensation … shall be made unless an application for such compensation has been made to the Secretary of State before the end of the period of 2 years beginning with the date on which the conviction of the person concerned is reversed … . The applicant's conviction was reversed on 6 April 2001. Section 133(2A) provides that the Secretary of State may direct that an application for compensation made after the end of (the 2 year) period is to be treated as if it had been made within that period if the Secretary of State considers that there are exceptional circumstances which justify doing so. Accordingly if the Department of Justice in Northern Ireland does not have power to reconsider the earlier refusal of compensationthen the applicant challenges the failure of the Department to consider whether his case might be an exceptional case falling within section 133(2A).

[9] Mr Hutton appeared on behalf of the applicant and Mr Coll appeared on behalf of the respondent.

Factual background

[10] On 15 December 1988 the police discovered a large bomb hidden in a culvert under a road near Antrim. It was designed to be triggered by a signal from a radio transmitter. A party of soldiers had been due to pass over the culvert in a bus shortly after the time at which the bomb was found. A number of persons were arrested in connection with the incident and a total of 11 were charged with terrorist offences, of whom 7 pleaded guilty.

[11] The applicant was one of those arrested and on 16 December 1988 he was taken to Castlereagh Police Office ("Castlereagh"). On arrival at Castlereagh the applicant was asked if he wanted to have a solicitor's advice and he said that he did and gave the officer who carried out the admission procedure the name of his solicitor. An instruction was, however, given by a senior officer, pursuant to the terms of section 15 of the Northern Ireland (Emergency Provisions) Act 1987, authorising 48 hours delay in the applicant's access to legal advice. This authorisation was granted on one or more of the reasons set out in section 15(8). The applicant was then interviewed without a solicitor at Castlereagh between 16 December 1988 and 18 December 1988 on ten occasions by two pairs of detectives. In the sixth interview, on the morning of 17 December 1988, he made a number of verbal admissions in reply to questions and in the seventh interview, which commenced at 2.00 pm on that day, he made a written statement of admission.

[12] The evidence against the applicant as to his involvement in the events on 15 December 1988 consisted solely of the oral admissions and the written statement made by him during police questioning in Castlereagh. On the basis of that evidence the applicant was prosecuted at Belfast Crown Court in relation to a number of serious terrorist crimes including conspiracy to murder, conspiracy to cause an explosion, possession of explosives substances and belonging to a proscribed organisation.

[13] At the trial the applicant contested the admissibility of the statement, claiming that he had suffered substantial physical ill-treatment from two of the interviewing detectives. The trial judge, Murray LJ, after a *voir dire* rejected all of his allegations, finding that he was satisfied beyond reasonable doubt that the appellant had not been ill-treated and that the allegations were fabricated by him. He convicted the appellant and sentenced him to concurrent terms of imprisonment, which amounted to an effective sentence of 20 years.

[14] It was not challenged during the course of the applicant's trial before Murray LJ that the senior officer was entitled to authorise 48 hours delay in the applicant's access to legal advice on the basis of one or more of the reasons set out in section 15(8) of the Northern Ireland (Emergency Provisions) Act 1987. Also it was not suggested during the course of the trial before Murray LJ that he should have exercised his discretion under section 8 (3) of the Northern Ireland(Emergency Provisions) Act 1978 to refuse to admit the statements made by the applicant on the ground that it was unfair in all the circumstances of the case, taking into account the atmosphere of Castlereagh, to decline to allow him access to legal advice for the period of 48 hours after his arrest. Such an argument could not have succeeded if made at the time of the applicant's trial in 1990. Parliament had, by enacting section 15 of the Northern Ireland (Emergency Provisions) Act 1987 and its successor, section 45 of the 1991 Act, specifically authorised the deferment of access to legal advice in certain circumstances for a maximum period of time. The courts, therefore, could not interpret section 8(3) of the Northern Ireland (Emergency Provisions) Act 1978 or its successor as giving authority to exclude a statement made by the person detained which would have defeated the will of Parliament.

