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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY VERONICA RYAN FOR JUDICIAL REVIEW

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SIR RONALD WEATHERUP

[1] This is an application by Veronica Ryan on her own behalf and on behalf of James Martin for judicial review of a decision of the Secretary of State for Northern Ireland dated 3 July 2017 refusing applications for compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988. Mr Southey QC and Mr Devine appeared for the applicant and Mr Coll QC and Ms Best appeared for the respondent.

[2] The grounding affidavits of the applicant and James Martin state that on 7 January 1990 they were arrested on suspicion of false imprisonment of a James Fenton between 25 and 26 February 1989 and of an Alexander Lynch on 5 January 1990. They were later charged with falsely imprisoning Fenton and Lynch and making their home available for use by terrorists. On 8 May 1991 they were convicted at Belfast Crown Court of aiding and abetting the false imprisonment of Fenton and Lynch and allowing their property to be used for terrorist purposes, the applicant upon a guilty plea. James Martin was sentenced to eight years in respect of the Lynch offences and four years consecutively in relation to the Fenton offences and was released in 1996 having served six years eight days in prison. The applicant was sentenced to three years' imprisonment in respect of the Lynch offences and six months consecutively in respect of the Fenton offences. She was released from custody in October 1991.

[3] On 30 April 2008 the applicant and James Martin were invited by the Criminal Cases Review Commission to apply to have the convictions relating to Lynch reviewed, based on confidential information. They applied and the Criminal Cases Review Commission referred the convictions to the Court of Appeal. The convictions relating to the Lynch offences were quashed by the Court of Appeal on 9 January 2009. They applied for compensation for miscarriage of justice on 26 September 2009 and the claims were accepted on 28 May 2012. On 4 March 2016

the Independent Assessor delivered his final assessment and awarded James Martin £367,950.50 and the applicant £186, 814.88.

[4] On 21 February 2008 the Criminal Cases Review Commission had also invited the applicant and James Martin to apply for review of their convictions relating to Fenton. They applied and the convictions were referred to the Court of Appeal and were quashed on 10 October 2014. The Court of Appeal relied on material within a confidential annex provided by the Criminal Cases Review Commission and declined to provide any résumé, gist or other information upon which they based their decision due to the sensitive nature of the information. The applicant and James Martin applied for compensation for miscarriage of justice and on 3 July 2017 the Secretary of State refused the applications. This is the decision which is the subject matter of the applications for judicial review made by the applicant and James Martin.

[5] Further to the grant of leave on the applications for judicial review and by reason of protected information being a feature of the decision to refuse compensation for miscarriage of justice the respondent applied for a Closed Material Procedure under section 6(2)(a) of the Justice and Security Act 2013. Special Advocates were then appointed.

[6] A Devolution Notice was issued pursuant to paragraph 5 Schedule 10 of the Northern Ireland Act 1998 as the challenge concerned the validity of the exercise of powers under section 86 of the 1998 Act. Further, a Notice of Incompatibility was issued on the basis of the claim that the statutory scheme for compensation for miscarriage of justice as amended in Northern Ireland was incompatible with the European Convention on Human Rights. No appearances were entered to either the Devolution Notice or the Notice of Incompatibility.

[7] The applications of James Martin and Veronica Ryan were consolidated and the proceedings continued under the name of Veronica Ryan as applicant.

[8] The proceedings awaited the outcome of two appeals to the Supreme Court. One was *R (Nealon) v Secretary of State for Justice* [2019] UKSC 2 which concerned the compatibility of section 133 (1ZA) of the Criminal Justice Act 1988 with the European Convention on Human Rights. The other was *R (Stott) v Secretary of State for Justice* [2018] UKSC 59 which concerned the scope of "other status" under the anti-discrimination provisions in Article 14 of the European Convention on Human Rights.

[9] The Order 53 Statement was amended and for present purposes two issues for determination were identified:

(i) First, whether the relevant amendments to the compensation scheme set out in section 133 of the Criminal Justice Act 1988 are compatible with or authorised by the Northern Ireland Act 1998.

(ii) Second, whether the compensation scheme is compatible with the European Convention on Human Rights.

1. THE NORTHERN IRELAND ACT 1998

[10] The scheme for compensation for miscarriage of justice arises under section 133 of the Criminal Justice Act 1988 ("the CJ Act"). The CJ Act purported to be amended in 2010 upon the devolution of policing and justice functions to the devolved administration in Northern Ireland. The amendments purported to be introduced by the exercise of powers in the Northern Ireland Act 1998 and the amendments are set out from subsection (6A) to (6K) below. It is the purported exercise of these powers which is challenged by the applicant. The CJ Act was further amended in 2014 as set out in sub-section (1ZA) below.

Section 133 of the Criminal Justice Act 1988

[11] Section 133, with the relevant amendments in italics, provides as follows.

> "(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.
>
> *(1ZA) For the purposes of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales or, in a case where subsection (6H) applies, Northern Ireland, if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence (and references in the rest of this Part to a miscarriage of justice are to be construed accordingly).*
>
> (2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State before the end of the period of 2 years beginning with the

date on which the conviction of the person concerned is reversed or he is pardoned.

(2A) But the Secretary of State may direct that an application for compensation made after the end of that period is to be treated as if it had been made within that period if the Secretary of State considers that there are exceptional circumstances which justify doing so.

(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.

(4) If the Secretary of State determines that there is a right to such compensation the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.

(4A) Section 133A applies in relation to the assessment of the amount of the compensation

(5) In this section "reversed" shall be construed as referring to a conviction having been quashed-

(a) on an appeal out of time; or
(b) on a reference-
(i) under the Criminal Appeal Act 1995; or
……
(c) on an appeal under section 7 of the Terrorism Act 2000; or
……

(f) on an appeal under Schedule 3 to the Terrorism Prevention and Investigation Measures Act 2011; or

(g) on an appeal under Schedule 4 to the Counter-Terrorism and Security Act 2015.

