Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Compensation Act 1988: Interpretation of Section 133

18 April 2013

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Stewart Dickson
Mr Tom Elliott
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Patsy McGlone

Witnesses:

Ms Claire Archbold	Department of Finance and Personnel
Mr Gareth Johnston	Department of Justice
Ms Susan Nicholson	Department of Justice

The Chairperson: I welcome to the meeting Mr Johnston, head of criminal justice policy and legislative division in the Department of Justice; Susan Nicholson, from the operations branch of criminal justice policy and legislation division; and Claire Archbold, director in the Departmental Solicitor's Office in the Department of Finance and Personnel. The evidence session will be recorded by Hansard and published in due course.

Mr Johnston, I invite you to outline the interpretation of the section.

Mr Gareth Johnston (Department of Justice): First, I apologise for what happened last week. The Department arrives at fairly conservative estimates for how Committee business will progress, and, even then, we try to be up here in good time. I am afraid that, last week, the Committee completely exceeded our expectations. I am sorry for the inconvenience to Committee members, and I can confirm that our Minister's office has looked again at how we let officials know about times at which they are expected to be in attendance. Apologies for that.

Following correspondence that you received from an applicant for compensation under the miscarriages of justice scheme, you asked for a briefing on the interpretation of that scheme. Before I endeavour to explain the legislation, I want to make an important point: compensation is not regarded as a necessary response to any and all situations in which the criminal justice system has got something wrong. It is not given under the statutory scheme as direct recompense for default by the police or prosecution. There may be other ways in which that can be pursued at law. It is not, nor has it ever been, given simply where a conviction is quashed on first appeal. Even the quashing of a conviction at an out-of-time appeal does not necessarily guarantee compensation, as I propose to explain.

The legislation in respect of compensation for a miscarriage of justice is contained, as you said, Chairman, in section 133 of the Criminal Justice Act 1988. It applies to Northern Ireland, England, Wales and Scotland. It was introduced to meet commitments to the United Nations' agreements on civil and political rights. The legislation states that for compensation to be payable there must be a reversal of a conviction by the Court of Appeal on an appeal out of time. In practice, that usually happens because a case has been referred to the Court of Appeal by the Criminal Cases Review Commission (CCRC). That reversal must be based on a new or newly discovered fact that shows beyond reasonable doubt that there was a miscarriage of justice. Generally, a new or newly discovered fact will be fresh evidence, such as a new alibi witness; the retraction of significant evidence that was given at trial; an admission from another person; or new scientific evidence that the appellate court is satisfied might, had it been available at the time of the trial, have caused the jury or judge to return a different verdict. However, fresh evidence that is not, for whatever reason, considered by the Court of Appeal or about which it makes no findings would not constitute a new or newly discovered fact. In other words, the issue is not simply whether fresh evidence was grounds for the appeal but whether it is the grounds on which the appeal succeeds. Therefore, eligibility under section 133 turns on the reasons that the Court of Appeal has quashed a conviction at an out-of-time appeal.

Since 1988, a significant body of case law has been developed on the correct interpretation of section 133 and the meaning of the phrase "miscarriage of justice". The House of Lords, in the 2004 case of the Crown versus the Secretary of State for the Home Department ex parte Mullen considered but gave no clear authority as to the actual meaning and scope of the phrase. In fact, two different views were expressed by their Lordships. Lord Steyn took the view that section 133 was limited to the payment of compensation to those who had been proved innocent, whereas Lord Bingham's view was that the phrase had a wider application and that it also included cases in which something had gone seriously wrong in the investigation and/or trial whereby the defendant should not have been convicted.

The basis for entitlement to compensation for miscarriages of justice was then considered by the Supreme Court. The decision was issued on 11 May 2011 in the case of the Crown on the application of Adams versus the Secretary of State for Justice. That reformulated the approach to the interpretation of a miscarriage of justice. The Supreme Court began with the framework that had been provided earlier by Lord Justice Dyson in the Court of Appeal in England and Wales. He had identified four categories of cases and considered whether each of them would constitute a miscarriage of justice under section 133. The first category is where fresh evidence shows clearly that the defendant is innocent of the crime for which he had been convicted. The second category is where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant. The Supreme Court held that both those categories were included in the concept of a miscarriage of justice. The first category being where someone is clearly innocent, and the second category being where no reasonable jury could properly have convicted them.

