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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

McCartney and McDermott's Applications [2009] NIQB 62

APPLICATIONS FOR JUDICIAL REVIEW BY

RAYMOND PIUS McCARTNEY AND EAMONN McDERMOTT

WEATHERUP J

Compensation for miscarriage of justice.

[1] These applications for judicial review are further instances of challenges to decisions of the Secretary of State for Northern Ireland refusing to award compensation under section 133 of the Criminal Justice Act 1988 further to the quashing of the applicants' convictions. Ms McDermott QC and Mr Sayers appeared for the first applicant, Mr Larkin QC and Mr Brolly for the second applicant and Mr Maguire QC and Mr Schofield for the respondent, the Secretary of State.

[2] On 12 January 1979 at Belfast City Commission the applicants were each sentenced to life imprisonment upon convictions for offences that included murder and membership of a proscribed organisation, namely the IRA. Others arrested in respect of the offences included a John Thomas Pius Donnelly and a Hugh Gerard Brady. The first applicant made a written statement to police admitting involvement in two murders. At his trial he alleged ill treatment during police interviews. He called Donnelly and Brady as witnesses on his behalf and each alleged ill treatment during police interviews. The trial Judge found a prima facie case of ill treatment but was satisfied beyond reasonable doubt that the first applicant had not been ill treated and that his statements were relevant and admissible. The second applicant made four written statements to police that amounted to admissions

of involvement in a murder and two incidents where shots were fired at soldiers. At his trial he alleged ill treatment during police interviews. The trial Judge was satisfied that the second applicant had not been ill treated and he relied on the statements to convict the second applicant. Appeals by the applicants against their convictions were dismissed by the Court of Appeal on 29 September 1982.

[3] Upon a reference back to the Court of Appeal by the Criminal Cases Review Commission, the convictions of the applicants were quashed by the Court of Appeal on 15 February 2007. New evidence was available concerning the police officers and the Court of Appeal was unable to rule out the possibility that had that new evidence been available at the trial the police officers may have been discredited. Accordingly the Court of Appeal considered the convictions to be unsafe.

[4] The applicants applied to the Secretary of State for compensation under section 133 of the Criminal Justice Act 1988. By letters dated 16 May 2008 compensation was refused. It was stated that the Secretary of State did not consider that anything went wrong with the investigation of the offences or in the conduct of the trial so as to result in a failure of the trial process. On 17 November 2008 this conclusion was affirmed after an exchange of correspondence between the Northern Ireland Office and the applicants' solicitors.

[5] 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 as follows (*italics added*) –

> "(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."

[6] New evidence was available that concerned internal memoranda obtained from the Public Prosecution Service, formerly the Department of the Director of Public Prosecutions, questioning the voluntariness of the statement of Donnelly, against whom the prosecution was discontinued, and a recommendation for prosecution of the police officers involved, a

recommendation that was not accepted by a senior official; further a Robert Barclay had also complained of assault by the same officers during interviews in 1977 and his conviction was later quashed by the Court of Appeal after his statement was ruled inadmissible because assault by the police could not be excluded; in addition Barclay brought a private prosecution against the police officers and the Judge hearing the prosecution found a prima facie case, although he acquitted the police officers because of doubts about Barclay's account.

[7] The applicants contend that had the new evidence been before the trial Judge he may not have accepted the evidence of the police officers and may have ruled the statements of the applicants to be inadmissible. In particular the applicants contend that if officials in what was then the office of the Director of Public Prosecutions had informed Counsel for the prosecution at the trial of the applicants of the reasons for discontinuing the prosecution of Donnelly, Counsel would not have put to Donnelly when he gave evidence in the applicants trial that he had been fighting with police, that his injuries were self inflicted and that when the trial Judge inquired as to the reason that the charges against Donnelly did not proceed, Counsel would have gone further than merely replying that the charges "were not proceeded with".

The opinions of the House of Lords on the interpretation of section 133.

[8] A wide interpretation and a narrow interpretation of the concept of "miscarriage of justice" emerged when the House of Lords considered section 133 in R (Mullan) v Secretary of State for the Home Department [2004] UKHL 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. To the extent that section 133 obliged the Secretary of State to pay compensation for failures of the trial process, the Court of Appeal in quashing the applicant's conviction had identified no failure in the trial process but rather an abuse of executive power which led to the applicant's apprehension and abduction.