(5A) But in a case where—

(a) a person's conviction for an offence is quashed on an appeal out of time, and
(b) the person is to be subject to a retrial, the conviction is not to be treated for the purposes of this section as "reversed" unless and until the

person is acquitted of all offences at the retrial or the prosecution indicates that it has decided not to proceed with the retrial.

(5B) In subsection (5A) above any reference to a retrial includes a reference to proceedings held following the remission of a matter to a magistrates' court by the Crown Court under section 48(2)(b) of the Senior Courts Act 1981.

(6) For the purposes of this section and section 133A a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted.

(6A) Subject to what follows, in the application of this section in relation to a person ("P") convicted in Northern Ireland of a criminal offence, in subsections (1) to (4) any reference to the Secretary of State is to be read as a reference to the Department of Justice in Northern Ireland.

(6B) If P is pardoned, subsection (6A) applies only if the pardon is a devolved pardon.

(6C) Subsections (6D) to (6H) apply if—

(a) P's conviction is reversed or P is given a devolved pardon,
(b) an application for compensation is made in relation to P's conviction,
(c) the application is made before the end of the period mentioned in subsection (2) or, if it is made after the end of that period, the Department of Justice gives a direction under subsection (2A), and
(d) the Department of Justice has reason to believe that protected information may be relevant to the application (for example, because the court which quashed P's conviction did not make public (in whole or in part) its reasons for quashing P's conviction).

(6D) The Department of Justice must refer the application to the Secretary of State who must then take a view as to whether or not any protected information is relevant to the application.

(6E) If the Secretary of State takes the view that no protected information is relevant to the application, the Secretary

of State must refer the application back to the Department of Justice to be dealt with by the Department accordingly.

(6F) If the Secretary of State takes the view that protected information is relevant to the application, the Secretary of State must refer the application back to the Department of Justice to be dealt with by the Department accordingly unless the Secretary of State is also of the view that, on the grounds of national security, it is not feasible for the Department (including any assessor appointed by the Department) to be provided with either –

(a) the protected information, or
(b) a summary of the protected information that is sufficiently detailed to enable the Department (including any assessor) to deal properly with the application.

(6G) If the Secretary of State refers the application back to the Department of Justice under subsection (6F), the Secretary of State must provide the Department with either –

(a) the protected information, or

(b) a summary of the protected information that appears to the Secretary of State to be sufficiently detailed to enable the Department (including any assessor) to deal properly with the application.

(6H) If the Secretary of State is not required to refer the application back to the Department of Justice –

(a) subsections (3) and (4) apply to the application ignoring subsection (6A), and
(b) any compensation payable on the application is payable by the Secretary of State.

(6I) In this section "protected information" means information the disclosure of which may be against the interests of national security.

(6J) In this section "devolved pardon" means –

(a) a pardon given after the coming into force of the Northern Ireland Act 1998 (Amendment of Schedule 3)

Order 2010 in the exercise of powers under section 23(2) of the Northern Ireland Act 1998(b);

(b) *a pardon given before the coming into force of that Order which, had it been given after the coming into force of that Order, would have had to have been given in the exercise of powers under section 23(2) of the 1998 Act (ignoring article 25(2) of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010).*

(6K) The pardons covered by subsection (6J)(a) include pardons given in reliance on article 25(2) of the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010."

[12] Section 133 of the CJ Act enacts the International Covenant on Civil and Political Rights 1966 Article 14(6):

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

[13] Section 133 therefore provides that applications for compensation for miscarriage of justice are dealt with by the Department of Justice in Northern Ireland. However, if the Department has reason to believe that protected information may be relevant to the application then the Department must refer the matter to the Secretary of State. If the Secretary of State takes the view that protected information is relevant, the Secretary of State must refer the application back to the Department unless on grounds of national security it is not feasible for the Department to be provided with the protected information or a summary of the protected information. In such a case it is for the Secretary of State to determine if there is a right to compensation. Hence, in the present cases, the Secretary of State dealt with the applications and determined that there was no right to compensation.

[14] The approach of the Secretary of State to entitlement to compensation is governed by sub-section (1ZA) which provides that miscarriage of justice is to be construed as meaning that it be shown beyond reasonable doubt that the applicant did not commit the offence. On the other hand when an application is dealt with by the Department of Justice a wider approach to entitlement is adopted.

The meaning of "miscarriage of justice"

[15] For some time there was uncertainty as to the meaning of "miscarriage of justice". In *R (Adams) v The Secretary of State for Justice* [2011] UKSC 18 the Supreme Court held that the true meaning of "miscarriage of justice" in section 133 of the CJ Act was not restricted to circumstances where conclusive proof of innocence was shown and that the phrase included cases where a new or newly discovered fact showed that the evidence against the defendant had been so undermined that no conviction could possibly be based on it and that in such circumstances it could be shown to be beyond reasonable doubt that the defendant had no case to answer and that the prosecution should not have been brought. Thus, there was a narrow meaning involving proof of innocence and a wider meaning involving proof that no prosecution should have been brought, which meanings applied to all applications for compensation in England and Wales and Northern Ireland until 2014.

[16] The narrow meaning was prescribed by sub-section (1ZA) in 2014 when the Secretary of State makes the determination in respect of applications in England and Wales and in respect of applications dealt with by the Secretary of State in Northern Ireland while the wider test continues to apply when the Department of Justice makes the determination. The result is that two tests apply to applications for compensation for miscarriage of justice in Northern Ireland, proof of innocence in cases determined by the Secretary of State and proof of innocence or proof that no prosecution should have been brought in cases dealt with by the Department of Justice.

[17] That the wider test continues to apply in Northern Ireland in cases determined by the Department of Justice is apparent from the decision of Maguire J in *McNally's Application* [2017] NIQB 80. The applicant's conviction was quashed on 26 July 2012 and his application for compensation was refused by the Department on 11 December 2015. While upholding the Department's refusal based on there being no new or newly discovered fact, Maguire J confirmed that the correct approach to miscarriage of justice in cases determined by the Department of Justice was to be found in the two categories of cases identified in *Adams*, being the narrow ground and the wider ground referred to above.

