Neutral Citation no. [2007] NIQB 88 | *Ref:* **WEAC5949**

Judgment: approved by the Court for handing down | *Delivered:* **24/10/2007**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY JOHN BOYLE
FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] This is an application for a judicial review of a decision of the Secretary of State for Northern Ireland refusing an award of compensation to the applicant under Section 133 of the Criminal Justice Act 1988 or under the ex gratia scheme, further to the quashing of the applicant's convictions. Mr O'Donoghue QC and Mr Green appeared for the applicant and Mr McCloskey QC and Mr Maguire QC appeared for the respondent.

The criminal proceedings

[2] On 14 October 1977 at Belfast City Commission before His Honour Judge Brown QC the applicant was convicted of possession of firearms and ammunitions with intend to endanger life contrary to Section 14 of the Firearms Act (Northern Ireland) 1969 and of membership of a proscribed organisation namely the Provisional IRA contrary to Section 19(1)(a) of the Northern Ireland (Emergency Provisions) Act 1973. The applicant was sentenced to 10 years imprisonment on the first count, two years imprisonment on the second count to run concurrently and a suspended sentence of 2 years imprisonment passed on 25 October 1974 was implemented consecutively. The applicant's total period of imprisonment was 12 years.

[3] The applicant appealed against conviction and sentence and on 13 January 1978 his appeal against conviction was dismissed and his appeal against sentence was withdrawn. The applicant served his sentence of imprisonment. On 14 December 1999 the applicant applied to the Criminal Cases Review Commission for a review of his conviction and by a Statement of Reasons dated 17 April 2001 the Criminal Cases Review Commission referred the applicant's conviction to the Court of Appeal. In a judgment in R v John Joseph Boyle delivered on 29 April 2003 the Court of Appeal quashed the applicant's conviction.

[4] The case against the applicant at trial was that he took part in a Provisional IRA attack on police officers in Belfast on 27 May 1976. The evidence against the applicant was based on admissions that the applicant was alleged to have made to two police officers in the course of interviews. Written notes of the interviews were made by the interviewing officers. The notes of one of the interviews contained the admission by the applicant that he was an officer and quartermaster in the Provisional IRA and that in the attack on the police officers he had provided cover with a pistol while another man had fired an armalite. The applicant denied that he had made such admissions. The evidence of the interviewing officers was that the notes of interview recording the admissions were made during the course of the interview with the applicant and that the applicant had made the admissions as recorded in the notes. The trial judge accepted the evidence of the interviewing officers and rejected the denials of the applicant.

[5] The applicant's case was referred back to the Court of Appeal by the Criminal Cases Review Commission after tests had been conducted on the interview notes by the ESDA process. The result of that process was that Mr Hughes, Forensic Scientist, concluded that there had been another version of the interview notes of interview five, being the interview at which the applicant was alleged to have made the admissions.

[6] The Court of Appeal, at paragraphs [5] to [9] of the judgment, considered it to be of "substantial significance" that there were verbal differences between the recorded interview and the impressions found by Mr Hughes on examination so that "…. they vary in certain minor respects and wording which cannot be accounted for, in our opinion, by anything appearing or explicable from the impressions and accordingly we accept the conclusion that Mr Hughes advanced that there appears to have been a different version of interview five in existence at some time" (paragraph [5]). As the interviewing officers had committed themselves in evidence to saying that the interview notes were taken at the time of the interview the Court of Appeal stated that their evidence in that regard "cannot be correct" (paragraph [7]). Accordingly the question arose as to whether the credibility of the interviewing officers could have been attacked had this been known at the trial. Carswell LCJ delivering the judgment of the Court of Appeal stated –

> "One cannot say at this stage what view the judge would have taken of that. He might have taken the view that it had fatally undermined their credibility and removed the evidence from the area of proof beyond reasonable doubt to some lesser area or he might have said that he nevertheless accepted that the evidence was reliable in substance and that the interviews reflected what was said. We are not in a position to say that and we simply could not say at this stage that the judge would necessarily have reached the same conclusion if he had known of the rewriting of the interviews and the matter had been pursued in evidence before him."

