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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

Appellant

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

Respondent

Mr Southey QC with Mr Devine (instructed by KRW Law Solicitors) for the Appellant
Mr Coll QC and Ms Best (instructed by Crown Solicitor) for the Respondent

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Before: Morgan LCJ, Colton J and Huddleston J

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal against a decision of Sir Ronald Weatherup refusing an application by the appellant on her own behalf and on behalf of James Martin for judicial review of a decision of the Secretary of State for Northern Ireland on 3 July 2017 refusing applications for compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988 ("the 1988 Act"). The matters in issue include the devolution arrangements for justice in Northern Ireland and rights under Articles 6, 14 and Article 1 Protocol 1 ("A1P1") of the European Convention on Human Rights ("the Convention").

Background

[2] On 9 May 1991 James Martin was convicted of allowing property to be used for terrorist purposes and aiding and abetting the false imprisonment of James Fenton between 25 and 26 February 1989 and Alexander Lynch on 5 January 1990. The appellant had already pleaded guilty to those offences. James Martin was

sentenced to a total of 12 years' imprisonment comprising 8 years for Lynch and 4 years consecutive for Fenton. The appellant was sentenced to a total of 3 years and 6 months' imprisonment, 3 years for Lynch and 6 months consecutive for Fenton.

[3] On 30 April 2008 the appellant and James Martin were invited by the Criminal Cases Review Commission ("CCRC") to apply to have their convictions relating to Lynch reviewed based on confidential information. The convictions were referred to the Court of Appeal and quashed on 9 January 2009. The Court of Appeal relied on material within a confidential annex provided by the CCRC and declined to provide any gist or other information upon which they based their decision due to the sensitive nature of the material. Both applied for compensation for miscarriage of justice on 26 September 2009. The claims were accepted on 28 May 2012 and substantial compensation paid.

[4] On 21 February 2008 the CCRC invited the appellant and James Martin to apply for review of the convictions relating to Fenton. The convictions were referred to the Court of Appeal and quashed on 10 October 2014. The Court of Appeal again declined to provide full reasons for its decision for the same reasons. The appellant and James Martin applied for compensation for miscarriage of justice in respect of these convictions and on 3 July 2017 the Secretary of State refused the applications.

[5] The appellants challenged the decision to refuse the compensation claim by way of judicial review. An application for a closed material procedure under section 6 of the Justice and Security Act 2013 was made and special advocates appointed. As a result of further discussions the Order 53 Statement was amended to reflect the issues arising in this appeal and the closed material procedure application was not pursued.

The relevant statutory provisions

[6] The United Kingdom ratified the International Covenant on Civil and Political Rights ("ICCPR") in 1976 which by Article 14(6) provides for the payment of compensation for miscarriage of justice in certain situations. This commitment was implemented in domestic law by section 133 of the Criminal Justice Act 1988:

> "(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."

The remaining subsections established a 2 year application process and arrangements for the appointment of an assessor to determine the amount of compensation. Section 133A of the 1988 Act provided further guidance in respect of the calculation of compensation.

[7] The Northern Ireland Act 1998 ("the 1998 Act") established constitutional arrangements for devolved government in Northern Ireland. Section 4 provided that excepted matters were those falling within a description specified in Schedule 2, reserved matters were those falling within a description specified in Schedule 3 and transferred matters were those which were not excepted or reserved. Paragraph 9(e) of Schedule 3 included "the treatment of offenders (including children and young persons, and mental health patients, involved in crime)." The Schedule indicated that this paragraph included in particular prisons and other institutions for the treatment or detention of persons mentioned in that subparagraph.

[8] Section 4 also provided for the circumstances in which a reserved matter could become a transferred matter. There were specific provisions in relation to policing and justice:

> "4(2) If at any time after the appointed day it appears to the Secretary of State:
>
> (a) that any reserved matter should become a transferred matter; or
>
> (b) that any transferred matter should become a reserved matter,
>
> he may, subject to subsections (2A) to (3D), lay before Parliament the draft of an Order in Council amending Schedule 3 so that the matter ceases to be or, as the case may be, becomes a reserved matter with effect from such date as may be specified in the Order.
>
> (2A) The Secretary of State shall not lay before Parliament under subsection (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; and

(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 subsection (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….

(4) If the draft of an Order laid before Parliament under subsection (2) is approved by resolution of each House of Parliament, the Secretary of State shall submit it to Her Majesty in Council and Her Majesty in Council may make the Order."