Constitutional arrangements for Northern Ireland

[18] The Northern Ireland Act 1998 established constitutional arrangements for devolved government in Northern Ireland. Certain functions were transferred to the devolved administration at Stormont and certain functions were reserved to the national government at Westminster. The applicant contends that compensation for miscarriage of justice was devolved to Northern Ireland with the introduction of the Northern Ireland Act 1998. Thus, according to the applicant, the purported amendments to the CJ Act made in 2010 setting up the present form of the scheme for compensation for miscarriage of justice and introduced by the use of powers

exercised under the 1998 Act to transfer matters to Northern Ireland, were invalid because compensation for miscarriage of justice was already a matter within the remit of the Northern Ireland administration. On the other hand the respondent contends that compensation for miscarriage of justice was a reserved matter in 1998 and that the exercise of powers under the 1998 Act in 2010 transferred that function to Northern Ireland and made amendments to the CJ Act and that the amended scheme is valid.

[19] So, for the reader, I am afraid it is necessary to look at the detail of the powers in question. The 1998 Act section 4 provides that "excepted matter" means a matter falling within a description specified in Schedule 2, "reserved matter" means a matter falling within a description specified in Schedule 3 and "transferred matter" means any matter which is not an excepted or reserved matter.

[20] Under Schedule 2 at paragraph 17 "national security" is an excepted matter. Under the original Schedule 3 at paragraph 9(e) "the treatment of offenders (including children and young persons, and mental health patients involved in crime)" was a reserved matter. The respondent contends that compensation for miscarriage of justice fell under paragraph 9(e) involving "the treatment of offenders" and thus was a reserved matter from 1998. The applicant contends that compensation for miscarriage of justice is not payable to an "offender" and thus this function was not reserved in 1998 and therefore became a transferred matter in 1998.

[21] The 1998 Act, section 4, provides a mechanism for reserved matters to become transferred matters, with specific provision for policing and justice matters in italics below:

> "4(2) If it appears to the Secretary of State that any reserved matter should become a transferred matter he may lay before Parliament the draft of an Order in Council amending Schedule 3 so that matter ceases to be a reserved matter.
>
> *(2A) The Secretary of State shall not lay before Parliament under sub-section (2) the draft of an order amending Schedule 3 so that a policing and justice matter ceases to be a reserved matter unless –*
>
> *(a) a motion for a resolution praying that the matter should cease to be a reserved matter is tabled by the First Minister and the Deputy First Minister acting jointly;*
>
> *(b) the resolution is passed by the Assembly with the support of a majority of the members voting on the motion, a majority of the designated nationalists voting and a majority of the designated Unionists voting.*

> (3) The Secretary of State shall not lay before Parliament under sub-section (2) the draft of any other order unless the Assembly has passed with cross-community support a resolution praying that the matter concerned should cease to be or as the case may be should become a reserved matter.
> ……
>
> (6) In this section 'policing and justice matter' means a matter falling within a description specified in:
>
> (a) any of paragraphs (9) to (12), (14A) to (15A) and (17) of Schedule 3; or
>
> (b) any other provision of that Schedule designated for this purpose by an order made by the Secretary of State."

[22] Policing and justice functions were devolved to Northern Ireland in 2010. The Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 ("the Schedule 3 Order"), was made on 31 March 2010 under section 4 of the 1998 Act after a motion for a resolution that policing and justice matters should cease to be reserved matters had been tabled by the First Minister and the Deputy First Minister acting jointly and had been passed by the Northern Ireland Assembly with the requisite support required by section 4(2A) of the 1998 Act. A draft of the Schedule 3 Order was approved by each House of Parliament. Under the heading "Prevention and Detection of Crime, Public Order, Prisons, Policing etc" a new paragraph (9) of Schedule 3 of the 1998 Act was substituted. The new paragraph (9) did not include "the treatment of offenders" or any other description that could have included compensation for miscarriage of justice as a reserved matter.

[23] The respondent contends that the Schedule 3 Order transferred compensation for miscarriage of justice to Northern Ireland. The applicant contends that the Schedule 3 Order was of no effect as compensation for miscarriage of justice was already a transferred matter.

[24] The 1998 Act section 86(1) contains powers to make arrangements in consequence of, or for giving full effect to the 1998 Act or any Order made under section 4 (such as the Schedule 3 Order) as follows -

> "Her Majesty may by Order in Council make such provision, including provision amending the law of any part of the United Kingdom, as appears to Her Majesty to be necessary or expedient in consequence of, or for giving full effect to, this Act or any Order under Section 4 or 6."

[25] The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010 ("the Devolution Order") was made under section 86 of the 1998 Act on 31 March 2010. A draft of the Devolution Order was approved by each House of Parliament. Under the heading "Functions Relating to the Treatment of Offenders" Article 6(3) stated that Schedule 6 (which makes amendments relating to the Miscarriage of Justice and the Royal Prerogative of Mercy) was to have effect. Schedule 6 amended the CJ Act to insert after section 133(6) the provisions set out above from sub-section (6A) to (6K).

The effect of the Schedule 3 Order and the Devolution Order

[26] The applicant contends that as compensation for miscarriage of justice was already a transferred matter, so that the Schedule 3 Order made under section 4(1) of the 1998 Act was ineffective, the Devolution Order which purported to be under section 86(1) was also ineffective as it could not be said to be necessary or expedient in consequence of or for giving full effect to an Order made under section 4. The respondent of course rejects the premise that the Schedule 3 Order was ineffective.

[27] The applicant makes two submissions on the interpretation of these powers. First of all that it is necessary to adopt a narrow construction because the approach adopted in the legislation involves the amendment of primary legislation by way of secondary legislation. Secondly, that the exercise of the powers to introduce the Schedule 3 Order and the Devolution Order must be looked at in the wider context. These submissions are accepted.

[28] The parties are in dispute as to whether compensation for miscarriage of justice was a reserved matter or a transferred matter under the 1998 Act. This turns on whether compensation for miscarriage of justice was embraced by the phrase "the treatment of offenders" in Schedule 3 paragraph 9 (e) of the 1998 Act.