[15] The appellant appealed to the Court of Appeal against his conviction contending that he had been subjected to ill-treatment which should have led to evidence being excluded by virtue of section 8(2) of the Northern Ireland (Emergency Provisions) Act 1978. The applicant also contended that the statement should have been excluded under section 8(3) on the basis that the interview transcripts were shown to be irregular following ESDA analysis, that there were deficiencies in the supervision of officers and interview notes were not properly "authenticated" by superior officers. The court rejected the allegations of ill-treatment and whilst expressing some concerns about identified flaws in the Castlereagh interview procedures these were treated as a complaint going to the authenticity of the interview notes themselves and were rejected as grounds upon which to exclude this evidence. In a written judgment delivered on 16 June 1993 the Court of Appeal dismissed the appeal being satisfied that the appellant had not been ill-treated and that his conviction was neither unsafe nor unsatisfactory.

[16] The appellant instituted proceedings before the European Court of Human Rights claiming that his treatment in Castlereagh had given rise to breaches of the European Convention on Human Rights. The European Court of Human Rights held, in a written decision given on 6 June 2000, that in the circumstances of his detention in Castlereagh there had been a violation of Article 6(1) of the Convention in conjunction with Article 6(3)(c) as regards the denial of access to a solicitor.

[17] On 25 July 2000 the Criminal Cases Review Commission referred the applicant's case to the Court of Appeal. On 6 April 2001 the Court of Appeal allowed the applicant's appeal and quashed the convictions.

[18] On 24 June 2002 the applicant applied to the Secretary of State under section 133 of the Criminal Justice Act 1988 for compensation for miscarriage of justice on the basis that he was a person who had been convicted of a criminal offence and subsequently his conviction had been reversed on the ground that a new or newly discovered fact showed beyond reasonable doubt that there had been a miscarriage of justice.

[19] On 6 December 2002 the Secretary of State refused the application for compensation on the basis that (i) the applicant's conviction had not been reversed on the basis of any new or newly discovered fact, and (ii) the applicant had not suffered a miscarriage of justice in that it had not been shown that he had been wrongly convicted, merely that his conviction was "unsafe".

[20] The applicant challenged that refusal by way of a judicial review application. On 16 September 2004 the applicant's judicial review challenge was refused. In refusing the application Girvan J held that:

> "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 the facts which had been known all along".

[21] The applicant appealed to the Court of Appeal which considered the meaning of miscarriage of justice but held, in dismissing the applicant's appeal, that even if one applied the wide meaning of miscarriage of justice "there were no new or newly discovered facts".

[22] The applicant then applied to the Court of Appeal in Northern Ireland for leave to appeal to the House of Lords. That application was refused.

[23] On 12 December 2007 the applicant then petitioned the House of Lords for leave to appeal. The grant of leave was objected to by the Secretary of State by way of written objection dated 9 January 2008. On 12 March 2008 an Appeal Committee of the House of Lords, comprising Lord Bingham, Lord Rodger and Lord Brown refused leave in the following terms:

> "Permission is refused because the petition does not raise an arguable point of law of general public importance which ought to be considered by the House at this time, bearing in mind that the cause has already been the subject of judicial decision and reviewed on appeal."

[24] On 11 May 2011 the Supreme Court delivered judgment _*R (Adams) v Secretary of State for Justice: Re MacDermott and McCartney [2011] UKSC 18*. The applicant contends that there is now a "changed legal landscape". In essence it is submitted that prior to the decision *in R (Adams) v Secretary of State for Justice: Re MacDermott and McCartney* there was controversy in relation to (a) what is a new or newly discovered fact and (b) what is a miscarriage of justice. In view of the change in the legal landscape the applicant contends that he now has a reasonable argument to say that in fact his conviction was overturned on the basis of a new or newly discovered fact and that he has been subject to a miscarriage of justice.