[7] Carswell LCJ drew comparisons with an earlier decision of the Court of Appeal in 1999 in R v Gorman & McKinney where it had been stated that, unlike some other reported cases, the evidence of the rewriting of the interview notes did not show the inclusion of any material that was to the detriment of the appellant nor did the fresh evidence afford direct and irrefutable contradiction of considered testimony given by police officers about the circumstances in which the rewriting took place. There might have been an innocent explanation of each instance of rewriting if the evidence had been before the Court of Appeal. Carswell LCJ concluded at paragraph [9] that –

> "…. because we are satisfied that there is at least a prima facie case that the notes were rewritten, we cannot regard the conviction as safe. We shall accordingly allow the appeal and quash the conviction."

The application for compensation

[8] Further to the quashing of the applicant's conviction by the Court of Appeal the applicant's solicitor, by letter dated 9 May 2003, applied to the Secretary of State for compensation under section 133 of the Criminal Justice Act 1988 and the ex gratia scheme. Correspondence was exchanged between the applicant's solicitor and the Northern Ireland Office on behalf of the Secretary of State and ultimately by letter dated 2 February 2005 compensation was refused to the applicant.

[9] Section 133 of the Criminal Justice Act 1988 represents the adoption of Article 14(6) of the International Covenant on Civil and Political Rights and provides –

> "(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."

[10] In addition the Secretary of State operates an ex gratia scheme. On 29 November 1985 the Home Secretary made a statement in the House of Commons outlining two additional grounds for the payment of compensation, namely serious default and exceptional circumstances.

> "I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph (now Section 133 of the 1988 Act) but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority.
>
> There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or on appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought."

[11] The Northern Ireland Office letter of 2 February 2005 refusing the applicant compensation stated that the grounds on which the Court of Appeal quashed the applicant's conviction did not satisfy the tests for a "miscarriage of

justice" within the meaning of Section 133 of the 1988 Act; that the judgment of the Court of Appeal contained no finding or conclusion about the conduct of the police that was sufficient to warrant the assessment that they had been guilty of "serious default" within the meaning of the first limb of the ex gratia scheme; that the circumstances of the applicant's case were not so exceptional as to justify an award of compensation under the second limb of the ex gratia scheme.

The grounds for judicial review

[12] The applicant's grounds for judicial review are as follows –

(a) The applicant's case is comparable to for example the UDR Four who were awarded compensation (see R Hegan (2000) NI 461). In breach of domestic law the applicant has not been afforded equal treatment (see Re Colgan's Application (1996) NI 24. 43H to 44B.

(b) The applicant does qualify for compensation within the meaning of Section 133 of the Criminal Justice Act 1988.

(c) The applicant was the victim of a miscarriage of justice within the meaning of Section 133 of the Criminal Justice Act 1988.

(d) The evidence of Kim Hughes, Forensic Scientist, admitted as fresh evidence before the Court of Appeal amounts to a "new or newly discovered fact" within the meaning of Section 133 of the Criminal Justice Act 1988.

(e) The case against the applicant crucially involved the integrity of the interviewing officers on the issue of whether the interview notes were contemporaneous and their evidence on the issue has been shown to be untruthful. It follows therefore that the conviction was based on this perjured evidence and amounts to a miscarriage of justice.

(f) Following the Court of Appeal's decision that there was at least a prima facia case of perjury and by their ruling that the conviction was unsafe the applicant is entitled to the presumption of innocence. In these

circumstances the determination by the Secretary of State that the applicant was not an "innocent person…..wrongly convicted" violates Article 6(2) of the European Convention on Human Rights and is in breach of his obligations under Section 6 of the Human Rights Act 1998.

(g) The DPP have consistently refused to provide reasons why these two police officers should not be prosecuted for perjury. The Police Ombudsman for Northern Ireland recommended that they be prosecuted and there existed a case of perjury against them. At no time has it ever been suggested that the reason not to prosecute has been that the two police officers did not rewrite these interview notes.

