Neutral Citation No. [2010] NIQB 14

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*(subject to editorial corrections)**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Worton's (Colin) Application [2010] NIQB 14

AN APPLICATION FOR JUDICIAL REVIEW BY COLIN WORTON

TREACY J

Introduction

[1] By this judicial review the applicant seeks an order quashing the decision of the Secretary of State for Northern Ireland dated 3 February 2009 confirming his earlier decision not to award the applicant any sum in compensation under the ex gratia scheme.

[2] The sole ground on which leave was granted was:

> **"The Respondent made an error of law, when, in his reply of the 3rd of February 2009, he persisted in holding to his interpretation of Kelly LJ's decision of the 30th of May 1986 (ruling that the confession of the Applicant was inadmissible), namely that there had been no serious default on the part of the Police. The Applicant relies upon:** ***In re McFarland [2004] UKHL 17 [2004] 1 WLR 1289; and In the Matter of an Application by John Boyle for Judicial Review [2008] NICA 35".***

Background

[3] The applicant, a then serving member of the Ulster Defence Regiment ("UDR") was arrested on 1 December 1983 in connection with the murder of Adrian Carroll on 8 November 1983 in Armagh. The applicant was

interviewed as were four of his colleagues namely Noel Bell, James Hegan, Winston Allen and Neil Latimer. They all made written statements confessing to their part in the murder of Mr Carroll.

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

[5] The other four defendants ("the UDR four") were found guilty on 1 July 1986 and their appeals dismissed on 4 May 1988. Fresh appeals were lodged by three of these four defendants based on ESDA tests and on 29 July 1992 Hutton LCJ allowed the appeals of Noel Bell, James Hegan and Winston Allen. On 9 February 2004 Carswell LCJ dismissed a fresh appeal by Neil Latimer. Following their release compensation was awarded to Noel Bell, James Hegan and Winston Allen under Section 133 of the Criminal Justice Act 1988[1].

[6] In 1992 and on various dates subsequently the applicant applied for compensation relying upon the ex gratia compensation scheme of 29

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[1] **133 Compensation for miscarriages of justice**

(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.

(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.

(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.

(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 section 17 of the [1968 c. 19.] Criminal Appeal Act 1968;

(ii) under section 263 of the [1975 c. 21.] Criminal Procedure (Scotland) Act 1975; or

(iii) under section 14 of the [1980 c. 47.] Criminal Appeal (Northern Ireland) Act 1980.

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

(7) Schedule 12 shall have effect.

November 1985. The Respondent has persistently refused to award the applicant compensation.

Ruling of Kelly LJ

[7] It is the Ruling of Kelly LJ which lies at the heart of this application and for ease of reference I set it out almost in its entirety:

> **"(i) The accused Colin Worton ... a full-time member of the UDR is now aged 25 ... The Crown case of murder against him is that he aided and abetted it. He knew of the plan and he took part in the mock arrest of Latimer in Lonsdale Street. He travelled in the same Land-Rover with him and saw the gun being handed over to him.**
>
> **(ii) The** *sole evidence* **against him on this charge of murder are the verbal and written confessions said to have been made to detectives at Castlereagh Holding Centre on 5 December 1983. Mr Smyth QC leading Mr Carl Simpson for the accused challenged their admissibility not on the statutory grounds of section 8 of the Northern Ireland (Emergency Provisions) Act 1978** *but that they had been induced by the detectives at Castlereagh by a trick which embraced threats and dishonest promises and oppressive and unfair means. In these circumstances the discretion of the Court is sought to exclude them.*
>
> **(iii) It is well established and I need not go over this well trodden ground in any detail that the courts in this jurisdiction retain a discretion, notwithstanding section 8, to exclude statements made by an accused the prejudicial effect of which outweighs their probative value, see** *R v Corey* **(1979) NI 49, or which have been involuntarily or oppressively obtained or unfairly induced see** *R v Milne* **(1978) NI 110;** *R v Llewellyn* **(1984) NIJB (No. 15) and in my view in order to ensure a fair trial** *R v Sang* **(1980) AC 402.**
>
> **(iv) Worton was arrested on Thursday 1 December 1983 at 6.21am and taken to Castlereagh police office. He was interviewed on that day by detectives and on each of the following days until he left Castlereagh at 9.30pm on 7 December 1983. Worton denied any complicity in the murder**

throughout 23 interviews. At the 24th interview on 5 December 1983 at 4.15-5.30pm he asked the detectives if he could see Detective Sergeant Doherty who was also an interviewer. He said to him "I want to make a statement about this." He was asked "Statement about what? A. What you have been talking to me about this last few days. Q. Do you want to talk about it first before you make the statement?" Worton replied "No get the paper now while it is fresh in my mind". Det Sgt Doherty and Det Con Williamson say that he then dictated a statement to them which Det Sgt Doherty wrote down (Ex. 10). Worton signed it and wrote in himself the statement certificate.