[29] Treatment of offenders would apply to all those who were offenders. The applicant contends that she would not be an "offender" after her conviction was quashed. However the applicant claims compensation in respect of the conviction and imprisonment, being a period when the applicant would have been regarded as an offender. The later quashing of a conviction would not alter the fact that during the period of conviction and imprisonment the applicant would have been regarded as an offender. In the period between completion of sentence and the quashing of the conviction the applicant would have been regarded as an ex-offender. The expression "treatment of offenders" is capable of applying to a person in the applicant's position and on a general reading I would conclude that the expression included a person whose conviction had been quashed. Does the context suggest that those in the position of the applicant would or would not fall within the meaning of "the treatment of offenders"?

[30] All of the categories in paragraph 9 of Schedule 3 of the 1998 Act were described in the broadest terms. The categories on the eve of devolution of policing and justice matters were (a) the criminal law, (b) the creation of offences and penalties, (c) the prevention and detection of crime and powers of arrest and detention in connection with crime or criminal proceedings, (d) prosecutions, (e) the treatment of offenders, (g) compensation out of public funds for victims of crime, (h) local community safety partnerships. If compensation for miscarriage of justice had been a reserved matter it might expect to be found in this grouping of functions under paragraph 9 and might expect to be found in this order in the list of functions under a suitable broad description.

[31] If compensation for miscarriage of justice was a transferred matter from 1998, as the applicant contends, it might have been expected that some provision would have been made for the operation of the scheme of compensation within the framework of the devolved administration. There is no indication that any such provision was ever contemplated.

[32] It is clear that in 2010 the provision of compensation for miscarriage of justice was regarded by the drafters of the legislative scheme as being a reserved matter to be included in the 2010 transfer of powers for policing and justice. Under the Devolution Order, Article 6, the "Functions relating to the treatment of offenders" are dealt with under five categories, namely prisons, prisoners who are on licence, miscarriage of justice and the Royal Prerogative, the Criminal Justice and Public Order Act 1994 and finally the Repatriation of Prisoners Act 1984 and the Crime Sentences Act 1997. Miscarriage of justice was regarded as a function under the heading "treatment of offenders".

[33] Further, the devolved scheme for compensation for miscarriage of justice was set out in Schedule 6 of the Devolution Order. The minimum requirement would have been for the powers of the Secretary of State under section 133 of the CJ Act to be exercised by the Department of Justice, although of course the amendments were much more extensive. However there was no amendment of section 133 of the CJ Act made in 1998 to provide for the manner in which the powers would be exercised when, as the applicant contends, they had been transferred to the devolved administration.

[34] I am satisfied that "the treatment of offenders" in paragraph 9 (e) of Schedule 3 of the 1998 Act included the payment of compensation for miscarriage of justice, which function was therefore a reserved matter under the 1998 Act.

[35] The applicant contends that section 86(1) of the 1998 Act did not permit the enactment of the amending provisions contained in the Devolution Order in 2010 as those provisions could not be said to be "in consequence of, or for giving full effect to, this Act or any Order under section 4 or 6". It involved secondary legislation in making amendments to primary legislation so that an existing role was split between the Department of Justice in Northern Ireland and the Secretary of State.

[36] Section 86 permits amendments in consequence of or for giving full effect to an Order under section 4. The Schedule 3 Order was made under section 4 to transfer the new functions. The Devolution Order was made under section 86 to make the necessary arrangements for the operation of the newly transferred functions. This required arrangements for devolved decision making as well as arrangements for the excepted matter of national security where that should arise. The Devolution Order was necessary in consequence of and for giving full effect to the transfer under the Schedule 3 Order.

[37] When compensation for miscarriage of justice became a transferred matter, applications for compensation were made to the Department of Justice. If the case concerns protected information the application must be referred to the Secretary of State. If the protected information or a summary can be provided to the Department then the Department determines the application. If the protected information or a summary cannot be provided to the Department the application is determined by the Secretary of State. The new scheme provides a mechanism by which the transferred matter within the remit of the Department meets the excepted matter of national security within the remit of the Secretary of State. Compensation for miscarriage of justice remains a transferred matter and if and when the Secretary of State decides that there is protected information that cannot be shared with the Department then the excepted matter of national security prevails and the determination of the application for compensation reverts to the Secretary of State.

[38] Not all aspects of the functions identified as a "policing and justice matter" were devolved in the 2010 transfers. A total of ten paragraphs were included in the meaning of policing and justice matters. In the Schedule 3 Order six of those paragraphs were omitted so that transfers were total. Four paragraphs were substituted so that the nature of the reserved matters and the transferred matters under each paragraph were redefined. The four matters were, paragraph 9 relating to the prevention and detection of crime where, for example, terrorism and drugs were reserved, paragraph 10 relating to the Public Processions (NI) Act 1998 where public order and the armed forces were reserved, paragraph 11 relating to the Police (NI) Act 2000 where certain temporary provisions were reserved and paragraph 12, the Firearms (NI) Order 2004 and the Explosives Act (NI) 1970, where certain aspects were reserved.

[39] There are other instances in the legislative arrangements for the devolution of policing and justice that involved reserving to the Secretary of State, on the grounds of national security by reason of the presence of protected information, the exercise of powers that are otherwise transferred. For example, under the Devolution Order the functions in respect of "the treatment of offenders" are dealt with under Schedules 4 to 8 of the Order. Schedule 4 deals with prisons and adds section 1A to the Prison Act (Northern Ireland) 1953. This provides that in matters of national security involving, in particular, protected information the Secretary of State may continue to exercise the functions which were exercised by the Secretary of State

prior to the Devolution Order. Schedule 5 deals with prisoners on licence and Articles 7, 8 and 9 of the Life Sentences (Northern Ireland) Order 2001 provide that, in respect of the release of prisoners on licence devolved to the Department of Justice, the Secretary of State may intervene on the basis of protected information. Schedule 8 deals with the transfer of prisoners and inserts section 8A of the Repatriation of Prisoners Act 1984. This applies to national security in Northern Ireland and again provides that the Secretary of State may intervene on the basis of protected information. Further, under Schedule 8 the Crime (Sentences) Act 1997 Schedule 1 paragraph (2) was amended to provide that decisions on the transfer of prisoners may be made by the Department of Justice or, where the Secretary of State is of the view that the transfer is in the interests of national security or that the transfer is based on protected information, the Secretary of State may make the decision.