[9] On 31 March 2010 the Northern Ireland Act 1998 (Amendment of Schedule 3) Order 2010 ("the Schedule 3 Order") was made. The introduction to the Order noted that in accordance with section 4(2A) of the 1998 Act a motion for a resolution praying that certain matters falling within paragraph 9 and other paragraphs of Schedule 3 to the Act 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 support of a majority of the members voting on the motion, a majority of the designated Nationalists voting and a majority the designated Unionists voting. The Schedule 3 Order was made in exercise of the powers under section 4(4) of the 1998 Act and for present purposes the importance lay in the fact that paragraph 9 of Schedule 3 was deleted and a new paragraph 9 not including "treatment of offenders" was substituted.

[10] Section 86(1) of the 1998 Act specifically provides that an Order in Council may make such provision, including provision amending the law of any part of the United Kingdom, as appears to be necessary or expedient in consequence of, or for giving full effect to any Order under section 4.

[11] On 31 March 2010 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. Article 6(3) stated that Schedule 6 (which made amendments relating to the Miscarriage of Justice and the Royal Prerogative of Mercy) was to have effect. Schedule 6 amended the 1988 Act by inserting after section 133(6) the following provisions:

"(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] The effect of these provisions is that payment of compensation for miscarriage of justice becomes a transferred matter in all cases except where there is protected information, defined as national security information, which has to be taken into account in order to deal fairly with the application and in respect of which neither the information nor a sufficient gist can be disclosed.

[13] The appellant submits that the reference to treatment of offenders in paragraph 9(e) of Schedule 3 as originally drafted did not include the payment of compensation for miscarriage of justice. The appellant is not an offender. The Court of Appeal has quashed her conviction. There is no other provision excepting or reserving the payment of compensation for miscarriage of justice. It follows that payment of compensation for miscarriage of justice always was a transferred matter.

[14] If that submission is correct the necessary condition set out in section 4(3) of the 1998 Act for transferred matters to become reserved matters in cases involving undisclosable protected information is a resolution passed with cross community support praying that the transferred matter should become a reserved matter. It is common case that no such resolution was made. In the absence of such a resolution it is submitted that the Devolution Order was neither necessary nor expedient in consequence of or for giving effect to an Order under section 4 of the 1998 Act. It was accordingly unlawful and should be quashed.

[15] The respondent contends that paragraph 9(e) of Schedule 3 to the 1998 Act as originally drafted included the payment of compensation for miscarriage of justice to those who fell within section 133(1) of the 1988 Act, that the effect of paragraph 9(e) of the 1998 Act was to make this a reserved matter and that the prerogative and other executive powers of a Minister or Northern Ireland Department were by section 23(2) of the 1998 Act confined to transferred matters. The Schedule 3 Order facilitated this reserved matter becoming a transferred matter and the Devolution Order, made on the same day, was necessary and expedient for giving full effect to the intention that national security matters should continue to be reserved.

"Treatment of offenders"

[16] The first issue between the parties was 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. The trial judge accepted that it was necessary to adopt a narrow construction of the Schedule 3 Order and the Devolution Order because they involved the amendment of primary legislation by way of secondary legislation. Secondly, it was accepted that the exercise of the powers to introduce the Orders must be looked at in the wider context. We agree.

[17] The judge concluded that the appellant's claim for compensation arises out of her conviction and imprisonment, being a period when she would have been treated as an offender. The later quashing of her conviction would not alter the fact that during the period of conviction and imprisonment she was regarded as an offender. In the period between completion of sentence and the quashing of the convictions she would have been regarded as an ex-offender. The expression "treatment of offenders" is capable of applying to a person in the appellant's position and the judge concluded on a textual basis that the expression included a person whose conviction had been quashed.

[18] Turning to the context he noted that all of the categories in paragraph 9 of Schedule 3 to the 1998 Act were described in the broadest terms namely:

> "(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 (including children and young persons, and mental health patients, involved in crime);
>
> (f) the surrender of fugitive offenders between Northern Ireland and the Republic of Ireland;
>
> (g) compensation out of public funds for victims of crime…

Sub paragraph (e) includes, in particular, prisons and other institutions for the treatment or detention of persons mentioned in that subparagraph."