(v) The statement describes the events of the day of the murder. It does not state that Worton had any knowledge of an intention or plan to carry out a murder. It does not state that Worton knew his actions were part of a murder plan. It simply sets out his activities that day, mentioning the events: (1) of talking first with his colleagues in the UDR in the search at Moy Road; (2) of heading back into Armagh in one of the Land-Rovers when the search was over; (3) of the Land-Rover stopping in Lonsdale Street and of how he and Bell jumped out and got Latimer out of the technical college grounds and put him in the Land-Rover; (4) of how they dropped Latimer off at McCrum's Court; (5) of how he heard two bangs; (6) of how his Land-Rover picked up Latimer shortly after in College Street, and how Latimer changed into civilian clothes and all returned to the RUC station.

(vi) All this was dictated by Worton, say the police, and came spontaneously from him, except that he asked them how to start it and they told him to start it with his occupation, save the last two sentences in the statement which came from questions by the police, the last one being that he, Worton, saw Hegan giving Latimer a handgun as they drove along.

(vii) A voir dire was held and Worton himself gave evidence. Worton's case on the issue of admissibility can be summarised as follows. The detectives at Castlereagh quickly found out his vulnerability in facing their questioning. It was a

very deep attachment to his girlfriend, now his wife, which raised corresponding intense jealous feelings about her including resentment of the mildest inquisitive discussion about her. Having discovered this they played on it. They told him if he made no confession he would be charged with murder and he would then go to jail for 15-20 years. When he got out he would see his girlfriend married, walking down the street with children that could have been his. On the other hand if he made a statement confessing to withholding information he would be charged only with that lesser crime and would then get five years imprisonment. Further, pending his trial he would get bail and be able to marry his girlfriend. For these reasons and because he "couldn't take any more questioning" he made the confession. His confession contained what he believed the detectives wanted from him and was what they had been alleging throughout the interview.

(viii) I confess that at the early part of the voir dire I thought this was not going to be an easy case for the accused to make with any degree of credibility. That a soldier of some years standing in the UDR could be persuaded to make a false confession to murder for reasons such as these seemed on the face of it highly unlikely. But as the voir dire proceeded as certain pieces of evidence were revealed some of which I found bizarre, and as I heard and observed the accused as he gave his evidence, I thought again.

(ix) The accused was in the witness-box for most of three days. He struck me as a very strange young man, a person of low intelligence and altogether an odd fish. Even to Crown counsel he was "a very odd character indeed". Dr Burton the consultant psychologist who had examined him on 31 January 1984 gave evidence and her opinion confirmed the view I had already reached about him. At her examination she found he had so much difficulty in understanding the questions she was putting to him that she wondered whether he could really hear her. In a full intelligence test she found him of dull intelligence. In educational tests, she found him to be extremely retarded in educational skills. He read like a ten-year-old. His spelling and other work was that of a nine-year-old. In personality tests he was

markedly emotionally unstable, shy, timid and ineffectual and a jealous man.

(x) His behaviour at Castlereagh, his reactions to questioning there and his conduct and demeanour in the witness-box all seemed to be consistent with these assessments. He started off his spell in Castlereagh by refusing food on 1 and 2 December, broke his fast at supper on the second day and then went willingly on a milk only diet until lunch on the 6th then reverted to the fast until the evening of the 7th. He described this as a hunger strike and he said he went on hunger strike to prove his innocence but there seemed to be little logic or pattern or even reason in it all.

