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COURT DISMISSES APPEAL AGAINST REFUSAL BY SECRETARY OF STATE TO PAY COMPENSATION FOR MISCARRIAGE OF JUSTICE

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal by Veronica Ryan against a refusal by the Secretary of State to pay compensation for a miscarriage of justice.

Background

In 1991, Veronica Ryan ("the appellant") pleaded guilty to offences of allowing property to be used for terrorist purposes and aiding and abetting the false imprisonment of James Fenton in February 1989 and Alexander Lynch in January 1990. Her co-accused James Martin was convicted of the offences. Martin was sentenced to a total of 12 years imprisonment and the appellant to a total of three years imprisonment.

On 30 April 2008, the appellant and Martin were invited by the Criminal Cases Review Commission ("CCRC") to apply to have their convictions relating to Lynch reviewed based on confidential information. The Court of Appeal relied upon material contained in a confidential annex provided by the CCRC and quashed the convictions. The Court declined to provide any gist or other information upon which they base their decision due to the nature of the material. The appellant and Martin applied for compensation for miscarriage of justice and substantial compensation was paid in 2012.

On 21 February 2008 the CCRC invited them to apply for review of the convictions relating to Fenton. These were quashed by the Court of Appeal on 10 October 2014 with the Court again declining to provide full reasons for its decision for the same reasons as before. The appellant and Martin applied for compensation but on 3 July 2017 the applications were refused by the Secretary of State. The appellant challenged this decision by way of judicial review but the application was refused. This was an appeal against that decision.

Relevant statutory provisions

Section 133 of the Criminal Justice Act 1988 provides that the Secretary of State shall pay compensation for miscarriage of justice in circumstances where a person has had his conviction for a criminal offence 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 unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

The court considered whether or not the payment of compensation was a reserved matter or a transferred matter under the constitutional arrangements for devolved government in Northern

[1] The panel was the Lord Chief Justice, Mr Justice Colton and Mr Justice Huddleston. The Lord Chief Justice delivered the judgment of the court.

Ireland as set out in the Northern Ireland Act 1998 ("the 1998 Act"). In paragraphs [7] to [11] of its judgment, the court set out the relevant provisions of the 1998 Act and subsequent amendments that were introduced upon the devolution of justice and policing on 31 March 2010. The court said that the effect of these provisions is that payment of compensation for miscarriage of justice became a transferred matter in all cases except where there was protected information, defined as national security information, which has to be taken into account in order to deal fairly with the application and in respect of which neither the information nor a sufficient gist of the information can be disclosed.

"Treatment of offenders"

The first issue between the parties was whether compensation for miscarriage of justice was embraced by the phrase "the treatment of offenders" in Schedule 3, paragraph 9(e) to the 1998 Act. The trial judge had concluded that the appellant's claim for compensation arises out of her conviction and imprisonment, being a period when she would have been treated as an offender. The later quashing of her conviction would not alter the fact that during the period of conviction and imprisonment she was regarded as an offender. In the period between completion of sentence and the quashing of the convictions she would have been regarded as an ex-offender. The court said the expression "treatment of offenders" is capable of applying to a person in the appellant's position and included a person whose conviction had been quashed.

The trial judge noted that all of the categories in paragraph 9 of Schedule 3 to the 1998 Act were described in the broadest terms and said it followed that if compensation for miscarriage of justice was a reserved matter it would be found in this grouping of functions under a suitably broad description. He said it was clear that in 2010 the provision of compensation for miscarriage of justice was regarded by those who drafted the legislative scheme as being a reserved matter to be included in the 2010 transfer of powers for policing and justice: "Miscarriage of justice therefore fell under the broad heading "treatment of offenders". If miscarriage of justice was a transferred matter in 1998 it ought to have required some mechanism by which the powers of the Secretary of State under section 133 of the 1988 Act could be exercised by the Department of Justice. No such provision was made."