(h) Given the evidence of Mr Hughes, which confirmed the applicant's case at trial that these interview notes had been rewritten, and the Court of Appeal's ruling that the police officers' evidence in denial of this was not correct, the applicant was convicted as a result of "serious default on the part of a member of the police or of some other public authority".

(i) That the conviction was based on the evidence of two police officers against whom there is strong evidence of perjury and that this amounts to the exceptional circumstances within the meaning of the Secretary of State's ex gratia scheme.

(j) That the decision not to find the circumstances of the applicant's case to be exceptional is "Wednesbury unreasonable".

Section 133 of the Criminal Justice Act 1988

[13] For the purposes of Section 133 of the 1988 Act it is clear that the applicant is a person who has been convicted of a criminal offence and that subsequently his conviction has been reversed. The quashing of a conviction is not sufficient to establish an entitlement to compensation. It is necessary for an applicant to establish that the conviction has been reversed "on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice".

"…. a new or newly discovered fact …."

[14] First of all there must be a new or newly discovered fact. A new or newly discovered fact does not arise where the fact was known during the trial or the appeal process.

[15] Nor does a new or newly discovered fact arise from a later legal ruling made on facts known during the trial or appeal process. In R (Bateman and Howse) v. Secretary of State for the Home Department (1994) Admin LR 175 convictions were quashed by the Court of Appeal after later legal rulings held in the first case that the bylaws grounding the conviction were invalid and in the second case that the evidence had been wrongly admitted. The Court of Appeal found that there was no new or newly discovered fact leading to the reversal of the convictions. Rather it was found that there was merely a decision on a point of law. Similarly in Magee's Application (2007) NICA 34 the conviction was quashed by the Court of Appeal after a legal ruling by the European Court of Human Rights that the absence of access to a legal adviser during police interrogation at Castlereagh was a violation of Article 6 of the European Convention. The Court of Appeal found that there was no new or newly discovered fact grounding the reversal of the applicant's conviction but rather the ECtHR made a ruling on facts known all along.

[16] Nor does a new or newly discovered fact arise from "new evidence" about facts known during the trial or appeal process. In R (Murphy and Brannan) v. Secretary of State for the Home Department [2005] EWHC 140 (Admin) the applicants had been convicted of murder. At a fourth police interview a defendant stated that the victim had a gun and this was treated as a case of recent invention. However the police had information before interviewing the applicant that the victim had a gun. On appeal there was fresh evidence from other witnesses that the victim had a gun but this was rejected by the Court of Appeal. On a reference by the Criminal Cases Review Commission the applicants' first solicitor gave evidence of instructions from the applicant that the victim had a gun and the Court of Appeal quashed the conviction. The applicant was refused compensation under Section 133 of the 1988 Act as there was no new or newly discovered fact. That the police had information before interviewing the applicant that the victim had a gun was not a new or newly discovered fact as it was known to the defence at the trial. Further the solicitors evidence before the Court of Appeal was not of a new or newly discovered fact but was "new evidence".

[17] In the present case the respondent contends that the Court of Appeal, in quashing the applicant's conviction, did not make any findings of fact in respect of the new evidence and that there was no new or newly discovered fact. There was certainly no finding, as the applicant contends, that the interviewing officers committed perjury at the trial. However at paragraphs [5]

to [7] of the judgment of Carswell LCJ in R v. John Joseph Boyle the Court of Appeal did conclude that it appeared that the evidence of the interviewing officers could not be correct where they stated that the notes of interview five were completed at the time of the interview and when there appeared to have been a different version of interview five in existence at some time. These matters represented new or newly discovered facts that were not known during the trial or the original appeal process. Accordingly the requirement of section 133 of the 1988 Act for a new or newly discovered fact has been satisfied.

"… on the ground that …."

[18] Secondly, it is the impact of the new or newly discovered fact that must be the basis of the reversal of the conviction. As Richards J stated in R (Murphy and Bannon v. Secretary of State for the Home Department [2005] EWHC 140 (Admin) at paragraph 64 –

> "In our judgment it is not sufficient that the new or newly discovered fact makes some contribution to the quashing of the conviction. It must be the principal, if not the only, reason for the quashing of the conviction. Only then could it be said that the new or newly discovered fact showed beyond reasonable doubt that there had been a miscarriage of justice."