(xi) His reaction to questioning about his part in the murder as the days progressed changed from firm denial to a period when he said he had a loss of memory about the crucial events on this day and then took a dramatic turn to confession. After confrontation with Latimer in an interview room whom he shouted down he said to Det Sgt Doherty, and this is the evidence of the police:

> **"Look you can help me. I want to find out about my 'nut' (meaning head). There must be something wrong with it. I am not kidding about this. I would like to see a psychiatrist or a hypnotist."**

(xii) When he was told that Latimer and Bell confessed, Worton says he asked Det Con Nixon whom he saw in a consultation room, although this Det Con it was agreed never interviewed him at any time, to go and tell Latimer and Bell that he, Worton, would kill himself in the toilet. This was to make them withdraw their admissions involving him. Mr Nixon denied this. He said he never met Worton at all. I think the detective's recollection may be at fault for I believe it may well have happened.

(xiii) Worton resented the detectives' continued references to his girl-friend. They asked, he said, was she pretty? What did she look like? What was the colour of her hair? Was she leggy? They went no further than this he said but he resented it, he

thought they were being rude. I thought in a short flash, the same resentment was sparked off honestly and spontaneously by the accused during a quiet exchange in the witness box with Mr McCollum when Mr McCollum was asking him about this girl.

(xiv) Then came perhaps the most bizarre evidence of all throughout the voir dire. In evidence, Worton produced a letter which he says he wrote on the second or third day in custody on police interview notepaper in an interview room in the presence of Det Sgt Doherty and Det Con Matthewson with a pen borrowed from one of them. The letter is testamentary in character and purports to dispose of his property and assets. Throughout the trial we have called it "the will" for convenience.

(xv) He said he wrote it at the time the detectives were telling him he would be going away for 15-20 years and this fact inspired it. He wanted them to send it to his family because he was going to kill himself when he got to jail. Here is the letter:

> **"Dear Mother Dad and Babs the rest of the family. Just a few words to say that I miss you all and that these CID say I will be in here for a long time so what ever I own I want to give it away. To Mum and Dad what ever is in my gateway book. To Babs my four calves and my £550. To Jennifer my car and £2 00 on one condition that she gives Dennis hers. To Dennis and Jacaline £350 each to Zelda and family what ever is in my credit book. Babs can have my bank book and safe. Well thats all love Hooley.**
>
> **PS If you want to get me a hypnotist to believe my story you can because I am now on hunger strike. Love Hooley. Thank you."**

(xvi) Worton says when he handed this letter to the detectives, they read it and laughed at it and took it away. But that is not all in this strange incident. Worton says they returned it to him a day or so later and said he wouldn't need it because he was getting

bail and to add to the mystery Worton says this was before he made his confession. After he'd made his confession he met these two detectives again. They told him he would get bail. Believing this and anticipating he would get married while on bail he asked them to his wedding and they gave him a phone number which one of them wrote on the back of this "will" by which they could be contacted to be told of the wedding date and plans when finalised.

(xvii) The detectives strongly denied any of this had taken place. The will was not written in their presence. They never had it in their possession. They never saw it before until it was shown in evidence. The discussion about bail never happened. The invitation to the wedding was never mentioned.

(xviii) It had to be admitted however that it was written on police interview notepaper and that the pen used to write it compared remarkably well with the pen Det Sgt Doherty was using from time to time to take interview notes. And it was common ground that paper and pen would not be available to an accused in his cell unless given by the uniformed police and recorded and even then a prisoner could not have a pen there to write unless supervised. Faced with the telephone number written on the back of the will, Det Sgt Doherty said it was the phone number of Armagh CID and admittedly it was in his handwriting. He may have written it to record that number he said for use because he was ordinarily stationed in Co Fermanagh.

(xix) I think this whole story about the will and the wedding invitation is so ridiculous, so extraordinary that it must have a basis of truth. The evidence established that it was highly unlikely to have been written by Worton in a cell or away from an interview room. The Crown were left to submit that it must have been written after he left Castlereagh. I am afraid I was far from impressed by the evidence of the detectives concerned on this matter.

(xx) Interesting and extraordinary though all this is, what is its significance in the trial of the

admissibility of his confession? In other words, to use Mr McCollum's question, what does it prove? Well it may be said with some force that the will and its nature and in particular the line it contained, "These CID say I will be in here for a long time" gives considerable credence to Worton's allegation that the detectives were telling him if he didn't make a confession he would be charged with murder and would go away for 15 to 20 years. Of course if he'd written the will after he'd confessed to murder, its significance would be nil in this context.

