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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY COLIN WORTON FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

and

IN THE MATTER OF A DECISION BY THE JUSTICE MINISTER

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John Larkin KC and Alistair Fletcher BL (instructed by Hewitt & Gilpin, Solicitors) for the Applicant
Philip McAteer BL (instructed by the Departmental Solicitor's Office) for the proposed Respondent

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ROONEY J

Introduction

[1] This is an application in which the applicant challenges the decision of the Justice Minister, which was communicated by letter dated 14 December 2021, refusing to make a payment to the applicant out of the ex gratia compensation scheme ("the ex gratia scheme") for those who fell outside of the statutory compensation scheme under Section 133 of the Criminal Justice Act 1988 ("the impugned decision").

[2] The grounds of challenge will be considered in more detail below. In essence, the applicant contends that in making the impugned decision, the Justice Minister ("the proposed respondent") has acted irrationally, in that she failed to make a decision on the merits because she wrongly believed that she was constrained or unable to do so. It is also argued that the Justice Minister failed to take into account or consider at all the Home Secretary's guidance document of 2003 entitled 'Practice in Administering the Statutory and Ex Gratia Schemes' and wrongly considered herself bound by the decision of a previous Justice Minister, who rejected a previous application from the applicant. The applicant further contends that the proposed

respondent wrongly believed that new evidence was required to show that the applicant had been completely exonerated and wrongly read the words "completely exonerated" as being akin to a requirement to prove innocence.

[3] The proposed respondent contends that the applicant did not apply again for ex gratia compensation and the Minister did not refuse such an application. Rather, following a meeting between the applicant and the Justice Minister on 7 July 2021, the applicant was advised that if new facts relevant to his case emerged, which had not been previously considered, the Minister would look again at the claim.

[4] In a letter dated 9 August 2021 from the Justice Minister to the applicant, it is stated that although the applicant remained eligible for ex gratia compensation in cases where previous applications had already been determined, the application would only be reconsidered if new facts emerge. In a further letter from the Minister dated 13 September 2021, it was further explained that the only grounds on which the application could be reconsidered would be if significant new information came to light which completely exonerated the applicant or which proved that there was serious default on the part of the police in this case.

[5] Accordingly, it is submitted that insofar as the proposed respondent did make a decision, it was a decision made in correspondence dated 9 August 2021 that there was no proper basis upon which to revisit the merits of previous decisions. Accordingly, the judicial review challenge which was initiated on 11 March 2022 was out of time and there is no good reason to extend time.

[6] Furthermore, the proposed respondent submits that the applicant cannot establish an arguable case in which there is a realistic prospect of success, that being the test to be applied by the courts in accordance with the recent Court of Appeal decision in *Re Ni Chuinneagain's Application* [2022] NICA 56 (at para [42]).

Background

[7] The relevant background circumstances are as detailed in the judgment of Treacy J in *Worton's (Colin) Application* [2010] NIQB 14.

[8] The applicant, a then serving member of the Ulster Defence Regiment ("UDR") was arrested on 1 December 1983 in connection with the murder of Adrian Carroll on 8 November 1983 in Armagh. The applicant was interviewed, as were four of his colleagues namely Noel Bell, James Hegan, Winston Allen and Neil Latimer. They all made written statements confessing to their part in the murder of Mr Carroll.

[9] The applicant was held on remand for a period of 30 months until 30 May 1986 when the trial judge Kelly LJ ruled that the applicant's statement, the only evidence against him, was inadmissible. He was therefore acquitted.

[10] The other four defendants ("the UDR four") were found guilty on 1 July 1986 and their appeals dismissed on 4 May 1988. Fresh appeals were lodged by three of

these four defendants based on ESDA tests and on 29 July 1992 Hutton LCJ allowed the appeals of Noel Bell, James Hegan and Winston Allen. On 9 February 2004 Carswell LCJ dismissed a fresh appeal by Neil Latimer. Following their release, compensation was awarded to Noel Bell, James Hegan and Winston Allen under Section 133 of the Criminal Justice Act 1988.