[19] In the present case the new or newly discovered facts referred to above were the reason for the quashing of the conviction. Accordingly the causal connection required by section 133 of the 1988 Act has been satisfied.

"…. a miscarriage of justice…."

[20] Thirdly, the reversal of the conviction on the ground of a new or newly discovered fact must show beyond reasonable doubt that there has been a "miscarriage of justice". There were two different interpretations of this concept in the House of Lords in R (Mullen) v. Secretary of State for the Home Department [2004] UK HL 18. The applicant was convicted of conspiracy to cause explosions but his conviction was later quashed by the Court of Appeal on the ground that his deportation from Zimbabwe to the United Kingdom involved an abuse of process rendering the conviction unsafe. The House of Lords upheld the refusal of compensation to the applicant on the ground that Section 133 of the 1988 Act obliges the Secretary of State to pay compensation for failures of the trial process and the Court of Appeal in quashing the applicant's conviction identified no failure in the trial process, but rather an

abuse of executive power which led to the applicant's apprehension and abduction.

[21] The House of Lords considered the meaning of "miscarriage of justice". Lord Bingham did not accept the argument of the Secretary of State that section 133 only applied where it was shown beyond reasonable doubt that the applicant was innocent of the crime of which he had been convicted. Lord Bingham gave a wide interpretation to the expression "miscarriage of justice". It was stated that, as with the expression "wrongful conviction", it could be used to describe the conviction of the demonstrably innocent and again it could be used to describe cases in which it was clear that the defendant should not have been convicted. The latter may arise because –

> "…. the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind it may, or more often may not, be possible to say that the defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in a conviction of someone who should not have been convicted".

[22] On the other hand Lord Steyn adopted a narrow interpretation of "miscarriage of justice". His conclusion was that Parliament had adopted the international meaning when it enacted section 133 of the 1988 Act and that the expression extended only to –

> "…. clear cases of miscarriage of justice, in the sense that there would be acknowledgment that the person concerned was clearly innocent."

Lord Roger accepted the arguments advanced by Lord Steyn. Lord Scott and Lord Walker did not express a preference for either view.

[23] The Court of Appeal in Northern Ireland considered the issue of "miscarriage of justice" in Magee's Application [2007] NICA 34. The Court of Appeal concluded that it was not necessary to decide between Lord Bingham and Lord Steyn because even on the wider interpretation of "miscarriage of

justice" the applicant did not qualify for compensation as there had been no failure of the judicial process.

[24] The issue has also been considered by a Divisional Court in England and Wales in R (Clibery) v. Secretary of State for the Home Department [2007] EWHC 1855 (Admin). The applicant had been convicted of raping his wife. After completion of the trial process fresh evidence emerged in relation to the victim's conduct after the trial which demonstrated a propensity for telling lies and therefore cast doubt on her credibility. On a reference by the Criminal Cases Review Commission his conviction was quashed by the Court of Appeal. An application for compensation was refused. On an application for judicial review of the refusal the Divisional Court was satisfied that the discovery of facts affecting the credibility of a witness was capable of constituting "new or newly discovered facts" within the meaning of section 133. The Divisional Court did not have to choose between the approach of Lord Bingham and Lord Steyn in relation to the expression "miscarriage of justice" as it was found that the applicant could not bring himself within the wider interpretation adopted by Lord Bingham. Again there was no failure in the trial process as the doubts about the victim's credibility concerned her conduct after the trial.