Lord Justice Dyson then moved on to look at third and fourth categories. The third category is where fresh evidence renders the conviction unsafe, in that had the evidence been available at the time of the trial, a reasonable jury might or might not have convicted the defendant. The Supreme Court confirmed that category 3, in effect, applies the safety test on an appeal against conviction and represents every quashed conviction, and is not included in the concept of a miscarriage of justice.

Finally, they looked at the fourth category, which is where something had gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted. The Supreme Court confirmed that category 4, in effect, concerns abuse of process and, again, is not included in the concept of a miscarriage of justice.

So, when considering applications for compensation, a line needs to be drawn between category 2 cases, which are included, and category 3 cases, which are excluded from the scheme.

The reformulation of category 2 was stated by Lord Phillips in the Supreme Court as:

> *"A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it."*

Lord Hope, at paragraph 102, said that he would rephrase category 2 so that it fitted more narrowly into the language of section 133. He said:

"I would limit it to cases where the new or newly discovered fact shows conclusively that there was a miscarriage of justice because the evidence that was used to obtain the conviction was so undermined by the new or newly discovered fact that no conviction could possibly be based upon it."

Lord Kerr stated that the test is:

"whether, on the facts as they now stand revealed, it can be concluded beyond reasonable doubt that the applicant should not have been convicted."

The other two Supreme Court Justices in the majority, Lady Hale and Lord Clarke, were prepared to subscribe to the test for category 2 as reformulated by Lord Phillips.

That sets out how the section has been interpreted over the years by senior courts. I should say that any decision taken by the Department with regard to eligibility may, of course, be challenged by way of judicial review, and as one might expect, it often is.

Finally, I should mention that, if the Department determines that there is a right to such compensation, the amount of the compensation is determined by an independent assessor who is appointed by the Department in accordance with section 133 and with schedule 12 to the 1988 Act. Independent assessors are members of the Bar of Northern Ireland and are selected from the government senior panel, who are appointed by means of an open advertisement and application process by the Government Legal Service for Northern Ireland.

I hope that that is of some help in setting out the law as it stands. It is, of course, a very involved area of law, as illustrated by the 284 paragraphs of the Supreme Court judgement in Adams, and is one on which we regularly take very detailed legal advice.

Chairperson, I am a grateful for your indication that, if members want to move from a general discussion into a more specific discussion about the correspondence that has been received from a particular applicant, you would be willing to have a short closed session, given the issues of confidentiality that arise. With that proviso, we are very happy to respond to members' questions.

The Chairperson: Do members have any general questions?

Mr McCartney: I have a couple. Previous to this challenge in the Supreme Court, the Department obviously had a narrow definition of what constituted a miscarriage of justice. In many ways, there is no guarantee that someone else will not make a further challenge and that the interpretation can be broadened out. Is that a fair point?

Mr Johnston: It is certainly open for further challenges, although I think that the Supreme Court recognised that there had been uncertainty about the law and was trying to do what it could to clarify it. Obviously, the definition that we are now using in the Department is very much the category 2 definition that the Supreme Court went with about so undermining the evidence against the defendant that no conviction could possibly be based upon it.

Mr McCartney: I can say from personal experience that the process is very much a paper exercise. It is correspondence and correspondence back; it is slow and unwieldy. Have you ever considered that this could be sorted out more appropriately? In fairness, the review commission was set up to examine the possibility or probability of a miscarriage of justice. If a person applies to the commission and it deems that it is necessary to go back to the Court of Appeal, the obvious assumption — false of otherwise — is that a body set up to examine miscarriages of justice deems that there were cases that were fit and then the Court of Appeal quashes the conviction. Therefore, you can understand why a person would feel that they had been subject to a miscarriage of justice. Rather than the unwieldy correspondence to and fro, would it be more appropriate for the departmental officials to sit across the table with the person and their legal representatives?