[9] Lord Bingham and Lord Steyn differed on the interpretation of the words 'miscarriage of justice'. Lord Bingham adopted a wide interpretation that applied where 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. He 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 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 as "…. something had gone seriously wrong in the investigation of the offence or the conduct of the trial….". 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".

[10] 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 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.

[11] The issue was considered by the Divisional Court in England and Wales in R (Clibery) v Secretary of State for the Home Department [2007] EWHC 1855 (Admin). Further to a conviction of a husband for the rape of his wife there emerged evidence that cast doubt on the credibility of the wife. In relation to the husband's innocence Lord Phillips stated at paragraph 26 that the most that could be said was that if the jury had had advance notice of the lies that the wife told after the trial, that they *might* not have convicted and "It is a matter of speculation whether such knowledge *would* have resulted in a different verdict…." To the contention that there had been a serious failure of the trial process such as to bring the case within Lord Bingham's second category of miscarriage of justice Lord Phillips CJ stated at paragraph 27 that this was manifestly not the case; that "…. there was nothing that went wrong in the investigation of the offence or the conduct of the trial, let alone seriously wrong"; all that occurred was that the complainant's conduct after

the trial raised doubts about her credibility; such a situation did not fall within Lord Bingham's second category.

<u>The approach to section 133 in Northern Ireland.</u>

[12] In Northern Ireland the issue of "miscarriage of justice" was considered by the Court of Appeal in <u>Magee's Application</u> [2007] NICA 34. The applicant had been convicted of scheduled offences on the basis of oral admissions and a written statement made during police interviews. The applicant alleged ill treatment by the police during the interviews but this was rejected. Later the European Court of Human Rights found a violation of Article 6 of the Convention on the basis that the applicant had been prevailed upon in a coercive environment to incriminate himself without the benefit of legal advice. The Criminal Cases Review Commission referred the case back to the Court of Appeal and the conviction was quashed. The refusal of the Secretary of State to award compensation to the applicant under section 133 of the 1988 Act was upheld by the Court of Appeal. 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. The applicant had received a fair trial in accordance with the domestic laws applicable at the time; he had not disputed before the ECtHR that his statements of admission were true; the ECtHR had not disputed the trial Judge's finding that the confessions were voluntary; the ECtHR took issue with the absence of legal advice for 48 hours; the regime was designed to be oppressive in order to deal effectively with the interrogation of terrorist suspects; the ECtHR had not found the treatment of the applicant to be inhuman; there were no new or newly found facts.

[13] The issue returned to the Court of Appeal in Northern Ireland in <u>Boyle's Application</u> [2008] NICA 35. The applicant was convicted on the basis of admissions made during police interviews. The applicant denied making the admissions and claimed that the alleged admissions had been written out by the police. The police contended that all interview notes had been made in the course of the interviews but later ESDA testing established that there was more than one version of the notes of the admission interview. The Court of Appeal quashed the conviction. The Secretary of State's refusal of compensation was upheld by the Court of Appeal. Kerr LCJ, with whom Campbell LJ agreed, stated that it was necessary for the appellant to establish that he should not have been convicted in order to qualify for compensation under section 133; on that issue the terms of the judgment of the Court of Appeal in quashing the conviction were critical; the judgment was that the appellant's conviction was unsafe; the judgment did not state that the appellant should not have been convicted; the judgment indicated that it was possible that the trial Judge, if he had been aware of the evidence, might well have convicted; it was impossible for the appellant to assert that he should not have been convicted; the police officers should not have given the

evidence that they did; the trial Judge was bound to have taken an entirely different view of their credibility from the extremely favourable impression that was formed; however it was impossible to conclude that the appellant would not have been found guilty if the evidence of the other version of the interview notes had been given.

[14] Girvan LJ, dissenting, noted that Lord Bingham and Lord Steyn both referred to the French text of the International Convention on Civil and Political Rights and drew different conclusions. The French language version uses the words *erreur judiciaire* where the words "miscarriage of justice" appear in the English language version. As Lord Bingham and Lord Steyn came to different views on the French text Girvan LJ undertook an examination of the French law in this context. This examination led Girvan LJ to conclude that, contrary to Lord Steyn's view, French law lends weight to Lord Bingham's approach. Girvan LJ stated at paragraph 14:

> "The key to the proper approach to the concept of a miscarriage of justice under section 133 lies in the recognition (to which effect is given by French law) that once a conviction is quashed in consequence of newly discovered facts that led to an erroneous decision the acquitted defendant falls to be considered to be a person presumed innocent whose presumed innocence cannot be gainsaid by reliance on evidence that falls short of establishing his guilt."