[40] This removal of responsibility when the excepted matter of national security is in play is not limited to the functions formerly included under the heading of the treatment of offenders. For example, Schedule 13 of the Devolution Order amends the Justice (Northern Ireland) Act 2002 section 49 in relation to reports by the Chief Inspector of Criminal Justice. This provides that the Chief Inspector reports to the Department of Justice but if it appears to the Secretary of State or to the Chief Inspector that the report might contain protected information, the Secretary of State may direct the exclusion from the report of protected information. A further example is that Article 5 and Schedule 3 of the Devolution Order amends the Police (NI) Act 1998 by introducing section 41A dealing with reports and other duties of Inspectors of Constabulary. The Secretary of State may intervene to prevent disclosure of protected information when the Department may require disclosure of the information.

[41] As stated above I am satisfied that "the treatment of offenders" in paragraph 9(e) of Schedule 3 of the 1998 Act included the payment of compensation for miscarriage of justice. Accordingly, compensation for miscarriage of justice under the heading "the treatment of offenders" fell within "policing and justice matter" which was defined in section 4(6) of the 1998 Act to include paragraph 9 of Schedule 3. Upon the agreement for the devolution of policing and justice in 2010 the requisite motion for a resolution that policing and justice matters cease to be reserved matters was tabled by the First Minister and Deputy First Minister acting jointly and the resolution was passed by the Northern Ireland Assembly as required by section 4(2A) of the 1998 Act. The Schedule 3 Order was duly passed and amended paragraph 9 of Schedule 3 of the 1998 Act so that the treatment of offenders, including compensation for miscarriage of justice, became a transferred matter. At the same time the Devolution Order was made under section 86 of the 1998 Act as being "... necessary or expedient in consequence of, or for giving full effect to, … any order under section 4." As "national security" remained an excepted matter under paragraph 17 of Schedule 2 of the 1998 Act it was necessary or expedient in consequence of or for giving full effect to the Schedule 3 Order made under section 4 that provision should be made for the national security dimension of

any application for compensation for miscarriage of justice. Such provision was made in Article 6(3) and Schedule 6 of the Devolution Order by the amendment of section 133 of the CJ Act and the introduction of sub-sections (6A) to (6K).

[42] The respondent adopted an alternative position as follows. If the applicant is correct that compensation for miscarriage of justice became a transferred matter in 1998, so that the Schedule 3 Order of 2010 was ineffective, it was nevertheless the case that the Devolution Order would have taken effect under section 86(1) of the 1998 Act so as to introduce the amendments to the 1988 Act. This, the respondent says, is because section 86(1) also allows the Devolution Order to be made if it is necessary or expedient in consequence of or for giving full effect to the 1998 Act (as well as an Order made under section 4). This requirement is satisfied, says the respondent, because if compensation for miscarriage of justice was transferred in 1998 and no arrangements had ever been put in place to give effect to that transfer, it therefore became necessary or expedient to make those arrangements in consequence of or for giving full effect to the 1998 Act transfer.

[43] This alternative argument of the respondent is not accepted. The Schedule 3 Order was made under section 4 of the 1998 Act. The Devolution Order was made under section 86 of the 1998 Act in consequence of the devolution of policing and justice under the Schedule 3 Order. The heading to Part 2 of the Devolution Order is "Provisions Consequential on Devolution to the Northern Ireland Assembly of Legislative Powers in Relation to Policing and Justice Matters". The Schedule 3 Order and the Devolution Order were both made on 31 March 2010 and both came into force on the same day 12 April 2010. It is clear that the Devolution Order seeks to provide detail to the transfer of functions under the Schedule 3 Order. It is clear that the Devolution Order is not seeking to give detail to matters that might have been transferred under the 1998 Act. The Explanatory Note to the Devolution Order, while not an aid to the interpretation of the Order, states "This Order amends certain statutory provisions and makes other provision in consequence of or for giving full effect to the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010" i.e. the Schedule 3 Order made under section 4 of the 1998 Act.

[44] The clear legislative intent was to introduce a measure in consequence of or for giving full effect to compensation for miscarriage of justice becoming a transferred matter in 2010. The exercise of the power under section 86(1) is for designated purposes, namely "…. as appears to Her Majesty to be necessary or expedient in consequence of or for giving full effect to [the 1998 Act] or [the Schedule 3 Order made under section 4]…". The Explanatory Note states that the Devolution Order was not made for the purposes of the 1998 Act but rather for the purposes of the Schedule 3 Order made under section 4. The exercise of the power under section 86(1) did not have the effect of making provision by Order in Council for the purposes of the 1998 Act as there is no basis for concluding that the condition for the exercise of that power was satisfied . If the applicant is correct that compensation for miscarriage of justice became a transferred matter in 1998 I would reject the

respondent's alternative argument that the Devolution Order has in any event made the amendments to the CJ Act, in effect by accident.

[45] The effective legislative change for present purposes was the requirement that an applicant for compensation for miscarriage of justice should show beyond reasonable doubt that they did not commit the offence, as appears in section 133(1ZA) of the CJ Act. This amendment was made by section 175 of the Anti-Social Behaviour Crime and Policing Act 2014 which came into effect on 13 March 2014. This provision was applied to England and Wales and to a case in Northern Ireland where section 133(6H) applied, namely an application for compensation where the Secretary of State was not required to refer the application back to the Department of Justice on national security grounds because the protected information or a summary could not be released. Hence the operation of the 2014 amendment in Northern Ireland depends upon the validity of the Devolution Order which introduced sub-section (6H). As stated above, I am satisfied as to the validity of the Devolution Order that introduced section 133(6H).

[46] In answer to the first issue, the amendments to the compensation scheme are compatible with and authorised by the Northern Ireland Act 1998.