Mr Johnston: We have taken the opportunity of some new assessors to issue fresh guidance to assessors, and that includes time limits for the completion of various stages. Obviously, we are very reliant on solicitors for an applicant providing all the information that is needed in a timely way, as in any case like this. However, we are making efforts with the new assessors to set down clearer guidance on the time limits and the standards that the Department expects, and that should allow us

to provide a quicker turnaround time. The problem may have been the fact that the guidance was not very clear in the past.

Mr McCartney: I have a general point, but it might relate to a particular case. When confidential evidence is provided to the commission and the Court of Appeal, how can they come to a conclusion that the person has not been the subject of a miscarriage of justice if his legal representatives have not seen the confidential annex?

Mr Johnston: There are some broader questions there beyond the issue of compensation. With regard to decisions on compensation, a significant factor is whether any confidential information that was exceptionally put to the CCRC and the Court of Appeal had influenced the Court of Appeal's decision. The Committee has seen correspondence regarding a recent case where there was a confidential annex but the Court of Appeal made no reference to it in its judgement. In fact, the reasons for the Court of Appeal's decision were very clear and were for other reasons. Our assessment on miscarriage of justice compensation is based on the reasons that were given by the Court of Appeal. In future, there could be a different case where confidential information clearly had a bearing on the reasons for the Court of Appeal's decision, and you could see why that would be germane to the Justice Minister's consideration of the compensation case. In those circumstances, I would expect the Department to seek to have access to that information.

Mr A Maginness: The whole process of determining miscarriages of justice is based in the Department but based on the judicial tests that have been laid down in case law. In a sense, it is a peculiar process. Although the courts have decided all those issues, it is up to the Department to interpret the court cases and see whether there is a newly discovered fact. That must be very difficult. Is it not?

Ms Claire Archbold (Department of Finance and Personnel): Conceptually, what the court is doing and what the Minister is doing are different. They apply different statutory tests, which, obviously, I do not need to explain to you. The test for the court is whether it thinks that the conviction is unsafe. In the case of Stafford and DPP, that was defined as meaning that there is a reasonable or lurking doubt based on the admissible evidence as a whole, whereas the statute gives the Minister a much smaller area of discretion. It has to be that, first, there is a new or newly discovered fact, so that is going to rule out a lot of cases. Secondly, it has to show conclusively that the evidence has been so undermined that no conviction could possibly be based on it; it is beyond reasonable doubt that there has been a miscarriage of justice.

The statute limits the cases in which compensation is payable to a much smaller group than the larger group of people whose appeals have been quashed. That is in the statute.

Mr A Maginness: You can sort of understand where a conviction has been quashed for a purely technical reason, but it is all those other cases in which it is not just a technical reason; some issue of fact has arisen.

Ms Archbold: Lord Phillips dealt with that in Adams and others. He said that section 133's objective is to compensate a person who has not committed a crime for which they have been convicted. In a later Northern Ireland case, the judge said that a declaration of innocence is beyond the competence of a criminal court. You have a small category of cases in which Parliament has said that it is not just that a person's conviction is to be quashed but that compensation is to be payable.

Mr A Maginness: That was the will of Parliament.

Ms Archbold: Yes.

Mr A Maginness: It is strange in a way that the final arbiter is really the Minister, albeit that he is interpreting the court's decision and so forth. It is not a judicial process as such. That might be challengeable at some future stage.

Mr Johnston: Once the decision is taken, the quantum moves very much out of the Minister's hands. The independent assessor will make a decision. The Minister's hands are tied in that decision.

Mr A Maginness: How quickly are those decisions made? I have heard some complaints about the slowness of the process.

Mr Johnston: We have put time limits in the new guidance. Susan will maybe keep me right on them. From the point at which all the information is supplied to the Department and we are able to draft the brief for the assessor —

Ms Susan Nicholson (Department of Justice): As soon as we have all the information, we agree with the solicitor that everything is in place. That will issue to an assessor. We will speak to them on the telephone and ask them whether they can complete it within four weeks. If there is something slightly more complicated about it, we will go back and seek agreement or further information. Four weeks is what we hope for. The payment process would then possibly take another four weeks. We have really tried to clamp down on it.