[15] Girvan LJ therefore concluded that in the light of Boyle's acquittal by the Court of Appeal he was to be presumed innocent on the charges of which he had been convicted and that as there was a serious failure in the judicial process involving grave prejudice to the appellant he was entitled to compensation.

The approach to "miscarriage of justice" in the Republic of Ireland.

[16] In the Republic of Ireland the adoption of Article 14(6) of the International Covenant on Civil and Political Rights is reflected in section 9 of the Criminal Procedure Act 1993 which provides that, where a person has been convicted of an offence and that conviction has been quashed, the Court may certify that a newly discovered fact shows that there had been a miscarriage of justice and the Minister shall pay compensation. In The People (Director of Public Prosecutions) v Peter Pringle (No 2) [1997] 2 IR 225 it was stated that the "primary meaning" of the expression "miscarriage of justice" was that the applicant was, on the balance of probabilities, as established by relevant and admissible evidence, innocent of the offence of which he was

convicted. However a wider meaning of the concept of a miscarriage of justice has also been recognised. The Court of Criminal Appeal has stated that the exercise in which the Court was engaged under the 1993 Act is to determine whether the newly discovered facts show that a miscarriage of justice occurred and that was not confined to the question of actual innocence but extends to the administration in a given case of the justice system itself – The People (DPP) v Meleady & Grogan (No 3) [2001] 4 IR 16, The People (DPP) v Nora Wall (Unreported 16 December 2005) and DPP v Hannon [2009] IECCA 43.

The Grounds for Judicial Review.

[17] The applicant's grounds for judicial review are as follows:

(a) The decision of the Secretary of State was wrong in law in that he misdirected himself as to the meaning of "miscarriage of justice" in section 133 of the 1988 Act. In particular he failed properly to understand and apply the opinion of Lord Bingham in Mullan and the judgment of Girvan LJ in Boyle's Application as leading to a conclusion that a miscarriage of justice had occurred.

(b) The Secretary of State failed appropriately to recognise the authority of the judgment of Girvan LJ in Boyle's Application as the authoritative appellate decision in this jurisdiction having as its primary focus the interpretation of Section 133 of the 1988 Act.

(c) The Secretary of State erred in approaching the question of whether the applicant should not have been convicted in the manner suggested by Kerr LCJ and Campbell LJ in Boyle's Application, which fails to give proper effect to the opinion of Lord Bingham in Mullan.

(d) In failing to conclude that the applicant should not have been convicted and that a miscarriage of justice had occurred the Secretary of State misdirected himself as to the import of the inclusion in R v Wilson [1913] 138 p971 in the list of examples given by Lord Bingham at paragraph 9 of Mullan of cases in which defendants should not have been convicted and in which it can be said a miscarriage occurred.

(e) The Secretary of State was wrong in law to consider that s133 imposed an onus of proof upon an applicant for compensation but that once an application is made under section 133 what remains is for the Secretary of State to make a determination.

(f) The Secretary of State was excessively prescriptive as to the materials that might form an assessment of whether the applicant should not have been convicted.

(g) The Secretary of State failed to take any or adequate account of a material consideration namely remarks by a Lord Justice of Appeal in the course of the Court of Appeal hearing.

(h) The failure of the Secretary of State to conclude that the applicant should not have been convicted given the failure of the trial process in which evidence helpful to the defence was not disclosed and that a miscarriage of justice occurred in the applicants' case was Wednesbury unreasonable and irrational.

(i) The Secretary of State failed to give effect to the presumption of innocence and thereby acted unlawfully and in breach of section 6 of the Human Rights Act 1988 with reference to Article 6(2) of the European Convention.

The application of section 133 to the applicants' cases.

[18] The Secretary of State, in assessing the application for compensation, must take his cue from the decision of the Court of Appeal in quashing the conviction. In Boyle's Application [2008] NICA 35 Kerr LCJ stated at paragraph [21] that

> "…. it is necessary for the appellant to establish that he should not have been convicted in order to qualify for compensation under section 133. On this issue the terms of the judgment of the Court of Appeal in quashing his conviction are critical. Its judgment was that the appellant's conviction was unsafe. It did not state that the appellant should not have been convicted. Indeed, the judgment clearly indicated that it was possible that the trial judge, if he had been aware of the evidence, might well have convicted."