(xxi) These conclusions do not imply that I have solved all the mystery of this will, or when and in what full circumstances it was written. Nor do they imply that I believe everything Worton has said or that I do not believe anything the interviewing detectives have said.

(xxii) I do believe the police were astute enough to find out Worton's weaknesses and vulnerability in the interview. But this is not to their discredit. On the contrary it is part of their job. Worton made no complaints of ill-treatment to the doctors. It is fair to say he alleged no form of physical ill-treatment against the detectives. The doctors found him relaxed and composed and normal. Of course they saw him only for minutes – there was no need in the circumstances to see him for longer. But I wonder would they have held to their opinion of complete normality if they had observed and heard him in the witness-box over the course of three days as I did.

(xxiii) I take Mr McCollum's point which is why should the detectives hand the will back to him if it was a damning document. I cannot say. I can only speculate, perhaps weakly, that they didn't anticipate it would be produced again or that they thought it was without significance.

(xxiv) I have considerable reservations about Worton's account of the actual circumstances of making the statement. I did not believe many of the things he said about this. I refrain from deciding whether his written confession amounts to a confession to murder or merely a confession to something less. He certainly has not the legal know-

> **how nor the cunning of some laymen to distinguish between the two. I refrain also from deciding whether its factual content is true.**
>
> **(xxv) At the end of the day I am left with the strong conviction that having regard to his make-up, to the situation in which he found himself, to all the circumstances of Castlereagh, to the length and persistence of his questioning, which I emphasise I do not hold to be oppressive or improper, that I should exercise my discretion and exclude as inadmissible his confession in statement Ex No 10. I go further and say even if this statement was admitted I would have some difficulty in assessing what weight should be given to it having regard to all the circumstances and in particular Worton's intellectual and emotional make-up. It has been said and I believe it to be appropriate here that the right to the assurance of a fair trial includes the right to be protected from evidence which might have an unreliable effect on the result of the trial."**
> [Roman Numerals added]

The Ex Gratia Scheme

[8] Until April 2006 an ex gratia scheme was operated by successive Home Secretaries and Secretaries of State for Northern Ireland for the payment of compensation to certain of those who had been wrongly convicted but whose cases did not come within section 133 or article 14 (6) of ICCPR. Although that scheme has been discontinued, it is accepted that those such as the appellant who applied before April 2006 continue to be entitled if they meet the requirements that it contains. Compensation under this scheme was payable on terms outlined to the House of Commons in a written answer by the then Home Secretary, Mr Douglas Hurd, on 29 November 1985:

> **"There is no statutory provision for the payment of compensation from public funds to persons charged with offences who are acquitted at trial or whose convictions are quashed on appeal, or to those granted free pardons by the exercise of the royal prerogative of mercy. Persons who have grounds for an action for unlawful arrest or malicious prosecution have a remedy in the civil courts against the person or authority responsible. For many years, however, it has been the practice for the Home Secretary, in exceptional circumstances, to**

authorise on application ex gratia payments from public funds to persons who have been detained in custody as a result of a wrongful conviction.

In accordance with past practice, I have normally paid compensation on application to persons who have spent a period in custody and who receive a free pardon, or whose conviction is quashed by the Court of Appeal or the House of Lords following the reference of a case by me under section 17 of the Criminal Appeal Act 1968, or whose conviction is quashed by the Court of Appeal or the House of Lords following an appeal after the time normally allowed for such an appeal has lapsed. In future I shall be prepared to pay compensation to all such persons where this is required by our international obligations."

[He then set out article 14 (6) of ICCPR and continued …]

"I remain prepared to pay compensation to people who do not fall within the terms of the preceding paragraph but who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from <u>serious default</u> on the part of a member of a police force or of some other public authority.

There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or an appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought."

Reasons for Refusal

[9] By letter dated 3 February 2009 David Mercer, on behalf of the Secretary of State, wrote to the applicant and stated:

> **"… Ministers do not read the trial judge's judgment as indicating that you should not have been prosecuted, or – as we have already indicated to you – that the conduct of the police towards you during questioning amounted to serious default. …**
> **I must therefore confirm that the Secretary of State's decision not to award you compensation still stands. …"**

[10] This response seems to incorporate by reference and repeat the basis upon which each application for compensation had been refused. For example in the letter dated 3 January 1996 from the then Secretary of State he stated "… the judge was at pains to exonerate the police from any culpability."