On appeal, the appellant accepted that the effect of section 133 of the 1988 Act was plainly to leave decision making with the Secretary of State but contended that the Northern Ireland Assembly was entitled to legislate. The court agreed with the trial judge that the headings set out in Schedule 3 to the 1998 Act were broad descriptions of the areas which were reserved and accordingly they should be interpreted broadly. The court also agreed that the term "treatment of offenders" against that interpretative background is apt to include compensation for treatment as an offender. Section 6 of the 1998 Act identifies those matters which are outside the legislative competence of the Assembly:

> "The Assembly has legislative competence in relation to reserved matters but the consent of the Secretary of State is required in relation to a Bill which contains a provision which deals with a reserved matter. The Assembly is free to legislate in relation to transferred matters."

The court noted that there is a corresponding devolution of competence to Ministers in section 23 of the 1998 Act to exercise the prerogative and other executive powers of Her Majesty. It said, however, that the executive power in respect of the payment of compensation for miscarriage of justice was retained by the Secretary of State when the 1998 Act was passed:

> "The absence of any mechanism for the administration of the scheme by a Minister is a strong indicator from the context that the payment of compensation for miscarriage of justice was not devolved. The 2010 Orders clearly proceeded on the basis that compensation for miscarriage of justice had not been devolved in 1998. We are satisfied … that compensation for miscarriage of justice was a reserved matter by virtue of paragraph 9(e) of Schedule 3 of the 1998 Act."

The meaning of miscarriage of justice

In the leading case on the circumstances in which compensation for miscarriage of justice should be paid (R (Adams) v Secretary of State [2012] 1 AC 48) it was concluded that the test was satisfied when by reason of a new or newly discovered fact either a person was to be viewed as innocent of the offences for which he or she had been convicted or could show that there had been a miscarriage of justice in that the evidence on which the convictions were based was so undermined that no conviction could properly be based on it. The court said this test was applied by both the Department of Justice in respect of devolved cases and the Secretary of State in respect of reserved cases after the 2010 Orders.

An amendment to section 133 of the 1988 Act was passed by Parliament with effect from 13 March 2014 creating different tests in respect of those whose convictions involved protected information depending upon whether the protected information could be disclosed or an adequate summary provided. The court said that since the convictions with which this appeal is concerned were quashed on 10 October 2014 this was the provision which governed the payment of compensation for miscarriage of justice in these cases. The appellant referred to this test as the "English test".

The Convention points

The court then considered whether the determination of compensation for miscarriage of justice under section 133 of the 1988 Act involves the determination of a civil right for the purposes of Article 6(1) of the ECHR. It noted that the Council of Europe states have made different provision for the payment of compensation where convictions have been set aside or pardons granted and some of these decisions have reached the European Court of Human Rights ("ECtHR"). The court referred to these cases in paragraphs [35] to [41] of its judgment. It agreed that there was an element of evaluative judgement involved in the determination of some of the applications and also that this is an area in which the court is particularly well placed to examine any determination. The court also agreed that Parliament clearly intended to make the Secretary of State the primary decision maker and chose to exclude the court in that role. It said it did not follow, however, that this is a significant feature in terms of whether or not the character of the right is civil:

> "What is at issue is a claim for pecuniary compensation in respect of the period during which the applicant was treated as an offender. Section 133A of the 1998 Act sets out the broad parameters and limits for the determination of the appropriate compensation. The pecuniary nature of the claim is a significant indicator in determining whether or not a civil right is at stake. The Secretary of State is obliged to pay compensation where the relevant test is made out and there are no disqualifying factors. In our view these considerations point towards the conclusion that determining an application for compensation for miscarriage of justice is the determination of a civil right. We agree with the learned trial judge, therefore, that Article 6 is engaged."

The appellant contended that the application of the English test was in breach of Article 6. The court, however, commented that section 133 of the 1988 Act was amended by the addition of subsection (1ZA) on 13 March 2014:

> "The appellant's convictions were quashed on 10 October 2014. At all material times the statutory provisions enabled the appellant to apply for compensation on the basis of the English test. There was no change of position from the date on which the appellant's right became available. There is no material to justify the argument that there was interference by the legislature with the administration of justice designed to influence the judicial determination of this application. In agreement with the judge we do not consider that there was any breach of Article 6."

Article 14

Article 14 ECHR prohibits discrimination and provides:

> "The enjoyment of the rights and freedom set forth in this Convention shall be secured without discrimination on any grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

The trial judge relied on the framework for considering the question of discrimination set out by the House of Lords in R(S) v Chief Constable of South Yorkshire [2004] 1 WLR 2196. The court agreed with this approach but said there was considerable dispute as to whether or not any difference of treatment was on a ground prohibited by Article 14. To achieve this the appellant had to establish that the difference of treatment was on the ground of "other status."