[19] In the present case the Court of Appeal, in quashing the convictions, stated that where there was an acquittal which indicated that the jury must have disbelieved the evidence of police officers they might be cross-examined about that in a subsequent case; that it was unlikely that the views expressed in the Office of the Director of Public Prosecutions about a possible prosecution of the two police officers could have been introduced in evidence; that the reason for the prosecution of Donnelly not being pursued would have been made known to the Judge if prosecuting Counsel had been informed

about it and this may have caused him to reach a different conclusion as to whether Donnelly was a person who could inflict severe injuries on himself. The concluding paragraph stated -

> "[96] We cannot rule out the possibility that the evidence of the police officers may have been discredited by evidence that is now available. The admission in evidence of MacDermott's confessions depended upon the acceptance by the judge of the evidence of DC French. If the judge had known of the finding of a *prima facie* case in the prosecution brought by Mr Barclay against DC French he may well have reached a different conclusion. To this is to be added the striking similarity between the description give by Donnelly and MacDermott as to the manner in which their admissions were recorded. If the allegations by Donnelly had been supported and strengthened by the new evidence this could have served also to discredit the evidence given by the police officers in McCartney's case. In both cases we are left with a distinct feeling of unease about the safety of their convictions based as they were on admissions and the convictions must therefore be quashed."

[20] The circumstances of the present cases are not such that it can be shown that the applicants were innocent and thus the narrow Steyn interpretation cannot be satisfied. The debate concerns the application of the wider Bingham interpretation. Counsel for the respondent contends that there is nothing in the judgment of the Court of Appeal indicating that the applicants should not have been convicted. It should not be expected that a Court of Appeal will state in terms that an appellant should not have been convicted. The approach of the Court of Appeal on an appeal against conviction is concerned with whether that conviction is "unsafe". In taking the cue from the Court of Appeal in determining a successful appellants entitlement to compensation it is necessary to have regard to the circumstances set out in the judgment of the Court of Appeal as well as the wording adopted in the judgment in relation to the position of the appellant. In the present case the new evidence relied on by the applicants led the Court of Appeal to the conclusion that they "cannot rule out the possibility" that the evidence of the police officers "may have been" discredited; had the trial Judge known of the finding in Barclay about the police officer "he may well have reached a different conclusion"; the new evidence "could have served also to discredit" the police officers. This was sufficient to raise doubts about the safety of the convictions but does not amount to a finding that had the new evidence been available the applicants would not have been convicted.

[21] However the basis of the assessment of entitlement to compensation should take account of all the circumstances outlined by the Court of Appeal. One species of new evidence is that which goes to the credibility of prosecution witnesses, in this case the police officers interviewing the applicants. New evidence may raise doubts about the credibility of those witnesses that are sufficient to warrant the conclusion that the conviction is unsafe but may not be sufficient to warrant the conclusion that the evidence of those witnesses would have been rejected had the new evidence been examined at the trial and may not warrant a finding that something has gone seriously wrong with the investigation of the offence or the conduct of the trial. Some of the new evidence in the present cases is of that character.

[22] Also being considered in the present cases was new evidence of a different species relating to the prosecution of Donnelly. One part of that new evidence was the internal memoranda from the DPP which accepted that Donnelly had been ill-treated during police interviews and that his confession could not be regarded as voluntary, although the officials differed on the strength of the evidence as to who was responsible for the ill treatment. As stated by the Court of Appeal, it is unlikely that the views of DPP officials on the prosecution of Donnelly could have been introduced in evidence.

[23] However another part of the new evidence relating to the prosecution of Donnelly concerned the manner in which his evidence was dealt with at the trial. When Donnelly was called as a defence witness, Counsel for the DPP, rather than proceeding on the position of the DPP officials dealing with the prosecution of Donnelly, adopted and put to Donnelly in cross examination the police approach rejected by those officials, namely that Donnelly had received injuries after an attack on police officers and that some injuries were also self inflicted. Further when the trial Judge was considering the evidence of Donnelly he asked Counsel for the DPP about the absence of a prosecution of Donnelly and a complete reply was not furnished. It is important to note that this was a non jury "Diplock" trial. It is apparent that the trial Judge was inviting Counsel to disclose, as delicately as the situation demanded, whether there was a reason for the decision not to prosecute that related to matters other than the alleged ill-treatment of Donnelly, in respect of which the answer of Counsel implied that there was. The trial Judge was not told that the DPP had concluded that Donnelly had been ill treated, that his confession was not to be considered as being voluntary and there was no other evidence against him. There is no suggestion that Counsel in the applicants' trial had been made aware of the DPP position relating to the prosecution of Donnelly. Had Counsel for the DPP been aware of the DPP approach to the prosecution of Donnelly two aspects of the trial would have been different. First of all, the cross examination of Donnelly would have taken a different course and Counsel would not have put to Donnelly that his injuries had been occasioned by defensive action by the police and by his own hand. Secondly, the submissions of Counsel for the DPP in relation to the

prosecution of Donnelly would not have rested on the bald assertion that the prosecution was not proceeded with but should have indicated the basis of the DPP decision.