[25] In relation to a new or newly discovered fact it is now clear, but was not previously clear, that a new or newly discovered fact includes a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings. The applicant contends that both he and his advisers (and coincidentally the trial Court and the Court of Appeal in 1993) were precluded by legislation from appreciating the significance of the lack of access to a solicitor. Accordingly the Secretary of State's rationale for refusing compensation in 2002 was incorrect in that it was asserted that there was no new or newly discovered fact. Also that the decision of Girvan J in 2004 and the decision of the Court of Appeal in 2007 were also incorrect in that it was held that there was no new or newly discovered fact.

[26] In relation to a miscarriage of justice the applicant contends that the test is now clear but was not previously clear. Following the decision in *R (Adams) v Secretary of State for Justice: Re MacDermott and McCartney* the test for a miscarriage of justice is:

> "that (the) new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it."

The applicant contends that the only evidence supporting his conviction was contained within the statement and that once the statement is excluded there was no other evidence. Accordingly, applying the test for a miscarriage of justice, the newly discovered fact had so undermined the evidence against the defendant that no conviction could possibly be based upon it. There was simply no other evidence left. Accordingly the Secretary of State's rationale for refusing compensation in 2002 was incorrect in that it was asserted that the applicant had not suffered a miscarriage of justice in that it had not been shown that he had been wrongly convicted, merely that his conviction was "unsafe". Also that the decision of Girvan J in 2004 and the decision of the Court of Appeal in 2007 were also incorrect in that it was held that there was no miscarriage of justice.

[27] I have set out the contentions on behalf of the applicant as to why his application for compensation should be reconsidered. The decision of the Department of Justice in Northern Ireland was that there was no power to reconsider. It would be inappropriate at this stage to set out what may be the response of the Department of Justice in Northern Ireland if it does reconsider the 2002 application. As I have stated this judicial review application is mainly confined to the questions as to whether the Department of Justice in Northern Ireland has the power to reconsider the 2002 decision and, if it does, whether it has a duty to do so.

Submissions on behalf of the applicant in relation to the grounds of challenge

[28] The applicant contends that section 133 provides that the "Secretary of State shall pay compensation" and that this is a continuing obligation. That the obligation to pay arises when the other qualifying criteria in section 133(1) are met. That the Department of Justice in Northern Ireland cannot properly perform its function, without investigating whether the qualifying criteria in section 133(1) are met. That the Department of Justice in Northern Ireland has not discharged its duty under section 133.

[29] The applicant also relies on section 12(1) of the Interpretation Act 1978 which states:

> "12.(1) Where an act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires."

The applicant states that the occasion of the new legal landscape since the decision of the Supreme Court in *R (Adams) v Secretary of State for Justice: Re MacDermott and McCartney* requires the power to be exercised or the duty to be performed again.

[30] The applicant states that in the past the Secretary of State has been prepared to reconsider decisions not to compensate an applicant. He states that evidence of this is set out in paragraphs [149] and [150] of the judgment of Lord Kerr in *R (Adams) v Secretary of State for Justice: Re MacDermott and McCartney* and that those paragraphs demonstrate that the Secretary of State reconsidered a decision to refuse Mr MacDermott compensation under section 133. Those paragraphs in the judgment of Lord Kerr show that by a letter similar to one dated 16 May 2008 sent on behalf of the Secretary of State to Mr McCartney, Mr MacDermott's application for compensation was rejected. It then appears from paragraph [150], which refers to a letter of 17 November 2008, that further representations were made on behalf of Mr MacDermott and that this led to

reconsideration by the Secretary of State but in the event, no alteration to the decision, which was that Mr McDermott was not entitled to compensation.

