Judicial Communications Office

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COURT QUASHES DECISION ON COMPENSATION FOR A MISCARRIAGE OF JUSTICE

Summary of Judgment

Mr Justice Colton, sitting today in the High Court in Belfast, quashed the decision of the Department of Justice (DoJ) that Gerard Adams ("the applicant") is not eligible for compensation for miscarriage of justice. The court held the Department's decision was unlawful under the terms of the legislation and directed that the application be reconsidered and redetermined in accordance with law.

Background

In 1975, the applicant was convicted of attempting to escape from detention. In 2020, those convictions were quashed by the Supreme Court: *R v Adams* [2020] UKSC 19. The detention from which he attempted to escape was founded on an interim custody order ("ICO") signed by the Minister for State for Northern Ireland on 21 July 1973 and purportedly made under Article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 ("the 1972 Order"). Such detentions were more commonly referred to as "internment without trial."

The appeal was brought following the release of government papers under the 30 year rule. These revealed that there had been debate among officials and Government legal advisors in 1973/74 about the need for the Secretary of State to consider personally the making of an ICO. The papers included an opinion from the legal adviser to the Attorney General responding to a request for directions in relation to a proposed prosecution of the applicant and three others involved in the attempted escape concluding that a court would probably hold that it would be a condition precedent to the making of an ICO that the Secretary of State should have considered the matter personally. Other documents confirmed that the Secretary of State had not given personal consideration to the applicant's case and that the Attorney General was prepared to rely on the presumption of law that any ICO which appeared on the face to have been properly executed must be assumed to comply with any necessary prior procedures.

The Supreme Court concluded that the ICO was therefore not made in accordance with Article 4(1) of the 1972 Order and that the making of the order was invalid. It followed that the applicant was not detained lawfully and was wrongfully convicted. The Supreme Court held that his convictions for the offences of attempting to escape from detention must be quashed.

Application for compensation

The applicant sought compensation for miscarriage of justice under section 133(1) of the Criminal Justice Act 1988 ("the 1998 Act"). This provides that:

> "When a person has been convicted of a criminal offence and subsequently the 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 DoJ shall pay compensation for this miscarriage of justice to the person who has suffered punishment as a result of such conviction unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted."

By letter dated 15 December 2021, the DoJ concluded that compensation should be refused. It considered that the discovery of the government papers was not 'a new or newly discovered fact', that it may have served to bring the matter to the applicant's attention and highlighted the pre-existing legal argument, but that it did not by itself lead to the quashing of the conviction. The DoJ said the conviction was quashed on foot of the ruling by the Supreme Court that the charges against the applicant were fatally flawed. In other words, the quashing of the conviction was based on an interpretation of what was required in law as opposed to a new or newly discovered fact.

The applicable law

The court said there was no doubt that the applicant has been convicted of a criminal offence and that his conviction has been reversed. It then went on to consider the remaining criteria. It considered whether the conviction had been reversed 'on the ground that' a new or newly discovered fact showed beyond reasonable doubt there had been a miscarriage of justice? This was dealt with in a judgment of the Supreme Court. It said that the words 'on the ground that' must, if they are to make sense, be read as 'in circumstances where.' Further, the Supreme Court said that only if a new fact or a newly discovered fact showed conclusively that the person was innocent or that the prosecution should never have been brought that there would be a right to compensation:

> "The availability of a facility to consider a new or newly discovered fact that emerges after the quashing of a conviction makes it clear that the phrase "on the ground that" is not to be understood as referring to the grounds upon which the conviction was quashed, although obviously, that is a matter which must be taken into account by the Department in making its decision."

Miscarriage of justice

In the leading case, the Supreme Court identified categories of cases to be considered when dealing with the concept of miscarriage of justice:

- Where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted.
- Where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant.

The court said the import of the Supreme Court judgment resulting in the reversal of the applicant's conviction in this case was clear. It said the applicant could not have been convicted on the evidence revealed to the Supreme Court and that subject to the issue of the proper interpretation of "on the ground that" and "a new or newly discovered fact" he met the test for a miscarriage of justice in the context of section 133 of the 1988 Act.

