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<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	ICOS No: 22/021509/01
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IN HIS MAJESTY’S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING’S BENCH DIVISION
(JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GERARD ADAMS
FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE DEPARTMENT OF JUSTICE

Mr Donal Sayers KC with Mr Eugene McKenna (instructed by PJ McGrory & Co,
Solicitors) for the Applicant/Respondent
Mr Peter Coll KC with Mr Philip McAteer (instructed by the Departmental Solicitor’s
Office) for the Respondent/Appellant

Before: Keegan LCJ and McCloskey LJ

KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] By notice dated 8 June 2023 the Department of Justice (“DoJ”) appeals the order of Mr Justice Colton of 28 April 2023 whereby he granted a judicial review application brought by the respondent, Mr Gerard Adams, quashed a decision to refuse compensation to him and ordered that the matter be reconsidered. DoJ has applied for an indeterminate stay of its appeal in the following circumstances.

Background

[2] The decision of Colton J is reported at [2023] NIKB 53. By the proceedings at first instance the respondent challenged the decision of the DoJ communicated by letter dated 15 December 2021 by which it concluded that the respondent was not eligible for compensation for a miscarriage of justice under section 133 of the Criminal Justice Act 1988 (“the 1988 Act”).

[3] In 1975, the respondent was convicted of offences of attempting to escape from detention. In 2020, these convictions were quashed by the Supreme Court on an appeal which was brought out of time and is reported as *R v Adams* [2020] UKSC 19. The detention from which the respondent attempted to escape was founded on an Interim Custody Order (“ICO”) dated 21 July 1973, purportedly made under Article 4 of the Detention of Terrorists (Northern Ireland) Order 1972 (“the 1972 Order”). Such detentions were prevalent during a period in Northern Ireland which involved internment without trial.

[4] Lord Kerr who delivered the unanimous judgment of the Supreme Court explained why the convictions should be quashed. This was essentially because it was determined that the power invested in the Secretary of State to authorise a detention of this nature by Article 4(1) of the 1972 Order could not be exercised by anyone other than the Secretary of State.

[5] Therefore, in cases where the Secretary of State had not signed the relevant order, as here, the Supreme Court rejected the application of the *Carltona* principle and decided that the detention was unlawful.

[6] Following the reversal of his convictions, by letter of 25 June 2020, the respondent sought compensation for miscarriage of justice under section 133(1) of the Criminal Justice Act 1988 (“the 1988 Act”). This section imposes a duty on the DoJ to pay compensation:

“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 ...”

[7] The DoJ confirmed its view that compensation should be refused in the respondent’s case by letter dated 15 December 2021. This was essentially on the basis that there was no new or newly discovered fact and, even if there were, the convictions were not quashed on the ground of that fact and that fact of itself does not show beyond reasonable doubt that there has been a miscarriage of justice. Thereafter a challenge was brought before Colton J disputing the DOJ rationale.

[8] In his judgment Colton J analysed the issue of whether a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice. The conclusion reached by the judge is found from paras [60]-[65] of his judgment. There he stated as follows:

[60] It is apparent from the above that the DoJ correctly identified the approach to determining an application under section 133 of the Criminal Justice Act 1988.

[61] Applying that approach I conclude that the applicant's case on appeal involved a newly discovered fact, that of no personal consideration of the ICO dated 21 July 1973 under which the applicant had been detained by the Secretary of State. That was not a fact known to the applicant or to the court at the time of his trial.

[62] On its emergence, this newly discovered fact was the basis on which the prosecution's reliance on the presumption of regularity was rejected by the Court of Appeal.

[63] Returning to the test under section 133 the applicant has been convicted of a criminal offence, his conviction has been reversed, in circumstances where a newly discovered fact (the lack of consideration by the Secretary of State) shows beyond reasonable doubt that there has been a miscarriage of justice, that is the applicant is innocent of the crime for which he was convicted.

[64] I therefore conclude that the DoJ erred in law in determining that the reversal of the applicant's conviction arose from a legal ruling on facts which had been known all along. I am satisfied that the applicant meets the test for compensation under section 133 of the Criminal Justice Act 1988."

Subsequent events

[9] On 18 September 2023, the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act") received Royal Assent. The provisions of the 2023 Act relevant to the issue of ICOs, namely sections 46 and 47, came into force on 18 November 2023.

[10] The operative paragraph for the purposes of this ruling is section 47(4) which reads:

"On or after the commencement date, no compensation for a miscarriage of justice is to be paid in respect of a conviction that has been reversed solely on the ground that an interim custody order was unlawful because an

authorised minister of the Crown exercised any of the order making functions.”

[11] As the respondent to this appeal accepts in the written argument, the above provisions mean that after 17 November 2023, insofar as they remain in force, there is no possibility of the appellant having any obligation to pay compensation to the respondent under section 133 of the 1988 Act in respect of his convictions for attempting to escape lawful custody which were quashed by the United Kingdom Supreme Court on 13 May 2020.