[19] It followed that if compensation for miscarriage of justice was a reserved matter it would be found in this grouping of functions under a suitably broad description. On the other hand if compensation for miscarriage of justice was a transferred matter in 1998 there is no indication that any provision was made for the operation of the scheme of compensation within the framework of the devolved administration.

[20] It is clear that in 2010 the provision of compensation for miscarriage of justice was regarded by those who drafted 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 was headed "Functions relating to the treatment of offenders." That dealt with 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 therefore fell under the broad heading of "treatment of offenders."

[21] If miscarriage of justice was a transferred matter in 1998 it ought to have required some mechanism by which the powers of the Secretary of State under section 133 of the 1988 Act could be exercised by the Department of Justice. No such provision was made.

[22] In this appeal the appellant repeated the submission that she was not an offender. Her conviction had been quashed and by virtue of section 2(3) of the Criminal Appeal (Northern Ireland) Act 1980 she had been acquitted. That reflected the presumption of innocence safeguarded by Article 6(2) of the Convention (Allen v UK (2016) 63 EHRR 10). In some cases the test imposed by section 133 of the 1988 Act means that some applicants will have demonstrated factual innocence. The correct analysis was that the appellant was wrongly regarded as an offender until her conviction was quashed.

[23] The appellant accepts that the effect of section 133 was plainly to leave decision-making with the Secretary of State. It was contended, however, that the Northern Ireland Assembly was entitled to legislate in this transferred matter. The judge placed some emphasis on the omission of any scheme of compensation within the framework of the devolved administration. Subsequent to the first instance hearing the appellant became aware of the Sea Fisheries (Northern Ireland) Order 2002 which gave the Assembly powers to legislate in relation to sea fisheries although the powers of enforcement remained with the Secretary of State.

[24] Thirdly, it was submitted that the Assembly was undoubtedly able to legislate at all material times in respect of section 133. If this was a transferred matter that was plainly right. If it was a reserved matter the Assembly could also do so but by virtue of section 8(b) of the 1998 Act any Bill dealing with a reserved matter required the consent of the Secretary of State. Finally, the appellant submitted that the fact

that the 2010 Orders appear to have assumed that the payment of compensation under section 133 was reserved is irrelevant.

Conclusion on "treatment of offenders"

[25] It is common case that the appellant is not an offender. It is also common case that the appellant was treated as an offender from the date on which she entered her plea of guilty until the date on which her convictions were quashed. The compensation which she claims arises out of her treatment as an offender during that period.

[26] We agree with the learned trial judge that the headings set out in Schedule 3 to the 1998 Act were broad descriptions of the areas which were reserved and accordingly that they should be interpreted broadly. We also agree that the term "treatment of offenders" against that interpretive background is apt to include compensation for treatment as an offender.

[27] The devolution arrangements under the 1998 Act established consequential powers for the Assembly and for Ministers. Section 6 of the 1998 Act identifies those matters which are outside the legislative competence of the Assembly. Those exclusions include excepted matters unless they are ancillary to other provisions dealing with reserved or transferred matters. The Assembly has legislative competence in relation to reserved matters but the consent of the Secretary of State is required in relation to a Bill which contains a provision which deals with a reserved matter. The Assembly is free to legislate in relation to transferred matters.

[28] There is a corresponding devolution of competence to Ministers in section 23 of the 1998 Act to exercise the prerogative and other executive powers of Her Majesty. The structure of the 1998 Act, therefore, is that these prerogative and executive powers will be devolved as part of the devolution scheme. It is clear, however, that the executive power in respect of the payment of compensation for miscarriage of justice was retained by the Secretary of State when the 1998 Act was passed. That is part of the context which must be taken into account and the fact that a special arrangement was made in relation to Sea Fisheries does not undermine that context. The absence of any mechanism for the administration of the scheme by a Minister is a strong indicator from the context that the payment of compensation for miscarriage of justice was not devolved.

[29] The 2010 Orders clearly proceeded on the basis that compensation for miscarriage of justice had not been devolved in 1998. The extent to which delegated legislation can be an aid to the construction of the principal Act is discussed in section 24.18 of the eighth edition of Benyon, Bailey and Norbury on Statutory Interpretation. We agree with the analysis in that section. Delegated legislation can be persuasive if it is roughly contemporaneous with the Act. The passage of time between 1998 and 2010 means that the delegated legislation in this instance is of little assistance.