[25] In the present case the applicant contends that there has been a failure in the trial process. On Lord Bingham's approach a "miscarriage of justice" arises not only where it has been demonstrated that the applicant is innocent, which is not the present case, but also where the applicant should not have been convicted. However the new or newly discovered facts referred to above do not establish that the applicant "should not" have been convicted. As Carswell LCJ stated in quashing the applicant's conviction in R v John Joseph Boyle the new or newly discovered facts rendered the conviction unsafe because the Court of Appeal could not determine what view the trial Judge would have taken of the evidence had he known that it appeared that there were two versions of the interview notes for interview five. The trial Judge might have taken the view that it had fatally undermined the credibility of the interviewers and removed the evidence from the area of proof beyond reasonable doubt to some lesser area, or he might have said that he nevertheless accepted that the evidence was reliable in substance and that the interviews reflected what was said. In other words it cannot be said that the applicant "should not" have been convicted. All that can be said is that the trial Judge may or may not have convicted the applicant had he known what is now known. Accordingly, as in Magee's Application and in Clibery, the applicant does not satisfy Lord Bingham's wider interpretation of "miscarriage of justice" as an applicant in respect of whom it has been established that he "should not" have been convicted. Clearly the applicant does not satisfy Lord Steyn's narrow interpretation of "miscarriage of justice" as an applicant in respect of whom it has been established that he is innocent. Accordingly the requirement of section 133 of the 1988 Act that there has been a miscarriage of justice has not been satisfied.

[26] The assessment of the basis for the reversal of the conviction has been based on the judgment of the Court of Appeal in quashing the conviction. Other relevant court proceedings may serve to inform the basis for the quashing of a conviction. The applicant applied for judicial review of the decision of the Director of Public Prosecutions not to prosecute the interviewing police officers for perjury. The Court of Appeal dismissed the application for judicial review - see Boyles Application [2006] NIJB 396. Had there been such a prosecution then the outcome may have further informed the assessment of the basis for quashing the conviction.

Unequal Treatment.

[27] The applicant claims unequal treatment. Comparison is drawn with the case of the "UDR Four" who were convicted of murder and in respect of three of whom the Court of Appeal quashed the convictions and the Secretary of State awarded compensation. Similarly in Gorman and McKinney, referred to by Carswell LCJ in quashing the present applicant's conviction in the Court of Appeal, compensation was paid further to the quashing of their convictions. In both instances the respondent agreed that the convictions were quashed further to the results of ESDA testing of interview notes indicating discrepancies in the records. In both instances it is agreed by the respondent that compensation had been paid under Section 133 of the 1988 Act.

[28] The principle of equal treatment is well recognised in administrative law. Having quoted Sir John Donaldson MR in R (Cheung) v. Hertfordshire County Council [1986] that "It is a cardinal principle of good public administration that all persons who are in a similar position should be treated similarly" Girvan J in Re Colgan's application (1996) NI 24 stated at page 44 –

> "A decision which results in an unjustifiable inequality of treatment is open to challenge on the ground of unreasonableness since if there is no logical difference between two situations justifying a differential treatment, logic and fairness require equality of treatment."

[29] De Smith, Woolf and Jowell in Judicial Review of Administrative Action 5th Edition at paragraph 13-036 describe two aspects of formal equality. The first aspect is a consistent application and enforcement of the law in the interests of legal certainty and predictability. The other aspect is that of ensuring that all persons similarly situated will be treated equally by those who apply the law and this aspect is stated to be the central aim of formal equality.

[30] The grounds for quashing the convictions in three of the cases of the "UDR Four" and the cases of Gorman and McKinney are similar to the present case. The explanation for different treatment is offered by David Mercer, Deputy Principal in the Criminal Law Branch of the Northern Ireland Office, as follows –

> "7. At the time of the decision making in respect of the cases of the UDR Three and of the cases of Gorman and McKinney the approach which was then taken to the requirements of Section 133 of the Criminal Justice Act 1988 was that it was sufficient for an applicant for compensation to show that a new or newly discovered fact had led to a late reversal of the applicant's convictions. In particular the view at that time was that the applicant was not required to do more such as to demonstrate his innocence or to show that the reversal arose from a failure of the trial process.
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> 8. The position described at paragraph 7 above altered however especially after the decision of the divisional court in England and Wales in the case of Mullan [2002]. Since at least that date legal advice has been that the issue of innocence is a live issue and that attention must be given to whether the new or newly discovered fact which led to the late reversal of the conviction gave rise to a miscarriage of justice as that concept was explained by the court in Mullan.
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> 9. The decision impugned in these proceedings was taken after the cases of Mullan and McFarland has been decided by the House of Lords and was made in the light of legal advice as to how those decisions affected the operation of both the statutory and ex gratia schemes.
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> 10. If the cases of the UDR Three where those of Gorman and McKinney had been decided after the House of Lords decisions referred to above the question of whether there had been within the statute a miscarriage of justice would have had to be explored in the same way as it has been explored in the present case."