[11] In 1992 and on various dates subsequently, the applicant applied for compensation relying upon the ex gratia compensation scheme of 29 November 1985. The respondent has persistently refused to award the applicant compensation.

The ex gratia scheme

[12] The International Covenant on Civil and Political Rights 1966 was ratified by the UK in May 1976 ("the Covenant"). Article 14(6) provides:

> "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…"

[13] The Criminal Justice Act 1988 gave effect to this right and replaced (in part) an ex gratia scheme for compensation that had been in effect since 29 November 1985. The ex gratia scheme had allowed for compensation where a person had been convicted or where they had been charged and detained in custody. With the introduction of the Act the former category became redundant, but the latter remained valid.

[14] Until April 2006 an ex gratia scheme was operated by successive Home Secretaries and Secretaries for State for Northern Ireland. As stated by Treacy J in *Worton's* [2010] at para [8], "although the scheme has been discontinued, it is accepted that those, such as the appellant, who applied before April 2006 continue to be entitled if they meet the requirements that it contains."

[15] Compensation under the ex gratia scheme was payable on terms detailed to the House of Commons by the then Home Secretary, Douglas Hurd, on 29 November 1985. The following is relevant to this application.

> "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.
>
> > … 'I remain prepared to pay compensation to people … 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." (Emphasis added)

Previous applications for ex gratia compensation

[16] In *Worton's (Colin) Application* [2010] NIQB 14, this applicant sought to judicially review a decision of the Secretary of State not to award the applicant any compensation under the ex gratia scheme. The sole ground on which leave was granted to challenge the decision, was that the Secretary of State allegedly made an error of law in his interpretation of Kelly LJ's decision to rule the applicant's confession inadmissible as disclosing no serious default on the part of the police. In essence, the applicant submitted that Kelly LJ's observations and findings, express and implied, pointed to the conclusion that there had been serious default on the part of the police as a result of which the applicant was wrongly charged. The applicant contended that any suggestion that Kelly LJ exonerated the police was misconceived.

[17] Treacy J referred to a number of authorities relevant to an interpretation of the ex gratia scheme. In particular, reference was made to the decision of the House of Lords in the Northern Ireland appeal in *McFarland* [2004] 1WLR, in which Lord Scott made the following observations at para [40]:

> "In making ex gratia payments the Home Secretary is disbursing public money. But he is not doing so pursuant to any statutory duty or statutory power. There is no

> statute to be construed. He is exercising a Crown prerogative. He is accountable for what he does with public money to Parliament and, in particular, to the House of Commons … But the scope of the Court's powers of intervention are, in my opinion, limited by the nature of the prerogative power in question … **Provided the Secretary of State avoids irrationality in his decisions about who is and who is not to receive ex gratia payments, and provided the procedure he adopts for the decision making process is not unfair, I find it difficult to visualise circumstances in which his decision could be held on judicial review to be an unlawful one."** [Emphasis added]

[18] Treacy J also referred to the dicta of Sir Thomas Bingham in *Bateman & Howse* [1994] EWCA Civ. 36. Applying the principles from the said authorities, Treacy J came to the conclusion that it was clearly open to the Secretary of State to have interpreted Kelly LJ's ruling that the conduct of the police did not amount to serious default. Specifically, at para [15] Treacy J stated as follows:

> "On any showing, it was not irrational of the Secretary of State to interpret the Judgment in the way in which he and successive Ministers of State have consistently done … Having regard to my conclusions above the application for judicial review must be dismissed."

[19] Responsibility for the ex gratia compensation scheme was transferred to the Department of Justice upon devolution. On 17 April 2013 Minister Ford rejected another application made by the applicant for an ex gratia payment.