[12] A person in a position similar to that of the respondent to this appeal, a Mr Fitzsimmons, challenges inter alia section 47(4) in a judicial review challenge which is ongoing and seeks a declaration under section 4 of the Human Rights Act 1998 that section 46 and 47 of the 2023 Act are incompatible with rights under the European Convention on Human Rights (“ECHR”) as set out in Schedule 1 to that Act.

[13] In addition, the respondent has explained in the skeleton argument that a small number of other individuals (believed to be in the region of nine) have had convictions quashed on appeal in similar circumstances following the judgment in *R v Adams* and are understood to have applied to the appellant for compensation. The point is made that there is similarly no prospect of the appellant being under any obligation to pay compensation to those individuals from 18 November 2023. The respondent assumes that those applications have not been processed pending the determination of this appeal.

This case

[14] Given the provisions of the 2023 Act which we have referenced above, the DoJ naturally considered what to do with the outstanding appeal. In that regard, of most moment is the series of correspondence which ensued between the Departmental Solicitor’s Office (“DSO”) and the respondent’s solicitors on this issue. We set out some of this correspondence as it highlights the issues material to this appeal.

[15] On 24 October 2023 the DSO wrote a letter to Mr Adams’ legal representatives. This letter referred to the 2023 Act and the *Fitzsimmons* case and then stated as follows:

“Accordingly, the 2023 Act essentially renders this appeal academic. However, there is pending litigation regarding the ECHR compatibility of the relevant legislative provisions. The Department submits that the court should adjourn the appeal to await the outcome of the judicial review challenge. This has the advantage of allowing any final decision on the appropriateness of proceeding with the appeal to take account of any impact on the utility/academic appeal issue arising from any further legislative developments that might follow in the event

that the judicial review application were to result in a declaration of incompatibility.”

[16] The reply from PJ McGrory Solicitors, on behalf of Mr Adams, is dated 27 October 2023. In this reply the respondent refers to the House of Lords decision in *R v Secretary of State for the Home Department ex parte Salem* [1991] 1 AC 450. The respondent’s solicitors then articulate the position as follows:

“It is clear that this case is not akin to the example in *Salem* of an academic appeal which there is good reason in the public interest to hear. That example related to a need to resolve an issue in the near future because of the existence or anticipation of a large number of similar cases. The present case is in contrast one of a necessarily limited cohort involving:

- (i) Detention on foot of an interim custody order unlawfully made by a junior minister;
- (ii) Conviction of an offence requiring proof of lawful detention; and
- (iii) The reversal of that conviction on a CCRC reference or an appeal out of time.

There are not understood to be a large number of cases in which all of these factors are present. Moreover, the 2023 Act will operate to prevent their number being significantly added to: on its commencement section 47(2) will preclude criminal proceedings relating to the quashing of a conviction being continued (save for pre-commencement proceedings) or brought on the basis that an interim custody order was unlawfully made by a junior minister.

Section 47(4) will in any event preclude payment of compensation for miscarriage of justice in all such cases on its commencement.

The DoJ does not, however, ask that this academic appeal be heard, but instead suggests its adjournment. This suggestion is made to preserve the appellant’s position, should it later wish to proceed with its appeal in light of ‘any further legislative developments that might follow in the event that the judicial review application were to result in a declaration of incompatibility.’

The speculative suggestion that the law may revert to what it was when the first instance decision was made does not, it is respectfully submitted, constitute a proper basis for the adjournment sought. Notably, this appeal is to be rendered academic by legislation plainly intended to secure a desired outcome in a dispute such as this. It is in such circumstances particularly inappropriate for the Department to seek the further advantage of a safety net, for use in the event that the relevant provisions of the 2023 Act are found to offend the Convention. It is, therefore, submitted that adjournment pending the outcome of *Fitzsimmons* should be refused, and that it should be concluded that the *Salem* discretion to hear academic disputes – which must always be exercised with caution – should not be exercised in the appellant’s favour.”

[17] Following from this correspondence written submissions were filed by Mr Sayers KC and Mr McKenna on behalf of the respondent and Mr Coll KC with Mr McAteer on behalf of the DoJ. These submissions largely repeat the matters which are found in the correspondence, save that the DoJ’s position altered slightly in the following respects. The DoJ now make the case that any outright dismissal at this stage of the appeal on grounds of it being academic would be somewhat misplaced. The argument is advanced that an assessment of whether the matter is academic or not can only properly be made on the final determination of the *Fitzsimmons* application and therefore that any consideration now is premature.

[18] Furthermore, the DoJ refers to the fact that a stay of cases has occurred in another context pending the outcome of the *McQuillan* case in the Supreme Court. The DoJ also contends that adjournment in the case has no negative impact on legal certainty and would occasion no prejudice to the respondent. Further, and in the alternative the DoJ argues that if the court is of the view that the appeal is academic it should exercise its discretion in favour of proceeding with the appeal substantively. Therefore, before this court, Mr Coll argued for an indeterminate stay or, in the alternative, a hearing on the issues.