[30] We are satisfied, however, for the reasons set out above that compensation for miscarriage of justice was a reserved matter by virtue of paragraph 9(e) of Schedule 3 to the 1998 Act. The Schedule 3 Order was made in exercise of powers provided by section 4 of the 1998 Act and the Devolution Order was made by virtue of section 86 of the said Act in order to give effect to the proposed devolution scheme.

The meaning of miscarriage of justice

[31] The circumstances in which compensation for miscarriage of justice should be paid were considered by the Supreme Court in R (Adams) v Secretary of State [2012] 1 AC 48. The court concluded that the test was satisfied when by reason of a new or newly discovered fact either a person was to be viewed as innocent of the offences for which he or she had been convicted or could show that there had been a miscarriage of justice in that the evidence on which the convictions were based was so undermined that no conviction could properly be based on it. That was the test applied by both the Department of Justice in respect of devolved cases and the Secretary of State in respect of reserved cases after the 2010 Orders.

[32] In 2014 Parliament passed the Antisocial Behaviour, Crime and Policing Act which in section 175 further amended section 133 of the 1998 Act with effect from 13 March 2014 by inserting:

> "(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)."

[33] The effect of the amendment, therefore, was to create different tests in respect of those whose convictions involved protected information depending upon whether the protected information could be disclosed or an adequate summary provided. That was the position in these cases. That change reflected the position adopted by the Secretary of State in applications for compensation for miscarriage of justice in England and Wales. Since the convictions with which this appeal is concerned were quashed on 10 October 2014 this was the provision which governed the payment of compensation for miscarriage of justice in these cases. The appellant has referred to this test as the English test.

The Convention points

[34] The first issue arising under the Convention is whether the determination of compensation for miscarriage of justice under section 133 of the 1988 Act involves

the determination of a civil right for the purposes of Article 6(1) of the Convention. The Council of Europe states have made different provision for the payment of compensation where convictions have been set aside or pardons granted and some of these have reached the European Court of Human Rights ("ECtHR").

[35] Humen v Poland (2001) 31 EHRR 53 was a Grand Chamber case in which the applicant was wrongly convicted after participating in a demonstration. Polish law provided that an accused who was acquitted as a result of lodging an extraordinary appeal should be entitled to compensation for the damage which he had suffered in consequence of having served the whole of the sentence imposed upon him. The relevant Code provided that a request for compensation had to be submitted to a regional court and cases relating to a request for compensation were to be given priority. The applicant complained that the proceedings had been delayed in breach of the reasonable time guarantee in Article 6 of the Convention.

[36] The applicability of Article 6(1) was not disputed in that case but the Grand Chamber noted that the proceedings in question concerned a dispute over the applicant's right to compensation for his wrongful conviction and unlawful detention which was a "civil right" within the meaning of Article 6(1) of the Convention.

[37] The Grand Chamber referred to Georgiadis v Greece (1997) 24 EHRR 606. In that case the applicant had been convicted of insubordination when called up for military service. He was eventually acquitted on the basis that he was a Jehovah's Witness minister of religion. The statutory provisions within the Code of Criminal Procedure provided that a person who had been detained and subsequently acquitted should be entitled to request compensation if it was established that they did not commit the criminal offence for which they were detained. In this instance the Military Tribunal which acquitted the applicant declared that he was not entitled to compensation because of his own gross negligence. The compensation provisions provided that once it was decided that compensation was payable the applicant was entitled to bring his claim in the civil courts.

[38] The Government submitted that there was no "civil right" at issue in the case. The court rejected that submission at paragraphs 34 and 35 of its decision:

> "34. It remains to be established whether such a right can be considered a "civil" right, as pleaded by the applicant. In this respect, the Court recalls that the concept of "civil rights and obligations" is not to be interpreted solely by reference to the respondent State's domestic law and that Article 6(1) applies irrespective of the status of the parties, as of the character of the legislation which governs how the dispute is to be determined and the character of the authority which is invested with jurisdiction in the matter (see, among other

> authorities, the *Baraona v Portugal* (1991) 13 EHRR 329, para 42).
>
> 35. The Court notes that although the prerequisite for the operation of Article 533 of the Code of Criminal Procedure, that is detention followed by an acquittal, concerns public-law issues, the right to compensation created by that provision is, by its very nature, of a civil character ("de caractère civil"). Its typically private-law features – which have not been contested by the Government – confirm this conclusion as does the fact that it is for the civil courts to decide on the precise amount of the compensation to be granted."