And by letter dated 12 December 2005 he stated:

> **"… do not represent any such serious default.**
>
> **As you will be aware at the time of dismissing the case against you the judge stated that in questioning you the police were doing their job and that there was nothing oppressive or improper. In the same context I am also aware that you have met with and had your case considered by the independent Police Ombudsman. Her remit would obviously be on the police aspects of your case. I understand that her advice is that there is nothing for her to investigate. Bearing in mind that the courts have already considered the police behaviour in the case and the assessment of the Police Ombudsman my conclusion is that there was no serious default involved. …"**

Was there serious default?

[11] The applicant submitted that the Trial Judge's observations and findings, express and implied, pointed to the conclusion that there had been serious default on the part of the police as a result of which the applicant was wrongly charged. The applicant contends that the claim that the Trial Judge exonerated the police is misconceived.

[12] The Respondent submits that on the basis of the Trial Judge's ruling there is no foundation upon which the Secretary of State could conclude that the police had been guilty of any serious default in relation to the applicant. The Respondent submitted that the Trial Judge had made an explicit finding that the questioning was not oppressive or unfair. Mr McDonald QC contended that that comment related to the length and persistence of the questioning rather than the nature of the questioning itself. Mr Maguire QC queried what the Trial Judge's point would have been in explicitly exonerating the police of misconduct in relation simply to the length and persistence of the questioning if he was, in reality, to be taken as having acknowledged in the same paragraph even more egregious misconduct in the form of the alleged trick.

Authorities

[13] There have been a number of authorities which have interpreted the ex gratia scheme. Of particular importance is the House of Lords decision in the Northern Ireland appeal of ***McFarland* [2004] 1 WLR 1289.** In that case Lord Scott at paragraph [40] made the following comment.

> **"In making ex gratia payments the Home Secretary is disbursing public money. But he is not doing so pursuant to any statutory duty or statutory power. There is no statute to be construed. He is exercising a Crown prerogative. He is accountable for what he does with public money to Parliament and, in particular, to the House of Commons ... But the scope of the Court's powers of intervention are, in my opinion, limited by the nature of the prerogative power in question ...** ***Provided the Secretary of State avoids irrationality in his decisions about who is and who is not to receive ex gratia payments, and provided the procedure he adopts for the decision making process is not unfair, I find it difficult to visualise circumstances in which his decision could be held on judicial review to be an unlawful one."***
> [Emphasis added]

[14] A similar approach to judicial intervention in the context of the operation of the ex gratia scheme had been expressed by Sir Thomas Bingham in ***Bateman & Howse* [1994] EWCA Civ 36.** He said:

> **"On any showing, all the Court could properly do, if it could do anything, would be to enquire whether the Secretary of State was obviously wrong in concluding that the period in custody did not result from serious default on the part of a member of the**

> **police force or some other public authority. It is plain that in neither case did it result from serious default on the part of a member of the police force. It was, in my judgment, open to the Secretary of State to conclude in both cases that the period in custody, or the conviction, did not result from serious default on the part of some other public authority … I say no more than it was open to him to so conclude. It is not a question whether I, as a member of the Court, agree with him or not. The question, at best for the Appellants, is simply whether one can say that this conclusion was open to him."**

Conclusion

[15] Applying these principles to the present case it was, in my judgment, clearly open to the Secretary of State, in light of the Trial Judge's ruling, to have interpreted it as not indicating that the conduct of the police amounted to serious default. Why else, one must ask, would the Trial Judge have explicitly emphasised, in relation to the applicant's questioning, that he found nothing oppressive or improper? In the final paragraph of the ruling the Trial Judge referred to "the situation in which he found himself" and "to all the circumstances of Castlereagh". These comments cannot reasonably be regarded as embracing an acknowledgement of the applicant's case that he was tricked in the manner summarised at the beginning of the Trial Judge's ruling. Had the alleged trick been the basis of the Trial Judge's finding he would have said so. It would not have been difficult. His explicit statement relating to the questioning which he emphasised he did not hold to be oppressive or improper is inconsistent with the finding of serious default. On any showing it was certainly not irrational of the Secretary of State to interpret the judgment in the way in which he and successive Ministers of State have consistently done.

[17] Having regard to my conclusions above the application for judicial review must be dismissed.