[24] Thus the issue of the treatment of the Donnelly evidence is not directly a matter about the credibility of the evidence given by the police officers, nor is it directly a matter about withholding disclosure from the defence. Rather it is a matter about the conduct of the prosecution in relation to the evidence of a witness who was central to the defence challenge to the voluntariness of the admissions on which the applicants were convicted. In light of the above discussion of the Donnelly evidence there is a basis for concluding that something had gone seriously wrong with the conduct of the trial. This is a matter that is capable of satisfying the wider interpretation of miscarriage of justice expounded by Lord Bingham.

[25] The applicant relied on the judgment of Girvan J in Boyle's Application. This was a dissenting judgment, with the majority, Kerr LCJ and Campbell LJ, not finding it necessary to elect between the approaches of Lord Steyn and Lord Bingham on the basis that the applicant could satisfy neither. Nor did the majority adopt the approach of Girvan J to the interpretation of section 133. I am bound to follow the decisions of the Court of Appeal in Magees Application and Boyles Application that the approach to section 133 is to be found in the opinions of Lord Steyn or Lord Bingham in the House of Lords in Mullan.

The recent approach to section 133 in England and Wales.

[26] The interpretation of section 133 has been further considered by the Court of Appeal in England and Wales in R (Allen) v Secretary of State for Justice [2009] 2 All ER 1. The claimant was convicted of the manslaughter of her 4 month old son in circumstances known as "Shaken Baby Syndrome". Upon a referral to the Court of Appeal by the Criminal Cases Review Commission a substantial divergence of medical opinion emerged among expert witnesses called in the Court of Appeal and it was concluded that the conviction was unsafe. The claimant was refused compensation. It was common case that the claimant could not demonstrate innocence. The claimant relied on the extended interpretation of miscarriage of justice adopted by Lord Bingham. Hughes LJ described the critical feature of the extended interpretation as being that something had gone seriously wrong in the conduct of the trial. The Court reached a clear conclusion that even on the interpretation of section 133 which Lord Bingham favoured the case could not succeed. Accordingly it was not necessary to resolve the difference of construction articulated by Lord Bingham and Lord Steyn. However Hughes LJ stated his conclusion that the correct interpretation of section 133 is that explained by Lord Steyn, for the reasons set out in the opinion of Lord Steyn

in Mullan and for the additional factors set out in paragraph 40 of the judgment in Allen.

[27] Hughes LJ also offered, at paragraph 35, a comprehensive rejection, with which I respectfully agree, of the contention that a person is entitled to compensation after the quashing of a conviction because that person is entitled to the presumption of innocence contained in Article 6 (2) of the European Convention and to deny compensation would be to voice a qualification that would infringe Article 6(2). The reasons for the rejection of that contention include reference to Article 14 (2) of the International Covenant on Civil and Political Rights which is identical to Article 6 (2). The provision for compensation in Article 14 (6) of the International Covenant plainly requires something more than the quashing of a conviction before the right to compensation arises, namely that a miscarriage of justice be conclusively demonstrated by new or newly discovered facts. Article 14 (6) and Article 14 (2) could not co-exist if the consequence of Article 14 (2) were that nothing more was required for compensation beyond the quashing of the conviction on the basis of new fact.

[28] May LJ and Sir Mark Potter P. expressed their agreement that the appeal in Allen should be dismissed for the reasons given by Hughes LJ. I interpret their agreement as extending not only to the dismissal of the appeal on the basis of the construction of section 133 adopted by Lord Bingham but also, obiter as it was, that the correct construction of section 133 was that explained by Lord Steyn.