[39] In the Humen and Georgiadis cases the compensation provisions provided access to a court on the basis of set criteria. That is not the position in this jurisdiction. The Secretary of State is by statute the person who is required to make a determination as to whether or not the test is satisfied. If so satisfied, the assessment of the appropriate award of compensation is made by an independent assessor. The court only becomes involved where a judicial review application is initiated.

[40] The issue of whether this procedure gives rise to a civil right within the meaning of Article 6 ECHR was considered by the Divisional Court in R (Ali) v Secretary of State [2013] 2 All ER 1055. The court recognised that the determination of the Secretary of State as to whether there had been a miscarriage of justice which would qualify for compensation was of high importance and significance to the individual concerned and was a matter of public interest. The subject matter of the decision, namely whether it had been shown beyond reasonable doubt that there had been a miscarriage of justice, was close to the heart of the court's exercise of its criminal jurisdiction and a task which it was well equipped to undertake. The court considered, however, that the determination of the issue involved an exercise of judgement by the Secretary of State which did not necessarily admit of an inherently right or wrong answer.

[41] In Ali it was concluded that even though the court was well equipped to deal with the issue it must not lose sight of the fact that Parliament had assigned the primary decision making function to a minister. There were examples within the immigration field where decisions of the Home Secretary were approached on a supervisory rather than a substitutionary basis even though the court was well placed to examine the decision. Taking into account the observations of Lord Bingham in Re McFarland [2004] 1 WLR 1289 that the decision to compensate persons whose convictions had been set aside was difficult and sensitive the court concluded that a supervisory approach was appropriate. The determination of entitlement to compensation depended upon a series of evaluative judgements by the Secretary of State which tended to suggest that it did not give rise to a civil right

within the autonomous meaning of Article 6. The court went on, however, to consider the case if Article 6 did apply.

[42] We agree that there is an element of evaluative judgement involved in the determination of some of these applications. We also agree that this is an area in which the court is particularly well placed to examine any determination. Although the court in Ali considered that a supervisory approach was appropriate in judicial review there was considerable detailed guidance given in that case in relation to how the Supreme Court decision in Adams should be applied including reference to those circumstances in which detailed reasoning from the Secretary of State would be required.

[43] We also agree that Parliament clearly intended to make the Secretary of State the primary decision maker and chose to exclude the court in that role. It does not follow, however, that this is a significant feature in terms of whether or not the character of the right is civil. What is at issue is a claim for pecuniary compensation in respect of the period during which the applicant was treated as an offender. Section 133A of the 1998 Act sets out the broad parameters and limits for the determination of the appropriate compensation. The pecuniary nature of the claim is a significant indicator in determining whether or not a civil right is at stake (Stran Greek Refineries v Greece (1994) 19 EHRR 293). The Secretary of State is obliged to pay compensation where the relevant test is made out and there are no disqualifying factors. In our view these considerations point towards the conclusion that determining an application for compensation for miscarriage of justice is the determination of a civil right. We agree with the learned trial judge, therefore, that Article 6 is engaged.

[44] The appellant relied upon Stran Greek Refineries v Greece (1994) 19 EHRR 293 to support the argument that the application of the English test was in breach of Article 6. In the Stran Greek Refineries case an arbitration award in favour of the applicants was challenged by the Greek state. While the proceedings were pending an act was enacted rendering the award invalid and unenforceable. The ECHR held that Article 6 was engaged and that the principle of the rule of law and 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. By intervening in a manner which was decisive to ensure that the imminent outcome of the proceedings was favourable to it the state infringed the applicant's rights under Article 6.

[45] In our view that case has no bearing on this appeal. Section 133 of the 1988 Act was amended by the addition of subsection (1ZA) on 13 March 2014. The appellant's convictions were quashed on 10 October 2014. At all material times the statutory provisions enabled the appellant to apply for compensation on the basis of the English test. There was no change of position from the date on which the appellant's right became available. There is no material to justify the argument that there was interference by the legislature with the administration of justice designed

to influence the judicial determination of this application. In agreement with the judge we do not consider that there was any breach of Article 6.