2. THE EUROPEAN CONVENTION

[47] The other issue that arises is whether the scheme for compensation for miscarriage of justice is compatible with the European Convention on Human Rights. The applicant relies on the right to a fair trial under Article 6, the right to property under Article 1 of Protocol 1 and the right to non-discrimination under Article 14 taken with Article 6 or Article 1 of Protocol 1.

[48] The affidavit sworn on behalf of the respondent by Sarah Cookson, Deputy Director in the Northern Ireland Office refers to correspondence from the respondent in relation to the two tests in operation in Northern Ireland and the principle of equality before the law and states:

> "We believe this differential application does not violate Article 14 (of the European Convention on Human Rights) if it were found to be engaged, as there is an objective and reasonable justification for any difference in treatments. The purpose of the legislation is to implement to Article 14(6) of the ICCPR in accordance with what the UK Government considers to be its proper meaning and to clarify the law in the face of continued uncertainty in the courts. We believe these are legitimate aims. Our system of devolution means that it is opened to the devolved administration to pay compensation which arguably goes beyond the requirements of Article 14(6) as the UK Government understands them. Article

> 14 of the ECHR does not prevent contracting states with a number of jurisdictions from applying different rules in different geographical locations."

Article 6

[49] The applicant contends that compensation for miscarriage of justice is a "right" for the purposes of the Article 6 which provides a right to a fair trial as follows:

> "In the determination of his civil rights and obligations and of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[50] The applicant refers to cases in the European Court of Human Rights. In *Georgiadis v Greece* [1997] 24 EHRR 606 the statutory provision provided that persons who had been detained on remand and subsequently acquitted would be entitled to request compensation if it had been established that they did not commit the criminal offence for which they had been detained and they had not intentionally or by gross negligence been responsible for their own detention. The Court found that the provision created a right for a person having been detained to claim compensation following his or her acquittal. Similarly, in *Werner v Austria* [1998] 26 EHHR 310 a person who had been acquitted or otherwise freed from prosecution after his detention had a right to compensation if the suspicion that he committed the offence had been dispelled. The Court contrasted the position with *Masson and Van Zon v Netherlands* [1996] 22 EHHR 491 where the award of such compensation was left entirely to the discretion of the court even where the legal conditions were met.

[51] The Supreme Court considered the issue of a "right" for the purposes of Article 6 in *Ali v Birmingham City Council* [2010] UKSC 8 when dealing with the duty to secure accommodation for the unintentionally homeless. The question was whether a statutory duty to provide benefits in kind as part of a scheme of social welfare fell within the scope of Article 6. Lord Hope stated at paragraph [43] that a distinction can be made between the class of social security and welfare benefits whose substance the domestic law defines precisely and those benefits which are in their essence dependent upon the exercise of judgment by the relevant authority. The conclusion was that the award of services or benefits in kind is not an individual right of which the applicant can consider himself the holder but is dependent upon a series of evaluative judgments by the provider as to whether the statutory criteria are satisfied and how the need for it ought to be met and do not engage Article 6. The evaluation had to be made under section 193 of the Housing Act 1996, where the authority had to secure that accommodation was available for an applicant who was homeless, eligible for assistance, had a priority need, where the authority were

satisfied that he was not homeless intentionally and that their duty would cease when the applicant had been informed and had refused an offer of accommodation which the authority was satisfied was suitable for him.

[52] The issue of a "right" to compensation for miscarriage of justice under section 133 of the CJ Act was then considered in England and Wales by a Divisional Court in *R (Ali) v The Secretary of State for Justice* [2013] EWHC 72 (Admin). The Divisional Court expressed its doubt that Article 6 of the ECHR was engaged but did however assume that it was engaged and decided that the availability of judicial review achieved compliance with Article 6. At paragraph [67] the Divisional Court placed the decision on compensation for miscarriage of justice in the nature of a series of evaluative judgments that did not create a "right". This may be reflected in the recent example of *McNally's Application* referred to above. The appellant's conviction was overturned some years afterwards because of the view that developed later about the suggestibility of young persons at police interviews without an appropriate adult or legal advice. His claim for compensation was rejected. The issues under section 133 were whether the new body of evidence on suggestibility was "a new or newly discovered fact" and if it had been known at the time of the trial, would it have demonstrated that there was no case against him. Maguire J upheld the conclusion that the new evidence on suggestibility was a change in the standards of fairness and procedural safeguards and was not a new or newly discovered fact. It was therefore unnecessary to consider the second issue as to whether, had the body of evidence on suggestibility been available at the trial, it would have demonstrated that there was no case against him that would stand up to legal scrutiny. This second issue may be said to be an instance of an evaluative judgment that the Divisional Court in *Ali* had in mind.

[53] The Divisional Court distinguished *Georgiadis v Greece* on the basis that there was an entitlement to compensation unless disqualifying factors applied and that the amount of compensation was to be paid by an independent assessor rather than the ordinary civil courts. The Greek Code provided an entitlement to request compensation after detention and acquittal where innocence was established and with no compensation if the applicant was at fault for the detention. Section 133 provides for compensation in a case such as the present after the quashing of a conviction where new facts have emerged and innocence is established and with no compensation if the applicant was at fault for the unknown facts. The added ingredient in section 133 is the requirement for new facts to have emerged. As noted above, the impact of the new facts on the existence of a miscarriage of justice, whether measured by proof of innocence or that no trial should have taken place, may be said to involve an evaluative judgment. However, the nature of the decision made under section 133 would appear to be one of entitlement subject to statutory conditions being satisfied rather than a series of evaluative judgments. Section 133 might also be categorised as one of entitlement subject to disqualification for fault. I find the entitlement arising under section 133 to be more akin to the Greek Code than to the instances of evaluative judgments. I do not find compensation from civil courts or an independent assessor a significant indicator on the issue. Section 133

compensation may be inherited which is a significant indicator of a right. I find that compensation for miscarriage of justice is a civil right and that Article 6 is engaged.