[31] The applicant does not accept this explanation, contends that on the above approach there was no place for an ex gratia scheme and that the Secretary of State and the Court should adopt the approach of Lord Bingham to the question of a miscarriage of justice. For the reason appearing above it is not necessary to choose between the approach of Lord Bingham and Lord Steyn.

[32] If similar cases are treated differently then that is unreasonable unless it can be justified by the decision maker. The three cases from the "UDR Four" and Gorman & McKinney are similar to the present applicant. The different treatment requires justification. In the interpretation of legislation a decision maker with the benefit of legal advice is entitled to alter his approach to the statutory provision, subject to the legality and reasonableness of the new approach (in the wider sense of making a rational decision on the basis of relevant considerations) and the requirements of procedural fairness. In the present case the approach to the interpretation of Section 133 of the 1988 Act was altered in the light of legal advice that took account of developing jurisprudence. A review of the previous approach was a step which the Secretary of State was entitled indeed obliged to undertake. A change of approach to the statutory provision was something the Secretary of State was entitled to undertake. The change that was undertaken has not resulted in an approach which could be treated as unlawful or unreasonable or procedurally unfair. I do not consider that there is any basis not to accept the explanation offered by Mr Mercer on behalf of the Secretary of State. I am satisfied that the respondent has justified the different approach adopted in the present case.

The ex gratia scheme.

[33] The ex gratia scheme for compensation was abolished on 19 April 2006. However those who had applied for compensation under the ex gratia scheme prior to that date continues to be entitled to have their applications considered. As the applicant applied for compensation under the ex gratia scheme prior to 19 April 2006 the Secretary of State has considered and will reconsider, if necessary, his claim for compensation under that scheme.

"…. serious default…."

[34] The first limb of the ex gratia scheme applies where there has been a "wrongful conviction" that has resulted from "serious default" on the part of a member of the police force or of some other public authority. It is contended on behalf of the applicant that he satisfies the first limb of the ex gratia scheme as the circumstances of the present case amount to serious default on the part of the police, namely the interviewing officers who gave incorrect evidence to the original trial about the interview notes.

[35] In considering the question of "serious default" the Secretary of State had properly to be guided by the judgment of the Court which quashed the conviction. The issue of serious default was considered by the House of Lords in McFarland [2004] UKHL 17. The applicant was convicted of indecent assault but the conviction was later quashed by the Divisional Court on an application for judicial review. The conviction was found to be flawed as it rested on a plea of guilty that was vitiated by lack of true consent brought about by a misapprehension stemming from the Resident Magistrate's discussions with Counsel. Having heard two prosecution witnesses the RM called prosecuting and defending Counsel to chambers to indicate that a continued contest would result in the RM referring the matter to the Crown Court for sentencing where a higher sentence of 18 months or more might be imposed. The applicant changed his plea to guilty and was sentenced to 8 months imprisonment. In the event the RM did not have the power to refer the case to the Crown Court for sentencing. The majority of the House of Lords found that Judges and Magistrates were not a "public authority" for the purposes of the first limb of the ex gratia scheme.

[36] However Lord Bingham at paragraph 16 stated that the Secretary of State, in considering the question of "serious default", had properly to be guided by the judgment of the Court which quashed the conviction and it would not generally be open to him to treat as minor that which the Court had treated as serious, or vice versa, as he had to take his cue from the Court. Further, had it been necessary to consider whether the RM's default was serious the Secretary of State would probably have concluded, on reading the judgment, that it was not serious. In addition Lord Bingham expressed his concern that the RM's conduct did not attract the censor that it was considered was merited. Nevertheless it was not for the Secretary of State to go behind the judgment of the Court. Lord Steyn described the RM's conduct as outrageous but concluded at paragraph 32 by stating that, given the terms of the judgment on which the Secretary of State was entitled to base his decision about an award of compensation, he would "…. nevertheless with considerable hesitation not press to dissent my view that there was "a serious default" by the magistrate".