Submissions on behalf of the respondent in relation to the grounds of challenge

[31] The respondent contends that the wording of section 133(1) does not impose an on-going or continuing obligation on the statutory decision-maker to pay compensation. That there is no on-going and continuing duty to consider whether any entitlement to compensation exists but rather that there is a public policy requirement of finality and certainty in administrative decision-making. That if there was not finality and certainty in administrative decision-making, then a wide range of administrative decisions could be re-opened even years after the event, in response to developments in the interpretation of statute law. The respondent contends that the applicant's interpretation of section 133 would undermine the legitimate public policy requirement of finality and certainty in administrative decision-making. That if the situation were reversed and the Supreme Court had interpreted the statutory test in a manner more restrictive than had previously been the case, it would not be open to the Department of Justice in Northern Ireland, in the absence of specific statutory authority, to reopen previous awards of compensation and reconsider them in the light of the new understanding of the statutory test. The respondent contends that the Secretary of State and now the Department of Justice in Northern Ireland is *functus officio* once the decision has been made.

[32] The respondent also contends that section 12 of the Interpretation Act 1978 is not to be seen as meaning that the power to decide questions affecting legal rights remains an open ended one. Instead it should be considered in the light of the principle of certainty and finality in administrative decision-making. Mr Coll, on behalf of the Department of Justice in Northern Ireland, referred to section 12 at page 193 of Wade, Administrative Law, 10th Edition which states that:

> "But this (section 12) gives a highly misleading view of the law where the power is a power to decide questions affecting legal rights. In those cases the courts are strongly inclined to hold that the decision, once validly made, is an irrevocable legal act and cannot be recalled or revised. The same arguments which require finality for the decisions of courts of law apply to the decisions of statutory tribunals, ministers and other authorities.
>
> For this purpose a distinction has to be drawn between powers of a continuing character and

> powers which, once exercised, are finally expended so far as concerns the particular case. An authority which has a duty to maintain highways or a power to take land by compulsory purchase may clearly act 'from time to time as the occasion requires'. But if in a particular case it has to determine the amount of compensation or to fix the pension of an employee, there are equally clear reasons for imposing finality. Citizens whose 'legal rights are determined administratively are entitled to know where they stand."

[33] In relation to the evidence that in the past the Secretary of State has reconsidered an application for compensation, the respondent states that what was or was not done does not alter the proper construction of the obligation under section 133. The Department of Justice in Northern Ireland also relies on the evidence of David Mercer who was the author of the letter dated 17 November 2008 which was referred to in the judgment of Lord Kerr. Mr Mercer was then of the Criminal Justice Policy Division of the Northern Ireland Office. He is now the Deputy Principal in the Department of Justice in Northern Ireland. In his affidavit in these proceedings Mr Mercer confirms that the decisions to refuse compensation to both Mr MacDermott and Mr McCartney were reconsidered but that was done without "detailed consideration" "as to whether the Secretary of State had the power to reconsider his decision of 16 May 2008 and in effect the matter was progressed on an assumption that such power did exist." Mr Mercer also states that it was not until Mr Magee's request for reconsideration was made that specific and detailed consideration was given to the existence of a power to reconsider.

[34] In relation to the issue raised by the applicant that there has been a failure by the Department to consider whether his case might be an exceptional case falling within section 133 (2A) the respondent contends that the applicant has not made a fresh application but rather that the application is for a reconsideration of the 2002 decision.

Discussion

[35] The case of *R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau* (The Times 4 April 1986 and Official Transcripts 1980-1989) concerned an administrative decision which was in error due to a failure to apply the correct legal test, which error came to light as the result of a subsequent decision of the House of Lords in another case. The question then arose as to whether the administrative decision should be reconsidered on the basis of the law as set out by the House of Lords.