[46] Similarly, A1P1 applies where the applicant demonstrates a legitimate expectation of an enforceable claim (Kopecký v Slovakia (2005) 41 EHRR at para 49). For the reasons we have set out the only enforceable claim available to the applicant under the statute was that under subsection (1ZA). We do not consider that there was a breach of A1P1 by virtue of the inability to engage with a more favourable test.

Article 14

[47] Article 14 prohibits discrimination and 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."

[48] The judge relied on the framework for considering the question of discrimination set out by the House of Lords in R(S) v Chief Constable of South Yorkshire [2004] 1 WLR 2196 at paragraph 42.

> "(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?"

There was no dispute between the parties that this was an appropriate approach.

[49] The judge proceeded on the assumption that the first three questions were answered in the affirmative. We agree that the first question should be answered in

the affirmative. The dispute in this case is with respect to the rights falling within the ambit of Article 6 and A1P1. We also agree that there was a difference in treatment between the appellant and others put forward for comparison. There was, however, considerable dispute as to whether or not any difference of treatment was on a ground prohibited by Article 14. It was common case that the appellant had to establish that the difference of treatment was on the ground of "other status."

[50] The application of the "other status" test was the subject of consideration by the ECtHR in Clift v United Kingdom (App no 7205/07) and by the Supreme Court in R (Stott) v Secretary of State for Justice [2018] 3 WLR 1831. Both were cases in which the difference in treatment consisted of different tests for release from custodial sentences as a result of the form or length of the sentence. In each case the court concluded that the "other status" test was satisfied. It is unnecessary to review the facts of each case but there is helpful guidance to be gained from those decisions.

[51] The impugned difference of treatment must be between groups of people. This issue was considered in Gerger v Turkey [GC] (App no 24919/94 8 July 1999). The applicant was convicted of offences contrary to prevention of terrorism legislation. He became automatically entitled to parole after serving three quarters of the sentence whereas under the law in respect of other types of offence automatic parole was available after serving half the sentence. The Grand Chamber concluded that the distinction was not between people but between different types of offence according to the legislature's view of their gravity. When discussing this case in Clift the ECtHR indicated that any exception to the protection offered by Article 14 of the Convention should be narrowly construed.

[52] The text of the Article provides that there must be a qualifying ground for the discrimination but "any ground such as" indicates that the list set out in Article 14 is illustrative and not exhaustive (Clift at para 55). In Clift and Stott each court also accepted that the French text for "other status", *toute autre situation*, also suggested a generous interpretation of that provision.

[53] Status is not limited to innate or acquired aspects of a person's personality and Article 14 itself includes property as a ground. In Clift at para 55 the court said:

> "Article 14 does not prohibit all differences in treatment but only those differences based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another."

This is a wider formulation than was used by the ECtHR in the earlier case of Kjeldsen v Denmark (1976) 1 EHRR 711 where status was defined simply as a personal characteristic by which persons or groups of persons were distinguishable from each other. This wider approach was adopted by the majority in Stott.

[54] In Clift the court did not accept the argument that the treatment of which an applicant complains must exist independently of the "other status" upon which it is based relying on Paulik v Slovakia (App no 10699/05). It was noted in Stott, however, that the applicability of Article 14 was not disputed in that case and there was no discussion of "other status" in the judgment. At paragraph 210 of Stott Lady Hale suggested that the true principle was that "status" must not be defined solely by the difference in treatment complained of. That appears to be a helpful way of approaching the issue and was also adopted by the Court of Appeal in England and Wales in London Borough of Haringey v Simawi [2019] EWCA Civ 1770 at para 41.

[55] The general purpose of Article 14 is to ensure that where a state provides for rights falling within the ambit of the Convention which go beyond the minimum guarantees set out therein, those supplementary rights are applied fairly and consistently to all those within its jurisdiction unless a difference of treatment is objectively justified (Clift at para 60). That reflects the aim of the Convention which is to guarantee rights that are practical and effective rather than rights that are theoretical or illusory.

[56] It is a constant theme of the case law both in the ECtHR and the Supreme Court that although not open-ended the grounds within Article 14 are to be given a generous meaning. Bearing in mind the guidance set out above that is the approach which we take to the question of "status." The status upon which the appellant relies is that she is an applicant for compensation for miscarriage of justice whose convictions were quashed on the basis of national security evidence which the Secretary of State concluded could not be disclosed or gisted. She compares herself with other applicants for compensation for miscarriage of justice arising from convictions in Northern Ireland including those whose convictions were based upon national security material that the Secretary of State concluded could be disclosed or gisted.

