Judicial review – Criminal Justice Act 1988 – Claim for compensation for miscarriage of justice – claim is alternative under ex parte scheme – whether applicant victim of miscarriage – whether decision of Secretary of State flawed.

Neutral Citation no. [2004] NIQB 57 | *Ref:* **GIRF5070**

Judgment: approved by the Court for handing down | *Delivered:* **16/09/04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (CROWN SIDE)

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IN THE MATTER OF AN APPLICATION BY MICHAEL GERARD MAGEE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

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AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR NORTHERN IRELAND

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GIRVAN J

[1] The applicant is Michael Gerard Magee who in this application challenges the decisions of the Secretary of State for Northern Ireland ("the Secretary of State") refusing him compensation both under section 133 of the Criminal Justice Act 1988 and under the ex gratia scheme for the compensation of people who spent time in custody following a wrongful conviction.

[2] The applicant was convicted of a number of scheduled offences before a judge sitting without a jury at Belfast Crown Court. The Crown case was that the applicant with a number of other accused persons was involved in the assembly and transporting of a terrorist bomb to a culvert designed to be blown up as members of the security forces passed by. The evidence against the accused consisted of oral admissions and a written statement made by him during police questioning at Castlereagh Holding Centre ("Castlereagh"). The applicant's defence was that he suffered substantial ill-treatment from two of the interviewing detectives. This case the court rejected. The trial

judge concluded that the applicant had fabricated the allegations of maltreatment. The applicant did not make out the case that the statement should be excluded on the basis that the police operated a general intimidatory environment at Castlereagh. He was sentenced to 20 years imprisonment. His first appeal was dismissed on 16 June 1993.

[3] The applicant took the matter to the European Court of Human Rights alleging a breach of Articles 3 and 6 of the Convention. The European Court by its decision given May 2000 held that the circumstances of the applicant's detention in Castlereagh led to a violation of Article 6(1) read in conjunction with Article 6(3)(c) because he had been denied access to a solicitor during his detention. The court considered that the central issue raised by the applicant's case was his complaint that in a coercive environment he had been prevailed upon to incriminate himself without the benefit of legal advice. The applicant had made a specific request to see a solicitor on arrival at Castlereagh. The decision was taken to delay his access to a solicitor and he was questioned for more than 48 hours without access to legal advice. He made his confession on 17 December and was eventually able to consult his solicitor at 1.00 pm on 18 December 1988. Prior to his confession he had been interviewed on five occasions for extended periods punctuated by breaks. The European Court did not dispute the finding by the trial court that the applicant had not been ill-treated and did not dispute the conclusion that the confession had been voluntary. In paragraph 43 of the judgment of the European Court it was stated:

> "Apart from his contacts with the doctor, the applicant was kept incommunicado during the breaks between bouts of questioning conducted by experienced police officers operating in relays. It sees no reason to doubt the truth of the applicant's submission that he was kept in virtual solitary confinement throughout this period. The court has examined the findings and recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment and Punishment in respect of the Castlereagh Holding Centre …. It notes that the criticism which the CPT levelled against the centre has been reflected in other public documents. The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to these considerations, the court is of the opinion that the applicant, as a matter of procedural fairness, should have been given

> access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confide in his interrogators. Irrespective of the fact that the domestic court drew no adverse inferences under Article 3 of the 1988 Order, it cannot be denied that the Article 3 caution administered to the applicant was an element which heightened his vulnerability to the relentless rounds of interrogation on the first days of his detention.
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> 44. In the court's opinion, to deny access to a lawyer for such a long period and in a situation where the rights of the defence were irretrievably prejudiced is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6 …"

Following the decision of the European Court the Criminal Cases Review Commission referred the applicant's case back to the Court of Appeal under section 10 of the Criminal Appeal Act 1995. Following the referral of the matter by the Commission the Court of Appeal quashed the applicant's conviction as unsafe. In the court's decision, given by Carswell LCJ, [2001] NI 217 at 228 the court stated:

> "Under section 2(1) of the Criminal Appeal (Northern Ireland) Act 1980, as amended by the Criminal Appeal Act 1995, the Court of Appeal is to allow an appeal against conviction if the court thinks it was unsafe and dismiss the appeal in any other case. In this reference we have to consider the effect of the argument now put before us, which was not advanced to the trial judge, that he should have exercised his discretion to refuse to admit statements made by the appellant on the ground that it was unfair in all the circumstances of the case, and taking into account the atmosphere of Castlereagh, to decline to allow him access to legal advice for the period of 48 hours after his arrest. Such an argument could not have succeeded if made at the time of the appellant's trial in 1990 or his appeal to this court in 1993. Parliament had by enacting section 15 of the Northern Ireland (Emergency Provisions) Act 1978 and its successor at section 45 of the 1991 Act specifically authorised the deferment of access to legal advice in certain circumstances for a maximum period of time.

> The courts therefore could not interpret section 8(c) of the 1978 Act or its successor as giving authority to exclude a statement made by the person detained which would have defeated the will of Parliament: see Re Russell's Application [1996] NI 310 at 323 and 336 per Hutton LCJ. Since the trial judge was not asked to exercise his discretion to exclude the statements on the ground of denial of access to legal advice, this court as an appellate tribunal has now to exercise the discretion deferred on him see for example R v Doherty (1999) Criminal Appeal Reports 274 at 281. If the law applying in 1990 had remained unchanged at the present time, we should be bound to reach the same conclusion that we could not exclude the statements on that ground.
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> The legal landscape has, however, been fundamentally changed by the enactment of the Human Rights Act 1998, which is now in force. By section 7(1)(b) the appellant is entitled to rely on his Convention rights sets out in Article 6 in any legal proceedings (which by section 7(6) include an appeal against the decision of a court). By section 22(4), section 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the action in question took place. Section 2(1)(b) requires the court determining a question which has arisen in connection with the Convention right to take into account any judgment of the ECHR."

The court went on to conclude that in determining the appeal the court had to judge its safety by applying the standards of today accepting the correctness of the decision in R v Bentley (1999) Criminal Law Review 330 and R v Johnston [2002] All ER (D) 2026. The court came to the conclusion that in light of the European Court ruling the conviction was unsafe.

[4] On 24 June 2002 the applicant applied to the Secretary of State for compensation under section 133 of the 1988 Act. By letter of 6 December 2002 the Northern Ireland Office informed the applicant that compensation would not be paid either under section 133 or under the Secretary of State's ex gratia scheme. The Secretary of State concluded that the applicant's conviction had not been reversed on the ground that new or newly discovered facts showed beyond reasonable doubt that there had been a miscarriage of justice. Rather his conviction had been quashed because of a breach of Article 6 of the Convention coupled with the Court of Appeal's determination that in assessing the safety or otherwise of the convictions the court should, by virtue

of the advent of the Human Rights Act 1988, give full effect to Article 6. Furthermore, a miscarriage of justice within the meaning of section 133 occurred only when an innocent accused person was wrongly convicted. Section 133 was not designed to compensate accused persons who convictions are judged unsafe. The applicant was not entitled to compensation under the ex gratia scheme because the conviction did not result from serious default on the part of the police or other public authority. The applicant had not been exonerated of the crime of which he was convicted nor had there been any judicial error or misconduct which was so great as to give rise to exceptional circumstances within the meaning of the policy.

[5] Section 133 of the 1988 Act, so far as material provides:

> "(1) Subject to sub-section (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he had 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.
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> (2) No payment of compensation under this scheme shall be made unless an application for such compensation has been made to the Secretary of State.
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> (3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.
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> (4) If the Secretary of State determines that there is a right to such compensation, the amounts of the compensation shall be assessed by an assessor appointed by the Secretary of State.
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> (5) In this section "reversed" shall be construed as referring to a conviction having been quashed –
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> (a) on appeal out of time; or
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> (b) on a reference;

(iii) under section 14 of the Criminal Appeal (Northern Ireland) Act 1980."