[54] The applicant contends that there has been a breach of Article 6 as there has been no equality of arms, that is, that the Secretary of State's role is such that there is an absence of fair balance between the parties to the dispute about the right to compensation. Reliance is placed on *Stran Greek Refineries v Greece* 19 EHRR 293. In a dispute about the construction of a crude oil refinery for the Greek Government an arbitration award was made in favour of the applicants which was then challenged in the Greek courts. While the hearing was pending the Parliament passed a law which rendered the arbitration award invalid and unenforceable. The Court found that the law in question was in reality aimed at the applicant company. It was stated that the notion of a fair trial precluded any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute. The State had infringed the applicant's rights under Article 6 by intervening in a manner which was decisive to ensure that the imminent outcome of proceedings in which it was a party was favourable to it. The Court stated the requirement of equality of arms, in the sense of a fair balance between the parties, as being that in litigation involving opposing private interests, equality implies that each party must be afforded a reasonable opportunity to present his case, under conditions that do not place him at a substantial disadvantage *viz a viz* his opponent.

[55] The *National and Provincial Building Society v United Kingdom* [1997] 25 EHRR 127 is a further instance. Regulations were introduced to change the system of taxation on interest paid to investors in Building Societies. The Regulations were found to be invalid. Building Societies commenced proceedings for restitution. Legislation came into force which validated the Regulations retrospectively. The Court found no violation of Article 6. The Court addressed the issue in terms of the right of access to a court, which right may be subject to limitations. The limitations must not restrict or reduce the access in such a way or to such an extent that the very essence of the right is impaired. A limitation must pursue a legitimate aim and bear a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

[56] The applicant's approach in the present case categorises the role of the Secretary of State as that of narrowing the scope of the applicant's claim for compensation. By this the applicant claims to satisfy the wider test for compensation but has been denied entitlement to that compensation by the Secretary of State intervening to apply a narrower test. I will assume that the applicant would satisfy the wider test in the present case if the legal requirements had been satisfied that would have allowed the claim to be determined by the Department. However, I am satisfied that the Secretary of State is not narrowing the scope of the applicant's claim but rather fulfilling the remit set by Parliament and the constitutional arrangements to deal with the excepted matter of national security when it arises in a particular case. Parliament sets the scope of claims for compensation for miscarriage of justice by defining the applicable conditions. The Secretary of State

must deal with such applications in the manner prescribed by Parliament and is held to such obligation by judicial review. Nor is the Secretary of State narrowing the scope of the applicant's claim by applying the narrow test, a test that Parliament adopted as sufficient to satisfy its international obligation. This is Parliament setting out the statutory parameters of the scheme and applying those parameters to all cases within the remit of the Secretary of State, both in England and Wales and in Northern Ireland.

[57] Nor is the legislation retrospective in relation to a pending application. Section 175 of the Anti-Social Behaviour, Crime and Policing Act 2014, which amended section 133 of the CJ Act to introduce section 133(1ZA) from 13 March 2014, provided that the sub-section had effect in relation to any application for compensation made (a) on or after the day on which the section came into force and (b) before that day but a right to compensation has not been finally determined before that day by the Secretary of State.

[58] The Schedule 3 Order and the Devolution Order came into effect on 12 April 2010. The introduction of sub-section (1ZA) was on 13 March 2014. The convictions in the Fenton appeal were quashed on 10 October 2014. The claims for compensation were made on 8 August 2015 and the decision to refuse compensation was issued on 3 July 2017.

[59] I find no interference with the right to a fair trial. Whether addressed as equality of arms or as access to the court the concern is with the adoption by Parliament of the narrow test in cases determined by the Secretary of State in Northern Ireland and not directly with the different procedures adopted or the impact of the protected information. The issues concern the remit of the Secretary of State and the adoption of the narrow test for compensation in cases within that remit, as opposed to cases within the remit of the Department of Justice and the wider test for compensation within the Department's remit. This is a matter of differential treatment. In any event, consideration of equality of arms and the right of access to a court eventually concern the justification for the measures taken, a legitimate aim being pursued, proportionality and a fair balance between the parties, themes that recur under Article 1 of Protocol 1 and Article 14.

[60] The question of justification also falls to be considered in relation to Article 1 of Protocol 1 and Article 14 and will be addressed below after the further Articles have been introduced.

Article 1 of Protocol 1

[61] Article 1 of the First Protocol includes the right not to be deprived of property and provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived

> of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provision shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[62] The applicant contends that there arises the entitlement to compensation under the wider test, thereby giving rise to a duty to pay that compensation, which the applicant contends is a right to property under Article 1 of the First Protocol. Accordingly, the refusal to pay that compensation by applying the narrow test amounts to a deprivation of that right to compensation.

[63] A claim for compensation is not a "possession" unless it is established by law. A legitimate expectation of a claim to compensation does not arise under the right to property unless it is a currently enforceable claim (*Kopecky v Slovakia* [2005] 41 EHRR 43). The applicant has no right to property in respect of the compensation claim. It is not a possession. There can be no legitimate expectation as the entitlement does not arise under domestic law. Article 1 of Protocol 1 is not engaged.

[64] If Article 1 of Protocol 1 were to be engaged the question of justification would arise. In *Lithgow v United Kingdom* [1986] 8 EHRR 329 it was claimed that the compensation paid on the nationalisation of aircraft and ship building industries was grossly inadequate and discriminatory. The Court stated that not only must a measure depriving a person of his property pursue on the facts, as well as in principle, a legitimate aim "in the public interest" but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The latter requirement has been expressed in other terms by the notion of the "fair balance" that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Again, it becomes necessary to consider justification, legitimate aim, proportionality and fair balance.

Article 14

[65] The applicant further relies on Article 14 and the prohibition of discrimination which provides:

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

> association with a national minority, property, birth or other status."

[66] In *R(S) v Chief Constable of South Yorkshire* [2004] 1 WLR 2196 at paragraph 42 the House of Lords set out five questions that can be posed as a framework for considering the question of discrimination -

> "(1) Do the facts fall within the ambit of one or more of the Convention rights?
>
> (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
>
> (3) If so, was the difference in treatment on one or more of the proscribed grounds under article 14?
>
> (4) Were those others in an analogous situation?
>
> (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?"