[36] The facts in *R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau* were that in 1978 Mr Cheung and Mr Pau had applied for higher education awards under section 1 of the Education Act 1962. That section provided that it:

> "shall be the duty of every local education authority, … to bestow awards on persons who (a) are ordinarily resident in the area of the authority, and (b) possess the requisite educational qualifications …"

At the time of their applications in 1978 it was generally, though erroneously, believed that an applicant whose home was overseas, but who came to this country to further his education, was "ordinarily resident" where his "true home" was. Accordingly, even if he had been living within the United Kingdom for the previous three years, he was disentitled to an award as being "a person who has not been ordinarily resident in the United Kingdom for the three years immediately preceding the first year of the course in question" and so was disqualified from receiving a grant. This error came to light in December 1982 when the House of Lords gave judgment in the conjoined appeals of The Queen v Barnet LBC, ex parte Shah [1983] 2 AC 309, [1983] 1 All ER 226. Mr Shah had applied for a similar award to Mr Cheung and Mr Pau a year later in 1979 rather than in 1978. However, another appellant in the appeals conjoined with that of Mr Shah was Mr Akbarali, who was a 1978 student and therefore in the same year as both Mr Cheung and Mr Pau. The factual background to Mr Akbarali's application for judicial review is set out in the report of the judgment of the Court of Appeal in the conjoined appeals, see [1982] 1 QB 688, at page 706. In the event the House of Lords required Mr Akbarali's application for a higher education award to be reconsidered on the basis of the law as declared by the House of Lords.

[37] In 1983 Mr Cheung and Mr Pau asked that their 1978 applications be reconsidered. Their respective local education authorities, whilst accepting that they had the power to reconsider the 1978 refusal, declined to do so on the basis of a policy which they had adopted and which had been suggested by the Department of Education and Science, namely to reconsider only cases where the refusal of the award was in respect of a course beginning in the academic year 1979/80 or later, save in exceptional circumstances. Mr Cheung and Mr Pau had applied in 1978 in respect of the academic year 1978/79. The Court of Appeal quashed that decision on the grounds that it was reached by the application of a policy which was flawed by an error of fact, namely that the House of Lords in Shah's case had not been concerned with, and had not given relief to, any 1978 student. As can be seen, the House of Lords had given relief to Mr Akbarali, who was a 1978 student. The Court of Appeal considered that it would appear that at any rate *prima facie* good public administration would require that all 1978 class students should be treated alike and in the same way

as Mr Akbarali. Accordingly the authorities were ordered to reconsider the applications of Mr Cheung and Mr Pau.

[38] In R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau submissions were made that section 1 of the Education Act 1962 gave rise to a continuing duty on the decision maker to bestow awards if the statutory criteria were met and that the administrative body had not discharged its duty. That is a comparable submission to the applicants' submission in this case, namely that section 133 gives rise to a continuing duty to pay compensation if the statutory criteria are met and that the Department of Justice in Northern Ireland has not discharged that duty. Sir John Donaldson stated:

> "The Education Act 1962 did more than impose a duty upon local authorities to bestow awards. It also required them to consider applications for awards and to determine whether or not the applicant was qualified. The duty to pay the award was quite separate. Thus an authority could, in theory, determine that a particular applicant was entitled to have an award bestowed upon him and then decline to pay the award. The first decision would stand and the court would simply order the authority to make the payment. I conclude, therefore, that the authorities in determining that the applicants did not qualify for awards were performing their duty under the Act, albeit mistakenly.
>
> This is not to say that, having determined that the applicants were not qualified, the authorities had no power to reconsider their decision. I am sure that they had."

It can be seen that in R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau the Court of Appeal rejected the proposition that there was a continuing duty under section 1 of the Education Act 1962.

[39] However, whilst the Court of Appeal in R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau rejected the proposition that there was a continuing duty under section 1 of the Education Act 1962, that decision is authority for the proposition that an administrative body had the power, in the circumstances of that case, to reconsider its earlier decisions. Sir John Donaldson approached that issue by first stating that:

> "It is well established that a public law decision is valid and effective, unless and until it is set aside by a court of competent jurisdiction."