[20] The applicant requested Minister Ford to provide the reasons underlying his decision of 17 April 2013. In correspondence dated 28 October 2013, the Minister gave his reasons. The Minister confirmed that he had regard to the said 1985 statement from the Home Secretary, which gave two examples of exceptional circumstances in which ex gratia compensation would be made to a person who had spent time in custody following a wrongful conviction or charge, namely:

(a) where he is satisfied that there has been serious default on the part of a member of a police force or some other public authority resulting in a wrongful conviction or charge (the first limb of the statement); or

(b) there are other exceptional circumstances justifying compensation, in particular the emergence of facts at trial or on appeal within time which completely exonerate the accused person (the second limb).

[21] The Minister confirmed that he had considered Mr Worton's application under all the ex gratia categories and concluded that Mr Worton's period in custody

did not result from serious default nor had he been completely exonerated. There were no other exceptional circumstances.

[22] Minister Ford noted that the refusal by the Secretary of State to make an ex gratia payment to Mr Worton had been upheld by Treacy J who confirmed no serious default on the part of the police.

[23] Turning to the issue of complete exoneration, the Minister referred to the definition provided by the Divisional Court in *R v Secretary of State for the Home Department Ex Parte Garner* [1999] All ER (D) 392 where the Home Secretary's policy was upheld, namely, that ex gratia compensation would only be paid on the basis of complete exoneration where facts emerge which establish beyond any doubt that a person did not commit, or could not have committed, the offence. Mr Ford concluded that no such facts emerged in Mr Worton's case.

[24] The applicant did not bring a judicial review challenge to the decision of Minister Ford. At this juncture, the following should be noted. Firstly, it is clear from the said letter which explained the decision of Minister Ford, that reference was made to a Guide produced by the Home Secretary as to how the ex gratia scheme should be interpreted. Secondly, the Home Secretary's Guide, which was produced in 2003, was also considered by Auld LJ in *R (On the Application of Raissi) v Secretary of State for the Home Department* [2007] EWHC 243. In his judgment, Auld LJ referred to paragraph 29 of the Home Secretary's Guide, under the heading "Other Exceptional Circumstances" which read as follows:

> "It is important to bear in mind that serious default and complete exoneration are only examples of 'exceptional circumstances' in which compensation might be paid. The Home Secretary's discretion under the 1985 statement is effectively unlimited and, even if neither of these examples apply, there may still be other circumstances which, taken together or separately, are sufficiently exceptional to justify payment. In practice, cases where ex-gratia compensation is paid on grounds other than serious default or complete exoneration will be very rare. In the very few cases where other exceptional circumstances had been identified, there has generally been a combination of factors which individually would not have triggered a payment but which collectively tip the balance in favour of payment (e.g. a default that would not, on its own, be regarded as sufficiently serious to merit a payment, coupled with facts which tend to, but do not completely, exonerate the Applicant). The circumstances of each case should therefore be examined as a whole, as well as against the specific examples."

[25] The applicant argues that the interpretation of the words "completely exonerated" in the Guide is glaringly out of step with the reasoning of the Supreme Court in *Re MacDermott and McCartney* [2011] UKSC 18. However, as stated by the proposed respondent, any issue about the interpretation of the words "completely exonerated" could have been raised in a challenge to Minister Ford's decision. Significantly, the applicant did raise issues relating to the meaning of "complete exoneration" in his pre action letter of 28 June 2013 which prompted the said correspondence from the Minister on 28 October 2013. Furthermore, the decision in *Re MacDermott* and *Re McCartney* had been delivered by the Supreme Court two years previously and, according to the proposed respondent, the applicant had sufficient time and awareness to raise any issues in respect of the interpretation of the words "completely exonerated" if he had chosen to do so in any judicial review proceedings.

The decision of the Minister

[26] The applicant argues that the impugned decision of the Minister was communicated by letter dated 14 December 2021. The proposed respondent submits that the applicant did not apply again for compensation and that the Minister did not refuse such an application. The proposed respondent further submits that, insofar as the proposed respondent did make a decision, it was that there was no proper basis upon which to revisit the merits of the previous decisions. The decision was made on 9 August 2021 and, according to the proposed respondent, it was plainly reasonable and lawful.