Consideration

[19] We detect an element of both sides wanting to maintain litigation advantage in this case. That, we think, distracts from the legal issues which are engaged which we can state in relatively simple terms. First, the undeniable context of the case is that the law as it stands precludes compensation for the respondent. We are effectively being asked to see past that current position in law on the basis that there may be changes made to the law by virtue of legal challenges which are ongoing. Of course, it is self-evident that these legal challenges may take some time to come to a conclusion.

[20] The fundamental flaw in the DoJ argument is that it makes effective and efficient judicial determinations in the area of judicial review virtually unworkable. That is because laws are all subject to change. However, we as judges must apply the law as it stands at a point in time. That much is uncontroversial.

[21] Equally, uncontroversial is that at this point in time by operation of law Mr Adams is precluded from obtaining compensation for a miscarriage of justice.

[22] Further, both parties have accepted that this case is academic. Turning to the seminal authority in this area of *Salem* we remind ourselves of the words of Lord Slynn as follows:

“My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se. The decisions in the *Sun Life* case and *Ainsbury v Millington* (and the reference to the latter in Rule 42 of the Practice Directions Applicable to Civil Appeals (January 1996) of your Lordships’ House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.

The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future ...”

[23] This definition of when a court may hear a case that has become academic has stood the test of time with a caveat that it is understood that the categories of case are not closed. That is because a court is undertaking an intensely fact sensitive discretionary exercise when deciding whether to hear an appeal which has become academic. This sentiment was expressed in *Re E’s Application for Judicial Review* [2003] NIJB 288 at para [7] which states:

“Unsurprisingly, no attempt is made in the authorities to state definitively what might qualify as a matter of general public interest or a question of fundamental importance.

This is something that must be decided according to the particular facts of the individual's case."

[24] Further in *Re Wright's Application* [2017] NIQB 29, the court provided the following analysis at para [16]:

"[16] It seems to me, flowing from these cases, that the guiding principle is whether or not a case raises a point of general public interest. This will depend upon the facts of each case. The identified categories in *Salem* in relation to statutory construction and such like are by way of example and do not form an inflexible code. So in my view the court must look at the facts of each case to decide on an overall appraisal whether or not a case should proceed in the public interest taking into account that an appropriate measure of caution should be applied."

[25] In the instant case the DoJ accepted unambiguously in its correspondence of 24 October 2023 that this appeal is academic. We are not convinced that this was a premature or misguided concession. The respondent agrees that the appeal is academic. We consider that looking at the matter here at this point in time, which is all a court can do, this appeal is academic due to the operation of the law.

[26] We, therefore, have to decide whether it would be in the public interest to hear the appeal notwithstanding the fact that the issue has been overtaken by operation of law.

[27] One matter which is relevant to our determination is the need for a court to consider the overriding objective which is contained in Order 1A(1) of the Rules of the Court of Judicature (Northern Ireland) 1980. That rule reads as follows:

"1A.-(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable -

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate to -
 - (i) the amount of money involved;

- (ii) the importance of the case;
 - (iii) the complexity of the issues; and
 - (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
- (3) The court must seek to give effect to the overriding objective when it –
- (a) exercises any power given to it by the Rules; or
 - (b) interprets any rule.”

[28] Self-evidently, if this court were to embark upon a hearing of this matter it would cause further resources to be expended on what would be, as it stands, an arid exercise given the current state of the law.

[29] A further point is that any clarification of the law in this area is also being dealt with in the *Fitzsimmons* litigation in which a declaration of incompatibility is sought against the offending statutory provisions. There is, therefore, another court seized of the very issue which this court is being asked to determine. We, in these circumstances, do not consider that it is necessary or of any utility for this court to embark on exactly the same judicial exercise.

[30] Further, it does not actually appear necessary to adjourn this case as the current position favours the DoJ. Put simply, the DoJ can reconsider this case and any of the other small cohort of cases in this area and determine either that it is precluded by law from giving compensation or that the respondent's application for compensation will not be reconsidered until the *Fitzsimmons* litigation is concluded. If the law changes the respondent, Mr Adams, can, of course, reignite his application. If the real worry here is that some comments in Colton J's judgment may be taken as binding against the DoJ, we can dispel that notion as if the issue arises again the points will have to be reargued.

Conclusion

[31] Accordingly, we consider that the correct approach is this. We decline to grant the indeterminate stay. We consider that this appeal is academic. We further consider

that in the exercise of our discretion it is not in the public interest to hear this appeal for the reasons that we have given.

[32] Therefore, we propose to dismiss the appeal. We do so without any adjudication on the merits of the appeal arguments that have been raised. We will hear the parties as to any other issue that arises and the question of costs.