However, it is clear that he was not stating that, in the circumstances of that case, a public body once it had taken a decision was *functus officio* and that, without its decision having been set aside by a court of competent jurisdiction, it had no power to reconsider its initial decision. In a later part of his judgment Sir John Donaldson stated that:

> "This is not to say that, having determined that the applicants were not qualified, the authorities had no power to reconsider their decision. I am sure that they had. It would be strange indeed if a public authority which discovered that it had inadvertently denied a citizen a benefit to which he was entitled could not correct its error. Indeed, I think that it would have a duty to consider exercising this power, although I also accept that it would have a discretion as to what action should be taken. This discretion would have to be exercised in accordance with the requirements of good public administration."

Sir John Donaldson also stated:

> ""*Stare decisis*" in the broad sense of the antithesis of "Order, counter order, disorder" is of the essence of good public administration. If the law is changed or suddenly discovered, it is right that it should be applied in its new form thereafter, but if it is to be applied retrospectively, this must be subject to some limitation. Quite what limitation should be applied would depend upon the particular circumstances. In the field of private law, retrospective action is controlled by the statute of limitations and the doctrine of laches. In the field of public law, it is controlled in the absence of any express statutory provision by the exercise of the court's discretion."

Accordingly the administrative body, in the circumstances of that case, could reconsider an earlier decision but retrospective consideration must be subject to some limitations. What those limitations are depend on the particular circumstances and good public administration.

[40] In R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau McNeill J at first instance considered whether the policy decision to exclude from reconsideration all students whose courses began in *1978 and earlier years*, subject to special circumstances, could be justified. This policy he held to be *Wednesbury* unreasonable. The Court of Appeal did not consider that to be correct. Sir John Donaldson stated:

> "With all respect to the learned judge, I am quite unable to accept his view that the policy decision reached by the authorities based upon the advice of the Secretary of State was, on the assumptions upon which it was based, unreasonable in a Wednesbury sense."

He went on to say that:

> "I also wholly accept that, in the circumstances of these particular awards, the very considerable administrative problems involved in re-assessing applications many years after the event render wholly reasonable a refusal to reconsider applications which are not similar to those involved in the group of test cases reported in The Queen v Barnet LBC ex parte Shah"

Accordingly in R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau it was appropriate to have as a limitation to the retrospective consideration of previous applications in the light of the newly discovered legal test a cut-off point. That the cut-off point was informed by the existence of a test case and the potential for others to have commenced proceedings for judicial review at the same time as those involved in the test case. The Court of Appeal disagreed with McNeill J that it was *Wednesbury* unreasonable to exclude those in the year 1978 or to exclude those in any year before 1978. The outcome was based upon the cardinal principle of good public administration that all persons who are in a similar position shall be treated similarly. Mr Cheung and Mr Pau should have been, but had not been, treated similarly to Mr Akbarali. The cut-off point had been set in the wrong year. That is 1979 as opposed to 1978. A cut-off in 1977 was both consistent with the principle of treating persons in similar positions similarly and was not *Wednesbury* unreasonable.

[41] In R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau good administrative practice required that persons who had applied in the same year should be treated in

the same way. What is good administrative practice is case specific. In law context is everything. For instance if third party rights had been effected it would be hard to see how retrospective consideration would be good administrative practice. Similarly, if compensation had been paid and an individual had arranged his affairs on that basis, again it would be hard to see how retrospective consideration would be good administrative practice. The Department of Justice in Northern Ireland in assessing any policy as to retrospective consideration will be aware of the total number of potential applicants and will be in a position to determine the administrative tasks involved. That task will be undertaken in the context of when compensation for miscarriages of justice was introduced. Section 133 of the Criminal Justice Act 1988 was enacted to give effect to Article 14(6) of the International Convention on Civil and Political Rights which Convention the United Kingdom ratified in May 1976. Initially the United Kingdom fulfilled its international obligations under an *ex gratia* scheme but after the introduction of the statutory scheme the *ex gratia* scheme terminated in both England and Wales and in Northern Ireland in April 2006.