[27] I have carefully considered the relevant correspondence and I conclude that a decision was made by the Minister on 9 August 2021. From the correspondence, it appears that the Minister met the applicant and his supporters on 7 July 2021 and the applicant's case was discussed at length. At the meeting, the applicant presented a number of additional papers for the Minister's consideration. The Minister advised that, if new facts relevant to his case emerged which had not previously been considered, then she would "look at the possibility of an ex gratia payment."

[28] In the said letter dated 9 August 2021, the Minister stated as follows:

> "I have now had time to consider the 2010 Judgment of Treacy J in dismissing the judicial review of the Secretary of State's 2009 decision not to award compensation under the ex gratia scheme. Although this Judgment outlines that those, like you, who have applied before 2006 would still be eligible, this does not extend to cases where an application has already been determined, unless significant new facts emerge. I have also considered the material you provided at that meeting. This material adds nothing new to your case and regrettably I am unable to do anything further."

[29] The applicant wrote a letter to the Minister dated 10 August 2021 requesting:

> "(a) a copy of the minutes of the meeting on 7 July 2021; and
>
> (b) a synopsis of the **decision making process** and details of those who contributed to the decision reached." [Emphasis added]

[30] In correspondence dated 13 September 2021, the Minister replied enclosing the documentation requested by the applicant.

[31] Mr Larkin KC, on behalf of the applicant, argues that the Minister was correct in her interpretation of Treacy J's Judgment in *Re Worton* at para [8], namely, that those who applied to the ex gratia scheme before it was discontinued in 2006 continued to be eligible if they meet its requirements. However, Mr Larkin KC states that the Minister was clearly wrong when she states that eligibility does not extend to those, such as the applicant, whose applications have already been determined.

[32] I am not inclined to accept Mr Larkin's restrictive interpretation of the Minister's letter. The Minister was plainly aware that the applicant remained eligible for an ex gratia payment under the scheme, provided the relevant criteria was satisfied. In her consideration of eligibility, she was entitled to have regard to the decisions of previous Secretaries of State, Ministers of Justice and the High Court. However, the notes of the decision-making process attached to the letter dated 13 September 2021, confirmed that the Minister had not closed her mind to a reconsideration of the applicant's claim. The notes provide as follows:

> "The only grounds on which the application could be reconsidered would be if there were to be significant new information coming to light which completely exonerates Colin Worton or which proves there was serious default on the part of the police in his case. The additional papers (presented at the meeting by the applicant) considered by Brian Grzymek and a junior official, do not add anything which would allow the Minister to reconsider his application under the ex-gratia scheme."

[33] A further explanation of the Minister's decision is provided in her letter dated 14 December 2021. The said correspondence was in response to a detailed letter from Jonathan Larner, Ulster Human Rights Watch, dated 1 December 2021. By way of explanation for her decision, the Minister refers to the guidelines relating to the ex gratia scheme and the relevant grounds for review, namely, exceptional circumstances including serious default on the part of a member of the public authority or facts which emerge that completely exonerate the applicant. The Minister re-affirmed that, on the basis of documentation provided by the applicant, no new information came to light which justified a reconsideration of the application under the ex gratia scheme.

Delay

[34] Order 53, Rule 4 of the Rules of the Court of Judicature (NI) 1980 provides -

> "An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made."

[35] Judicial review proceedings were issued on 11 March 2022. The applicant asserts that the impugned decision was made in correspondence dated 14 December 2021. For the reasons given above, I disagree. The decision of the Minister was given in correspondence dated 9 August 2021. On receipt of the correspondence dated 9 August 2021, the applicant sent an email to the Minister dated 10 August 2021 requesting a "synopsis of the decision-making process and details of those who contributed to the decision reached." A further email was sent by the applicant on 23 August 2021 requesting the said details. The correspondence from the Minister dated 13 September 2021 (with attachments) and 14 December 2021 are in effect explanations as to how the decision was reached by the Minister on 9 August 2021.