Mr Johnston: That is obviously from the point at which we have been supplied with all the information that is needed and we are able to digest it and pass it on to the assessor. If that can be done speedily, we are really aiming at much quicker turnarounds for those cases.

Mr McCartney: I have two points. I did not want this to become about my case, but it was on 11 May 2011. To date, it still has not been finalised for a variety of reasons, but not through any fault of my legal side. The four-week target may be in the paper, but that is certainly not the outcome.

Mr Johnston: It is a new arrangement that has just come in.

Mr McCartney: I accept that. In case you think that I am making undue criticism, I accept that the first assessor was made a High Court judge. I do not know whether that was because he took my case on.

Mr Johnston: There was a need for an appointments process for assessors; they are now in place. We had quite a good response. We now have a number of assessors in place, and we just rotate them. That means that we have a bit of resilience and that, if another one were elevated to the judiciary, we will not be left stuck.

Mr McCartney: I have a broad question. In this case and maybe more, the judge did not act properly. There are other cases in which people, who were underage at the time and should have been accompanied by a legal guardian, were referred back and not given compensation under this Act . What process was in place to detect that? What process is in place now to detect it if it happens again? It should have been realised that it is wrong if someone who is entitled to legal representation appears in front of a court and is convicted on the basis of a statement of an admission that was taken improperly, yet nobody spotted it. That goes right through. In one sense, I am being critical even of the defence team. In this case, there was no summing up by the judge. I am told that with this particular judge there may have been a number of other cases in which there was no summing up. Whose responsibility was it to detect that and ensure that it did not happen?

Ms Archbold: The route for challenging a court decision is by appeal. I cannot comment on individual cases of what happened in the past because I do not know those cases. However, nowadays, you would expect the defence legal team to be all over it. You would expect that because the Police and Criminal Evidence Act (PACE) sets out things like your right to be accompanied by an appropriate adult and your right to see your solicitor. You would also expect it because the European Convention on Human Rights pushes areas, such as your due process rights and your rights when you are in police custody, to a new state of clarity. It is something that we are now much more aware of in the justice system, but it does not come under section 133. It is done through the appeals process. People can then go to the CCRC if they feel that all those mechanisms have let them down.

Mr McCartney: That brings me back to my original point. Someone who this has happened to believes that it is a miscarriage of justice and that the trial was not carried out properly. They then go to the body that was set up to examine whether there was a miscarriage of justice. It refers the case back, the Court of Appeal quashes it, and the Department interprets that there was not a miscarriage. You can see why people become frustrated. You can see that in the correspondence.

Mr Johnston: It comes down to the two different tests. The test that the Court of Appeal applies and the test that the statute requires the Minister to apply are different. The Court of Appeal is looking to see whether the conviction is safe. It is often expressed as: is there a lurking doubt that the

conviction may be unsafe? However, there is a much tighter definition that the Minister needs to apply for compensation.

Ms Archbold: In a sense, the Minister is bound by the statute here. The only power that he has is the power that the statute gives him, and it is very tightly constrained.

Mr McCartney: I accept that. Previously, "demonstrable innocence" was the catchphrase.

Mr Johnston: That was even tighter.

Mr McCartney: It was not the function of the Court of Appeal. Individuals are put in the position of having to go to judicial review, appeal that and then take it to the Supreme Court, which means a hefty legal bill. How many people are put off challenging a court decision because the outcome is uncertain and they will be faced with a hefty legal bill? That is why this has to be tested. As part of the examination of the process, you should sit down around the table rather than having a paper exercise that can sometimes become, not necessarily confusing, but certainly complex. If it is done face to face, that might move us to a better situation. That may be something to reflect on.

Mr Johnston: Yes, we will think about that and whether, at the stage that the Minister is making a decision on whether the case is eligible, never mind the quantum, there is room for consultations between the legal advisers. We can certainly keep that in mind.

Mr McCartney: I think that the general question about confidentiality may be examined in this case. If something is confidential, a person will have lingering doubt about whether it is a new or a newly discovered fact.

The Chairperson: Is there anything in —

Mr McCartney: No; I think that it has been covered. I would be loath to go into a closed session. That is fine.

The Chairperson: No members have any other issues. Thank you very much for coming along. It was much appreciated.