[42] The subject matter of the policy is also part of the context. In R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau the subject matter was an aspect of education, namely the retrospective consideration of higher education awards to those who had in the event been able to obtain and pay for their higher education without the provision of a grant. In this case there is no policy as to the retrospective consideration of compensation for miscarriages of justice to those whom it had previously been decided were not entitled. For the Department of Justice in Northern Ireland to arrive at a decision as to whether to retrospectively reconsider the 2002 refusal of compensation to the applicant it will be necessary for it to take into account all relevant matters. The subject of the matter in hand is one of those matters. The Department of Justice in Northern Ireland may make a decision solely in the case of the applicant or it may formulate a policy. In either event the subject matter of the decision or of such a policy is the administration of justice with the potential for a miscarriage of justice to be compounded by an erroneous decision as to compensation. The effect, if any, of that different subject matter on the decision or on the policy of the Department of Justice in Northern Ireland as to whether to retrospectively consider past applications for compensation, is for the Department to consider.

[43] In R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau the decisive factor was the disparate treatment of similar applications based on a policy which was informed by a factual inaccuracy. In this case consideration will have to be given by the Department of Justice in Northern Ireland as to what are and what are not disparate cases. The applicant previously brought judicial review proceedings. Does that make his case disparate from the case of Mr MacDermott, one of the appellants in R (Adams) v Secretary of State for

Justice: Re MacDermott and McCartney? Mr MacDermott was arrested in 1977, convicted of murder on 12 January 1979, and his first appeal was dismissed on 29 September 1983. His case was referred by the Criminal Case Review Commission to the Court of Appeal and the Court of Appeal allowed his appeal on 15 February 2007. On 15 May 2011 the Supreme Court held that he was entitled to compensation under section 133 in respect of a miscarriage of justice that had occurred on 12 January 1979. Mr Magee was arrested on 16 December 1988, convicted in 1990 and his first appeal was dismissed on 16 June 1993. His conviction was quashed on 6 April 2001. If there was a miscarriage of justice, then it occurred in 1990. The weight, if any, to be applied to the factor that Mr Magee previously brought a judicial review appeal application which was dismissed and his judicial review appeal was also dismissed is also for the Department of Justice in Northern Ireland.

Decision

[44] In view of the decisions at which I have arrived in relation to the applicant's other grounds of challenge it is not necessary to decide the applicant's submission which relies on section 133(2A). However, my view is that there has been no fresh application and therefore section 133(2A) does not arise.

[45] In relation to the evidence that in the past the Secretary of State has reconsidered an application for compensation, I consider that what was or was not done does not alter the proper construction of the obligation under section 133 and, in any event, I accept the evidence that this was not a considered position by the Secretary of State.

[46] For the reasons set out by the Court of Appeal in R v Hertfordshire County Council ex parte Cheung; R v Septon Metropolitan Borough Council ex parte Pau I do not consider that there is a continuing duty on the Department of Justice in Northern Ireland under section 133. I reject that part of the applicant's challenge. I consider that the Secretary of State performed his duty under section 133 in 2002 but that does not mean that the Department of Justice is now *functus officio*. Certain administrative decisions may be irrevocable but this is not one of them. I consider that the Department of Justice in Northern Ireland has a discretionary power to reconsider the 2002 decision. It has a duty to exercise that discretion. Whether it chooses in the exercise of discretion to do so is a matter for the Department of Justice in Northern Ireland depending on what, if any, limitations on retrospective consideration it chooses to impose, which limitations have to be consonant with good public administration in the context of the subject in hand. The various factors to be taken into account in exercising that discretion are matters for the Department of Justice in Northern Ireland. Those requirements are controlled in the absence of express statutory provision by the exercise of the court's supervisory powers applying judicial review principles. The Department of Justice in Northern Ireland has, for

instance, to take into account relevant factors and to leave out of account irrelevant factors.

[47] In this case the Department of Justice in Northern has mistakenly held that it has no discretionary power to reconsider the 2002 decision. Accordingly the decision not to reconsider should be quashed and the Department of Justice in Northern Ireland should now exercise its discretion whether or not to reconsider the 2002 application and an order of mandamus will issue.