[36] In *Re Laverty's Application* [2015] NICA 75, the Court of Appeal stated -

> "If there has been delay, the application for leave should include (a) an application to extend time stating the grounds relied on and (b) an affidavit explaining all the aspects of the delay."

[37] The applicant has not sought any relief by way of an extension of time. No evidence has been produced to explain the delay. Accordingly, I am not satisfied that there is a good reason for extending the period within which the application shall be made.

[38] The proposed respondent makes the following further submissions. Firstly, any issue regarding the Home Secretary's Guidance of 2003 and its interpretation could have been raised in the application determined by Treacy J on 9 February 2010 ([2010] NIQB 14) on foot of the challenge to the Secretary of State's decision of 3 February 2009 confirming his earlier decision not to award the applicant any sum in compensation under the ex gratia scheme. Secondly, any challenge regarding the Home Secretary's Guidance and its application by Minister Ford could have been brought after his decision on 17 April 2013. No judicial proceedings were instigated. Thirdly, any issue relating to the interpretation of the words "completely exonerated" could have been raised in a challenge to Minster Ford's decision of 17 April 2013. It is noted that the applicant did, *inter alia*, raise issues about the meaning and extent of "complete exoneration" in his pre action letter of 28 June 2013 which prompted the further correspondence from the Minister dated 28 October 2013 and discussed above. If the Minister's reasoning is, as alleged by Mr Larkin KC, glaringly out of step with the reasoning of the Supreme Court in *Re MacDermott and*

McCartney [2011] UKSC 18, then this issue should have been raised in a challenge to Minister Ford's decision of 17 April 2013.

[39] The proposed respondent argues, and I agree, that there has been no change in the grounds for the application which gave rise to the decision of Minister Ford on 17 April 2013. Any application now is significantly out of time and there is no good reason to extend time. Time cannot be extended by the artificial mechanism of asking for a redetermination in an attempt to start the clock running again.

[40] *In the Matter of an Application by Gordon Duff for leave to apply for judicial review* [2022] NIKB 8, Humphreys J stated as follows:

> "[27] … As Lewis LJ observed in *R(AK) v Secretary of State for the Home Department* [2021] EWCA Civ. 119:
>
> > 'A claimant cannot avoid the application of the time limits by writing to the defendant and then seeking to characterise a response as a fresh decision.' [para 50]"

[41] The decision made by the Minister in correspondence dated 9 August 2021 was that she could find no basis upon which to reconsider the application. The Minister properly focused on whether there had been any change in the circumstances so as to warrant revisiting the decision. As stated in the decision making process, following the Minister's meeting with the applicant on 7 July 2021, the only grounds on which the application could be reconsidered would be if significant new information came to light which completely exonerated the applicant or which proved there was serious default on the part of the police. This was a rational approach to take and cannot be characterised as *Wednesbury* irrational. The Minister's decision is plainly reasonable and lawful. It was not a redetermination. The decision does not operate to reactive the clock so as to start time running again to challenge decisions refusing ex gratia payments in the past.

[42] For the reasons given, it is my decision that the proposed application is out of time, there is no reasonable excuse for the delay and time should not be extended to permit the application to be brought. (See *Re Wilson's Application* [1989] NI415 at 416 cited by Kerr J in *Re McCabe's Application* [1994] NIJB 27 at 29).

[43] Furthermore, for the reasons given above, the applicant cannot establish an arguable case on which there is a realistic prospect of success, that being the test to be applied in accordance with the recent Court of Appeal decision in *Ni Chuinneagain's Application* [2022] NICA 56 (at §42).

Conclusion

[44] For all these reasons leave to apply for judicial review is refused.