[6] Mr Treacy QC on behalf of the applicant argued that the applicant's conviction was quashed as a direct result of the conclusion of the European Court that there had been a violation of his right to a fair trial. He contended that the following could be characterised as new or newly discovered facts:

(i) the conclusion by the CPT that the material conditions in Castlereagh coupled with the intensive and prolonged character of the interrogation process placed persons detained therein under a considerable degree of psychological pressure which if sufficient to break the will of a detainee would amount to inhuman treatment;

(ii) the decision of the European Court that the applicant's Article 6 rights had been breached and that he had not had a fair trial;

(iii) the decision of the European Court that the conditions in Castlereagh constituted an intimidating atmosphere specifically devised to sap the applicant's will and make him confess to his interrogators; and

(iv) the decision of the European Court that the conditions in Castlereagh coupled with the administration of the Article 3 caution were in breach of the applicant's right to a fair trial was a newly discovered fact which could not have been within the knowledge of the applicant or the trial judge at the time of his trial.

Mr Treacy, founding his argument on Lord Bingham's reasoning in R (Mullen) v Secretary of State contended that the term "miscarriage of justice" has a broader meaning than that ascribed to it by the Secretary of State and is sufficiently brought to encompass the facts of the present case. The only evidence against the applicant was the confession made by him in conditions in which he was subject to prolonged and intensive interrogation conducive to breaking down any resolve he might have manifested at the beginning of his detention to remain silent. A finding by the European Court of a violation of Article 6 must inform the reasoning of "miscarriage of justice" within section 133 of the 1988 Act and the term must be sufficiently broad to encompass a finding that the applicant did not have a fair trial within Article 6. Following the ruling that the applicant had been denied a fair trial under Article 6 and the ruling of the court and following the Human Rights Act 1988 and the interpretative obligation contained in section 3 thereof, section 133 must be interpreted in a manner consistent with the Convention rights. The phrase miscarriage of justice must be sufficiently broad to include a trial which was unfair within the meaning of Article 6. Under the ex gratia scheme, if the applicant had to rely on it, there was no exhaustive definition

of exceptional circumstances. The Secretary of State had a broad discretion when concluding whether to make an ex gratia payment. In this case the public authority whose actions were the subject of censure were the police who had responsibility for the applicant's conditions of detention, the prolonged and intensive interrogation and the decision to deny him access to a solicitor. The European Court decision led to the conclusion that the conviction resulted from serious default on the part of the police. In seeking to uphold the decision of the Secretary of State Mr McCloskey QC contended that there had been no new or newly discovered fact establishing a miscarriage of justice. The critical impediment was the absence of access to legal advice, this forming the sole basis of the Court of Appeal decision to quash the convictions. This was not a new or newly discovered fact. It had been known throughout the history of the proceedings. The Court of Appeal ruling was a legal ruling on facts which were known all along. Lord Steyn in Mullen required proof by an applicant for compensation that he was clearly innocent. Lord Bingham preferred a more expansive meaning of miscarriage of justice to encompass failure of the trial process. In this case it had not been demonstrated that the applicant was clearly innocent nor was there was any proven failure of the trial process. As the law stood at the time of trial the trial was fair and the law had been correctly applied. In relation to the ex gratia scheme the conclusion of the Secretary of State that there was no serious default on the part of members of the police force or other public authority could not be challenged as Wednesbury unreasonable. The exceptional circumstances limb of the policy requires the Secretary of State to exercise a discretion and to form a rational judgment. It was open to the Secretary of State to conclude that there was no case of exceptional circumstances within the ambit of the scheme.