[67] As the present case involves differential treatment of applications made within the jurisdiction of Northern Ireland, I will assume that the applicant falls within Article 14 as having "other status". Assuming the first three questions to be answered in the affirmative there is an overlap between the fourth and fifth questions concerning the character of the analogous situations and the justification. It might be said that the applicant and those whose applications for compensation are dealt with by the Department are in analogous situations or it might be said that the applicant's case, being dealt with by the Secretary of State for reasons of national security, is not analogous to those dealt with by the Department. Once again the question ultimately comes down to one of justification. Although I have found that Article 1 of Protocol 1 is not engaged I will consider justification for any interference with the right to property and differential treatment in relation to the right to property. So for the purposes of Article 6 and Article 1 of Protocol 1 and Article 14 in conjunction with both Article 6 and Article 1 of Protocol 1, what is the justification for the scheme applied to the applications for compensation for miscarriage of justice?

Justification

[68] As appears from *R (Tigere) v Secretary of State for Business* [2015] UKSC 57 paragraph 33, it is now well established that the test for justification is fourfold:

(i) Does the measure have a legitimate aim sufficient to justify the limitation of a fundamental right,

(ii) Is the measure rationally connected to that aim,

(iii) Could a less intrusive measure have been used,

(iv) Bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?

[69] The context of this dispute requires attention. It is set in the constitutional arrangements made by Parliament for the division of responsibilities between the national government and the devolved administration. Further, the nature of the dispute for present purposes requires attention. The focus is not on the different procedure that is applied to national security cases where the protected information cannot be disclosed to the Department nor is it on the use of protected information nor on access to that information or a summary. Rather, it is on the adoption of the narrow test of entitlement to compensation that is applied to the national security cases determined by the Secretary of State in contrast to the wider test applied to the cases determined by the Department.

[70] As to legitimate aim, there are two separate measures that are relevant to the compensation scheme for miscarriage of justice. The first measure concerns the division of powers between the national government and the devolved administration and the procedures applied to address the involvement of protected information. The division of powers is designed to give effect to the interests of national security as an excepted matter. It is a legitimate aim of the procedures adopted that the determination of those national security cases that cannot be undertaken by the Department should be undertaken by the Secretary of State on behalf of the national government. The second measure concerns the test that is applied to the Secretary of State's determination of the right to compensation. Legislation has applied the narrow test to that determination in all cases determined by the Secretary of State in England and Wales and Northern Ireland to give effect to the national view of the extent of the State's obligation to pay compensation. Parliament has taken the view that the proper meaning of the international obligation to provide compensation for miscarriage of justice involves the adoption of the test of proof of innocence. The application of that test to all the cases determined by the Secretary of State is for the legitimate aim of applying Parliament's view of its obligations, being a view that it is entitled to hold consistent with those obligations.

[71] Each measure has its legitimate aim. There is also interaction between the two measures. Overall it is a legitimate aim to achieve a balance of interests between the role of the Department and that of the Secretary of State, being the interest of the

Department in carrying out a transferred function in the manner required by the devolved administration, subject to the interest of the Secretary of State in carrying out an excepted function in the manner required by the national Parliament.

[72] The measures are each rationally connected to the legitimate aims.

[73] The measures are no more intrusive than necessary. On the issue of compensation for miscarriage of justice, the national Parliament and the devolved administration each had political and financial choices to make. The options for Parliament in 2014, when introducing the narrow test to cases in England and Wales, was either to apply that test to the Secretary of State's cases in Northern Ireland (which was the choice adopted) or not to extend the narrow test to any cases in Northern Ireland (thus opting out of the application of the preferred test to one area of responsibility in Northern Ireland while applying that test elsewhere) or to impose the narrow test on the determinations of the Department (thus undermining the balance of interests sought to be maintained with the devolved administration). To achieve the legitimate aim of applying the adopted test to the determinations of the Secretary of State, the choice made was not only within the reasonable range of legislative measures available but was the only one available. At the same time the Northern Ireland Assembly had an option in 2014 in light of the choice actually made by Parliament. It could continue to apply the wider test to Department cases or it could have introduced legislation to apply the narrow test to Department cases. In the latter case the application would still have been determined by the Secretary of State and the applicant would have had no complaint about the test applied. No such legislation was introduced in Northern Ireland.

[74] Has a fair balance been achieved? Again, the constitutional context is important. Different jurisdictions within the State may take different approaches to the same issue. It is in the nature of devolution to local administrations that they make their own political and financial judgments, provided they act within their remit and in a compatible manner. That narrow test, applied throughout England and Wales, is not incompatible with the State's obligations under the European Convention on Human Rights. The national Parliament has respected devolution by not imposing the test on the devolved administration.

[75] In the adoption of an approach to any measure there is accorded a discretionary area of judgment. In the context of the constitutional settlement for devolved government, a tension may arise between on the one hand a transferred matter being dealt with by the devolved administration and on the other hand an aspect of a transferred function that is an excepted matter because of national security considerations. The respective decision-makers in the national government and in the devolved administration maintain their freedom of decision-making within their respective remits and the compatibility of their respective approaches.

[76] As a result, different outcomes may arise in different jurisdictions and each would require justification. The application of the narrow test in England and Wales

has been shown to be justified. When transferred matters and excepted matters meet there is no clear blue line between the jurisdictions. In such circumstances the outcomes within a jurisdiction resulting from the meeting of excepted decisions and transferred decisions are in the nature of different outcomes between different jurisdictions on the same issue.

[77] The Secretary of State has concluded that the applicant does not satisfy the test for compensation, a test that is compatible with the European Convention, one that reflects the national Government's and Parliament's view of its obligations to pay compensation and a test that is applied to all other cases determined by the national executive. The approach taken is within the discretionary area of judgment in dealing with functions that involve the excepted matter of national security and applying the compatible view of its obligation to provide compensation. Otherwise there will be enforced uniformity. The national government and the Parliament would be compelled to adopt any more generous scheme applied by the devolved administration, which outcome would undermine the balance of interests where excepted matters interact with transferred matters.

[78] In answer to the second issue, the compensation scheme is compatible with the European Convention on Human Rights.

[79] Having answered both questions in the affirmative the application for judicial review is dismissed.