[57] We are satisfied that the group of people claiming compensation for miscarriage of justice on the basis of confidential evidence constitute a different group from those claiming such compensation where the relevant evidence can be disclosed. The claimed status is one which arises by operation of law but constitutes an identifiable objective characteristic. The difference in treatment of which the appellant complains relates to the application of the English test but the definition of the group of which the appellant claims membership is defined by the limitation on the disclosure of confidential evidence. The claim is concerned with the distribution of compensation between the comparable groups. In our view these factors support the view that the appellant can claim to have a relevant status.

Analogy and Justification

[58] We agree with the learned trial judge that these issues can be considered together. The approach was set out by Lord Nicholls of Birkenhead in R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173 at paragraph 3:

> "the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

[59] There are considerable grounds for concluding that some of the comparators identified by the appellant are in an analogous situation. Each comparator will have been convicted of a criminal offence. Each will have had their convictions quashed on the basis of a new or newly discovered fact. In some of the cases national security information will have been relevant to the decision to quash the conviction. The distinction between the appellant and the comparators is that in her case the Secretary of State considered that the relevant national security information could not be disclosed. We consider, therefore, that this is a situation in which it can be said that the comparators whose cases have involved relevant national security information that can be disclosed or gisted can be regarded as analogous.

[60] In this case the judge decided to apply the test for justification in R (Tigere) v Secretary of State for Business [2015] UKSC 57 at paragraph 33:

> "(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?"

We agree that what has to be justified is the application of the different test.

[61] In order to examine the legitimate aim it is necessary to look at the legislative background. Prior to the devolution of justice in 2010 the determination of

compensation for miscarriage of justice was a reserved matter under the 1998 Act to be determined by the Secretary of State. Under the devolution settlement in 2010 in those cases where there was relevant national security information which could not be disclosed or gisted the payment of compensation for miscarriage of justice remained a reserved matter.

[62] The allocation of responsibility for public administration in a devolved environment is essentially a matter to be determined in accordance with the constitutional structures in each state. It follows that there may be differences of approach in the devolved parts of a state. The principle that the adoption by the administration of different standards does not give rise to discrimination was recognised by the Grand Chamber of the Court of Justice in Case C-428/07 Horvath. That principle should also apply under the Convention.

[63] The decision in 2010 that sensitive national security matters should be dealt with by the Secretary of State rather than the devolved administration could not have given rise to any complaint under the Convention. Between 2010 and 2014 the Department of Justice and the Secretary of State applied the same test. In March 2014, prior to the quashing of the appellant's conviction, Parliament inserted section 133(1ZA) of the 1988 Act. The learned trial judge set out at para 48 the reasoning behind that amendment as disclosed by Ms Cookson in her affidavit:

> "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."

[64] In R (Nealon) v Secretary of State for Justice [2019] UKSC 2 the amended provision was found to be compatible with the Convention. The amendment reflected the will of Parliament that compensation should be paid for miscarriage of justice in accordance with the requirements of the ICCPR. The devolution settlement left it open to the Department of Justice to take a more generous approach. All of those falling within the reach of the UK Government were dealt with in the same way as were all of those falling within the jurisdiction of the Department of Justice.

The application of different tests within a devolved structure is a fundamental aspect of a state operating on such a basis. The determination of a state as to the allocation of responsibility for national security matters is deserving of very great respect and weight.

[65] The grounds for the difference of treatment in this case do not impinge on the more sensitive and innate personal characteristics which require intense scrutiny. It is in the nature of any state with devolved legislatures that there will be differences of approach. It is also the case that in any state issues affecting national security are matters of great sensitivity and it is unsurprising the central government would be cautious about delegating responsibility to a devolved entity.

[66] In our view any difference of treatment is a consequence of the entitlement of the different administrations in the UK to make their own political and financial arrangements. Those arrangements have been democratically approved. The Secretary of State retained responsibility for cases such as that of the appellant in 2010. That did not give rise to a difference of treatment. The fact that Parliament changed the entitlement for all those for whom the Secretary of State had responsibility prior to the acquittal of the appellant did not give rise to unlawful discrimination. If he had treated the appellant differently he would have had to justify the approach he took to others for whom he was responsible.

Conclusion

[67] In agreement with the trial judge and broadly for the same reasons we dismiss the appeal.