[37] The House of Lord revisited the issue of "serious default" in R (Mullen) v. Secretary of State for the Home Department. The Secretary of State accepted that the unlawful conduct of the Intelligence Service and the police force amounted to a serious default on the part of a public authority. Nevertheless the Secretary of State refused compensation to the applicant on the basis that it would have been "an affront to justice" if an applicant who conceded that he was rightly convicted was compensated financially for an abuse of process. The House of Lords rejected the applicant's contention that the Secretary of State's decision to refuse compensation had been irrational.

[38] In relation to the exercise of discretion to make ex gratia payments Lord Bingham stated at paragraph 12 –

> "I consider that the Secretary of State must enjoy some latitude in the administration of an ex gratia scheme, so long as he acts fairly, rationally, consistently and in a manner that does not defeat substantive legitimate expectations."

[39] The Northern Ireland Office letter of 2 February 2005 stated that the judgment of the Court of Appeal contained no findings or conclusions about the conduct of the police that was sufficient to warrant the assessment that they had been guilty of "serious default". The applicant contends that there was serious default on the part of the police in that the interviewing officer secured a conviction on the basis of false testimony. As stated by the House of Lords in McFarland the Secretary of State in determining whether to pay compensation under the ex gratia scheme must be guided by the judgment of the Court which quashed the conviction. That there was default on the part of the interviewing officers is beyond question. The Court of Appeal stated that it appeared that their evidence that the interview notes had been made at the time of the interviews could not be correct. However the Court of Appeal did not conclude that this amounted to "false testimony" or perjury. The Court compared its conclusion to that in R v Gorman and McKinney where it was stated that there might well be an innocent explanation of each instance of re-writing. However no explanation was before the Court of Appeal in either case and the convictions were quashed. Had there been perjury there would clearly have been serious default. The basis of the challenge to the Secretary of State's decision is irrationality. However it was not established that there had been perjury and the Secretary of State was entitled to conclude that the default of the police officers was not "serious". It cannot be said, in the light of the terms of the judgment of the Court of Appeal quashing the conviction, that the decision of the Secretary of State that the conduct of the interviewing officers did not amount to serious default was irrational.

"… exceptional circumstances…."

[40] The applicant contends that the case falls within the second limb of the ex gratia scheme, namely exceptional circumstances. The applicant sought leave to contend that there were exceptional circumstances in the loss by the applicant of his right of action against the interviewing police officers for misfeasance in public office because such a claim had become statute barred. The applicant's argument was that time began to run against the applicant at the time of his trial in 1977 as that was the date on which he had knowledge that the interviewing officers were guilty of misfeasance in public office. However the findings of the trial Judge in 1977 precluded the applicant from

effectively undertaking proceedings against the police officers for misfeasance in public office. Further the applicant argued that by the time the conduct of the police officers had been exposed after the CCRC began investigations in 1999 and the Court of Appeal quashed the conviction in 2003 any claim by the applicant for misfeasance in public office had become statute barred and there was no power to extend time in such cases. This was not a point relied on by the applicant in representations to the Secretary of State, not a point considered by the Secretary of State, not one of the grounds on which leave had been granted and it emerged in the applicant's skeleton argument. The respondent opposed the application for the grant of leave, which was first made at the substantive hearing. Leave was refused on the hearing of the application. This was not an issue that had been raised with the decision maker and was not a matter that the decision maker should have known to take into account in any event. Nor was this a matter on which the respondent might have been able to reply after a short adjournment as it in effect required a reconsideration of the decision in issue. It was a matter which, arising as it did as an afterthought when leave had been granted, the applicant ought to have raised with the respondent and if rejected have been the subject of a further application for leave before the substantive hearing of the judicial review.

[41] There are no other particular circumstances that might be regarded as exceptional for the purposes of the second limb of the ex gratia scheme.

[42] I have not been satisfied on any of the applicant's grounds for judicial review and accordingly the application will be dismissed.