In paragraphs [50] to [54], the court outlined case law in which the application of the "other status" test was considered. It said the general purpose of Article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified. That reflects the aim of the Convention which is to guarantee rights that are practical and effective rather than rights that are theoretical or illusory. The court noted that it is a constant theme of the case law both in the ECtHR and the UK Supreme Court that although not open-ended the grounds within Article 14 are to be given a generous meaning. It said it is satisfied that the group of people claiming compensation for miscarriage of justice on the basis of confidential evidence constitute a different group from those claiming such compensation where the relevant evidence can be disclosed:

> "The claimed status is one which arises by operation of law but constitutes an identifiable objective characteristic. The difference in treatment of which the appellant complains relates to the application of the English test but the definition of the group of which the appellant claims membership is defined by the limitation on the disclosure of confidential evidence. The claim is concerned with the distribution of compensation between the comparable groups. In our view these factors support the view that the appellant can claim to have a relevant status."

Analogy and Justification

The court said there are considerable grounds for concluding that some of the comparators identified by the appellant are in an analogous situation:

> "Each comparator will have been convicted of a criminal offence. Each will have had their convictions quashed on the basis of a new or newly discovered fact. In some of the cases national security information will have been relevant to the decision to quash the conviction. The distinction between the appellant and the comparators is that in her case the Secretary of State considered that the relevant national security information could not be disclosed. We consider, therefore, that this is a situation in which it can be said that the comparators whose cases have involved relevant national security information that can be disclosed or gisted can be regarded as analogous."

The court agreed with the trial judge that what has to be justified in this case is the application of the different test. It said that in order to examine the legitimate aim it is necessary to look at the legislative background. Prior to the devolution of justice in 2010 the determination of compensation for miscarriage of justice was a reserved matter under the 1998 Act to be determined by the Secretary of State. Under the devolution settlement in 2010 in those cases where there was relevant national security information which could not be disclosed or gisted the payment of compensation for miscarriage of justice remained a reserved matter. The court said the allocation of responsibility for public administration in a devolved environment is essentially a matter to be determined in accordance with the constitutional structures in each state. It follows that there may be differences of approach in the devolved parts of a state.

The court said that the decision in 2010 that sensitive national security matters should be dealt with by the Secretary of State rather than the devolved administration could not have given rise to any complaint under the Convention. It noted that between 2010 and 2014 the Department of Justice and the Secretary of State applied the same test. In March 2014, prior to the quashing of the appellant's conviction, Parliament inserted section 133(1ZA) of the 1988 Act which was noted by the trial judge as amendment which Parliament considered was necessary to clarify the law in the face of continued uncertainty in the courts. The UKSC had found the amended provision to be compatible with the Convention:

> "The devolution settlement left it open to the Department of Justice to take a more generous approach. All of those falling within the reach of the UK Government were dealt with in the same way as were all of those falling within the jurisdiction of the Department of Justice. The application of different tests within a devolved structure is a fundamental aspect of a state operating on such a basis. The determination of a state as to the allocation of responsibility for national security matters is deserving of very great respect and weight. The grounds for the difference of treatment in this case do not impinge on the more sensitive and innate personal characteristics which require intense scrutiny. It is in the nature of any state with devolved legislatures that there will be differences of approach. It is also the case that in any state issues affecting national security are matters of great sensitivity and it is unsurprising the central government would be cautious about delegating responsibility to a devolved entity."

The court said that, in its view, any difference of treatment is a consequence of the entitlement of the different administrations in the UK to make their own political and financial arrangements which

have been democratically approved. It said the Secretary of State retained responsibility for cases such as that of the appellant in 2010 and that, therefore, did not give rise to a difference of treatment:

> "The fact that Parliament changed the entitlement for all those for whom the Secretary of State had responsibility prior to the acquittal of the appellant did not give rise to unlawful discrimination. If he had treated the appellant differently he would have had to justify the approach he took to others for whom he was responsible."

Conclusion

The court agreed with the trial judge and dismissed the appeal.

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://judiciaryni.uk).

ENDS

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