A newly discovered fact/a legal ruling on facts which have been known all along

The applicant's application was advanced on the basis that the newly discovered fact was that the Minister of State who signed the ICO did so without the case being considered by the Secretary of

State. He said this fact became apparent when the papers released under the 30 year rule were disclosed to him. The issue therefore was whether the DoJ was correct in its contention that the effect of the Supreme Court decision was "a legal ruling on facts which had been known all along." In other words, that the conviction was not reversed, as the applicant contended, "on the grounds of a new or newly discovered fact." The court noted that the expression "new or newly discovered fact" has been the subject of substantial judicial consideration outlining the cases in paras [49] – [50] of its judgment.

The newly discovered fact relied on in this case, namely that the ICO had not been personally considered by the Secretary of State, was clearly a fact of an evidential nature:

> "It only became apparent when the note for the record was disclosed. It was not known to the defence or perhaps more importantly to the trial judge at the time of the applicant's conviction. Therefore, this fact, of an evidential nature, was not known at the trial. This is not a case where the trial judge concluded that the ICO was valid, notwithstanding the fact that it had not been considered by the Secretary of State. Had that point been argued and he nonetheless came to the conclusion that the ICO was legally valid, and the Supreme Court subsequently took a different view on the law then in those circumstances the applicant would not meet the section 133 test. However, in this case the contrary was the position in that, as is clear from the Attorney General's note since disclosed, to the effect that "… The Attorney General is prepared to rely on the presumption of law that any instrument which appears on the face to have been properly executed (as these ICOs do) must be assumed to comply with any necessary prior procedures."

The court added that this was not a case where the Supreme Court was correcting some error of law by the court which convicted the applicant. Nor was it a case where, as a result of the changes in the standards of fairness and procedural safeguards a conviction was quashed as it does not involve a change in legal standards. What had occurred here was the discovery of an evidential based piece of factual information which, if it had been known at the time of the trial, and had the law been properly applied at that time, would have demonstrated that there was no case against the applicant:

> "There is a clear distinction between the correction of a conviction because of new factual material not known at trial and the correction of a conviction because of a different view on the law applied to the same factual situation known at trial. It cannot be sustained that the applicant's conviction has been overturned because of a different view on the law applied to the same factual situation at the trial. The trial judge and the defence were unaware of the true factual situation."

The court noted that the Attorney General said in 1974 that "on balance a court would probably hold that the requirement relating to an ICO were satisfied if the Secretary of State had considered the case and that it was not essential the Secretary of State should personally consider the papers." At the time of the trial, however, no evidence was available to the applicant or to the court by which the presumption of regularity could be displaced. The court added that this issue was not addressed by the trial judge because he, like the applicant's lawyers, was unaware of the fact that the Secretary of State had not considered the case personally. Thus, the Supreme Court judgment did not bring about any change in the law since the court did not have the opportunity to consider the issue having regard to the prosecution's failure to disclose a material evidential matter:

> "It is important to note that the conviction was quashed by the Supreme Court … on the common assumption that the ICO had not been personally considered by the Secretary of State. It may well be that the Supreme Court would have reversed the applicant's conviction on the narrower ground that there was no evidence of personal consideration at the trial. However, the fact that the Secretary of State did not personally consider the applicant's case means that the applicant's conviction has been reversed "in circumstances where" that fact shows beyond reasonable doubt that there has been a miscarriage of justice".

Conclusion

The court stated that the DoJ had correctly identified the approach to determining an application under section 133 of the Criminal Justice Act 1988, however, it concluded that the applicant's case on appeal involved a newly discovered fact (that of no personal consideration of the ICO dated 21 July 1973 under which the applicant had been detained by the Secretary of State) that was not a fact known to the applicant or to the court at the time of his trial. On its emergence, this newly discovered fact was the basis on which the prosecution's reliance on the presumption of regularity was rejected by the Court of Appeal:

> "Returning to the test under section 133 the applicant has been convicted of a criminal offence, his conviction has been reversed, in circumstances where a newly discovered fact (the lack of consideration by the Secretary of State) shows beyond reasonable doubt that there has been a miscarriage of justice, that is the applicant is innocent of the crime for which he was convicted. I therefore conclude that the DoJ erred in law in determining that the reversal of the applicant's conviction arose from a legal ruling on facts which had been known all along. I am satisfied that the applicant meets the test for compensation under section 133 of the Criminal Justice Act 1988."

The court made the following orders:

- An order quashing the decision of the DoJ by which it concluded that the applicant is not eligible for compensation for a miscarriage of justice under section 133 of the Criminal Justice Act 1988;
- A declaration that the said decision is unlawful, ultra vires and of no force or effect; and
- An order that the application be reconsidered and redetermined in accordance with law.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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