[29] In R (Siddall) v Secretary of State for Justice [2009] EWHC 482 (Admin) a Divisional Court considered a claimant who had been convicted of numerous sex offences and further to a later reference by the Criminal Cases Review Commission the convictions were quashed by the Court of Appeal. The reasons for the quashing on appeal concerned the failure in the course of the trial to identify and disclose matters that were relevant to the claimant's defence. In relation to the extended interpretation of miscarriage of justice adopted by Lord Bingham it was stated by Levison LJ at paragraph 42 that the failure to identify and disclose matters that could have been made available to challenge the credibility of a witness demonstrated that there had been a serious failure akin to concealment or withholding of evidence such that something had gone seriously wrong in the investigation of the offence or the conduct of the trial. In proceeding to consider the true meaning of section 133 Levison LJ referred to the decision of the Court of Appeal in Harris and stated, with the agreement of Sweeney J, that he would adopt the approach of Lord Steyn and the reasoning of Hughes LJ. At paragraphs 45-48 of the judgment are set out additional reasons for adopting that position.

The effect in Northern Ireland of decisions of the Court of Appeal of England and Wales.

[30] As appears from Allen v Secretary of State the Court of Appeal in England and Wales has stated obiter that the correct interpretation of section 133 is that adopted by Lord Steyn in Mullan. Great respect is accorded by the courts in Northern Ireland to the decisions of the Court of Appeal in England and Wales.

(i) In the Irish Court of Appeal in McCarten v Belfast Harbour Commissioners [1910] 2 IR 470 Holmes LJ stated at 494-495 that:

> "It is true that, although we are not technically bound by decisions in the coordinate English court, we have been in the habit, in adjudicating on questions as to which the law of the two countries is identical, to follow them. We hold that uniformity of decision is so desirable that it is better, even when we think the matter doubtful, to accept the authority of the English Court, and leave error, if there be error, to be corrected by the tribunal whose judgment is final on both sides of the channel."

(ii) The above approach was adopted by the Northern Ireland Court of Appeal in Northern Ireland Road Transport Board v The Century Insurance Company Limited [1941] NI 77 at 107.

(iii) To the above authorities the Northern Ireland Court of Appeal in McGuigan v Pollock [1955] NI 74 at 107 added-

> "And perhaps this course is especially one to be followed when the matter at issue is not one of any broad legal principle but is really a question as to the construction to be placed upon somewhat obscurely worded statutory provisions".

(iv) This approach was restated by Lord Lowry LCJ in McKernan's Application [1985] NI 383. In that case Lord Lowry proceeded to take a different position on the issue before the Court to that taken by the Court of Appeal in England and Wales, and the House of Lords endorsed Lord Lowry's position. However the general approach to decisions of the Court of Appeal in England and Wales was stated at page 389 -

> "Although decisions and dicta of the Court of Appeal in England do not bind the courts in this jurisdiction they traditionally, and very rightly, are accorded the greatest respect, particularly when the same, or identically worded, statutes fall to be construed."

(v) This approach continued when Carswell LCJ stated in Beauford Developments v Gilbert Ash [1997] NI 142 at 155:

> "We are conscious, however, of the practice which the Court of Appeal in this jurisdiction has adopted in the past of following the decisions of and the English Court of Appeal where it has pronounced upon a topic, even where we think that another conclusion might be preferable."

(vi) More recently in Starritt and Cartwrights' Applications [2005] NICA 48 Campbell LJ stated that:

> "It has been long established that while this court is not technically bound by decisions of courts of corresponding jurisdiction in the rest of the United Kingdom it is customary for it to follow them to make for uniformity where the same statutory provision or rule of common law is to be applied. This is not to say that the court will follow blindly a decision that it considers to be erroneous."

[31] The interpretation of section 133 is a matter in respect of which the approach of the two jurisdictions in Northern Ireland and in England and Wales ought to be identical, involving as it does the interpretation of a common statutory provision applying an international obligation. I am not persuaded by the recent approach of the Court of Appeal in England and Wales and followed by the Divisional Court, but I consider that a consistent approach is important, at least at first instance. The Court of Appeal in Northern Ireland has not had the opportunity to consider the recent approach in England and Wales. If Northern Ireland is now to take a different approach I consider that that is a matter that ought to occur at Court of Appeal level. I propose to follow the dicta in the Court of Appeal in England and Wales in R(Allen) v Secretary of State for Justice and adopt the approach of Lord Steyn to the concept of miscarriage of justice as requiring that the applicant be shown to be innocent. As the applicants in the present case cannot satisfy that approach I conclude that they are not entitled to compensation under section

133 of the Criminal Justice Act 1988. The applications for Judicial Review are dismissed.