[7] With the benefit of hindsight, in the light of later House of Lords authority the actual decision of the Court of Appeal in Magee quashing the conviction following a decision of the European Court was wrong. As Carswell LCJ stated in R v Latimer (2004) NICA 3 at paragraph 74:

> "Our decision in R v Magee has however been overtaken in domestic law by the decisions of the House of Lords in R v Lambert [2002] 2 AC 545 and R v Kansal No. 2 [2002] 2 AC 69. The effect of these decision is that retrospective effect of the Human Rights Act 1998 and the direct enforcement of Convention rights do not apply where a defendant convicted before the Act came into operation on 2 October 2000 brings an appeal after that date. In that respect our decision in R v Magee was wrong in that we had held that the 1998 Act did apply retrospectively to the case. It also follows that the appellant in the present appeal cannot found a claim

> that his confession should not have been admitted upon the ground that the conditions of detention at Castlereagh were in breach of his Convention rights."

There was no failure of the trial process in relation to the original conviction of the applicant. He did receive a fair trial under domestic law as it then stood. The trial did not satisfy the requirements of the European Convention but at the time of the trial and the first appeal the applicant could not in domestic law rely on the Convention as conferring any legal rights. In Mullen at paragraph 9 Lord Bingham stated that the quashing of Mullen's conviction was not the result of a failure in the trial process:

> "It is for failings of the trial process that the Secretary of State is bound by section 133 and Article 14(6) of the International Covenant on Civil and Political Rights to pay compensation. On that limited ground I would hold that he was not bound to pay compensation under section 133."

Lord Bingham and Lord Steyn took different views on whether an applicant for compensation would need to prove his innocence before the case established an entitlement to compensation. Reading the speeches of the Law Lords together it is difficult to say that the House has reached a considered view on that issue. The majority were content to found the decision on the proposition that there had been no failure of the judicial process. I would hold against the applicant on the ground that he has not established that he was a victim of a miscarriage of justice attributable to any failure in the judicial process.

[8] The applicant must point to a reversal of his conviction on the ground of the discovery of a new or newly discovered facts. The ground of the Court of Appeal reversal of his conviction was not the discovery of a new or newly discovered fact but was the result of a legal ruling on facts which had been known all along. I accept Mr McCloskey's argument that the critical ingredient in the present case was the absence of access to a legal adviser. This did not contribute a new or newly discovered fact. It was a given in the course of the trial. The European Court ruling (which led to the Court of Appeal reversing the convictions on the reference) was a legal ruling on facts known all along. The defendant sought to have his confession excluded on the basis of oppressive misconduct, making allegations against members of the police force which the trial judge rejected on grounds upheld by the Court of Appeal and which the European Court did not criticise.

[9] On the question whether the applicant should have succeeded under the ex gratia scheme the conclusion of the Secretary of State that the conviction did not result from serious default on the powers of members of

the police force or any other public authority could not be considered to be Wednesbury unreasonable. The relevant statutory provisions relating to a detained persons rights of access to solicitors were properly complied with in the then prevailing circumstances. It was open to the Secretary of State to conclude that the decision to operate the conditions at Castlereagh (which were criticised by the European Court) was not the product of serious default on the part of members of the police force. Even if the conditions did not comply with the Convention, at the time there was no breach of domestic law.

[10] In relation to the wider "exceptional" circumstances argument for the payment of compensation under the ex gratia scheme that limb of the policy requires the Secretary of State to exercise a discretion. Lord Bingham pointed out in Mullen that the Secretary of State must enjoy some latitude in the administration of the ex gratia scheme so long as he acted fairly, rationally, consistently and in a way which did not defeat legal expectations. These are essentially matters for a decision by the Secretary of State. He was entitled to conclude that the applicant had not been exonerated of the crime. He had confessed to the crimes and the court had justifiably concluded that the confession was not obtained in such circumstances that it should not be treated as voluntary. The Secretary of State was entitled to conclude that there had been no judicial error or misconduct giving rise to exceptional circumstances. Indeed the trial judge was bound to apply domestic laws and then stood and reached a decision which was entirely consistent with the domestic law.

[11] In these circumstances the applicant has failed to establish that the decisions of the Secretary of State to reject his claim for compensation under section 133 and under the ex gratia scheme were wrong in law and the application is dismissed.