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Taylor, R (on the application of) v Secretary of State for the Home Department [2002] EWHC 2761 (Admin) (20 December 2002)

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Case No: CO/4746/1999

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

20 December 2002

Before:

THE HONOURABLE MR JUSTICE MAURICE KAY

THE QUEEN On the application of JOHN HENRY TAYLOR
Claimant

and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

(Transcript of the Handed Down Judgment of
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Peter Irvin (instructed by Abboushi Associates) for the Claimant

Hugo Keith (instructed by Treasury Solicitors) for the Defendant

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Mr Justice Maurice Kay :

John Henry Taylor is now eighty years old. On 9 August 1962, following a trial at the County of London Sessions, he was convicted of an offence of breaking out of a building having committed a felony therein contrary to section 26 of the Larceny Act 1916. He was sentenced to five years imprisonment. He applied to the Court of Criminal Appeal for leave to appeal against conviction and sentence but on 21 December 1962 leave was refused. He has always maintained that he was wrongly convicted. He unsuccessfully petitioned the Home Secretary to have the matter referred back to the Court of Appeal. It was only after the establishment of the Criminal Cases Review Commission that his case was again referred to the Court of Appeal Criminal Division. On 18 June 1998 the Court of Appeal allowed the appeal and quashed the conviction. Within days, solicitors acting on behalf of Mr. Taylor applied to the Home Secretary for compensation pursuant to the statutory scheme pursuant to section 133 of the Criminal Justice Act 1988 or for an ex gratia payment in accordance with the Home Secretary's statement to the House of Commons on 29 November 1985. On 18 November 1998 the Home Secretary refused compensation under both headings. Mr. Taylor applied for judicial review of that decision and on 19 April 1999 the Divisional Court quashed that refusal in R v. SSHD ex parte Garner, Carter, Thompson, Tawfick and Taylor. Thereafter the Home Secretary invited fresh representations and such representations were submitted by and on behalf of Mr. Taylor. On 6 September 1999 the Secretary of State again refused him compensation. This was followed by copious further representations and the present application for judicial review which was launched on 2 December 1999. For a period of about two years Mr. Taylor and his solicitors were submitting yet further representations whilst at the same time the application for judicial review (for which permission had been granted on 24 March 2000) was being adjourned from time to time for various reasons. On 28 January 2002 the Home Secretary refused compensation for the third time. There is now before the court the application for judicial review of the second refusal of 6 September 1999 and (by amendment) an application for judicial review of the third refusal of 28 January 2002 for which permission was subsequently granted. Thus, over forty years after the date of conviction and sentence, I am concerned with an application for judicial review of decisions refusing compensation made in September 1999 and January 2002. It is now accepted on behalf of Mr. Taylor that he cannot successfully challenge the refusal under section 133. To be eligible for compensation under the statutory scheme the conviction must have been quashed "on the ground that a new or newly discovered fact shows

beyond reasonable doubt that there has been a miscarriage of justice". This case is now confined to the ex gratia scheme.

The Home Secretary's Statement to the House of Commons on 29 November 1985 sought to implement an international obligation arising under Article 14.6 of the International Covenant on Civil and Political Rights. The relevant parts of the Home Secretary's Statement read as follows:

"For many years it has been the practice for the Home Secretary, in exceptional circumstances, to authorise on application ex gratia payments from public funds to persons who have been detained in custody as a result of a wrongful conviction....I remain prepared to pay compensation to people....who have spent a period in custody following a wrongful conviction or charge, where I am satisfied that it has resulted from serious default on the part of a member of a police force or of some other public authority. There may be exceptional circumstances that justify compensation in cases outside these categories. In particular, facts may emerge at trial, or on appeal within time, that completely exonerate the accused person. I am prepared, in principle, to pay compensation to people who have spent a period in custody or have been imprisoned in cases such as this. I will not, however, be prepared to pay compensation simply because at the trial or on appeal the prosecution was unable to sustain the burden of proof beyond a reasonable doubt in relation to the specific charge that was brought."

It is apparent, therefore, that ex gratia payments will only be made "in exceptional circumstances" and that the scheme comprises two limbs. The first limb is concerned with circumstances in which custody follows a wrongful conviction or charge that has resulted from "serious default on the part of a member of a police force or of some other public authority". The second limb embraces other "exceptional circumstances", of which facts amounting to a complete exoneration are but an example.

It is now necessary for me to put some flesh on the bones of the procedural history to which I have referred. I begin by taking from the judgment of Rose LJ in Ex parte Garner and Others the following succinct description of the trial in 1962:

"The prosecution case was that five others had stolen a safe and taken it to the flat of a sixth man where there was oxy-acetylene equipment and Taylor was sleeping. When the police arrived soon afterwards Taylor, in his under clothes, let them in. The five others were there fully dressed. According to the police, Taylor admitted helping to carry the safe into the flat and did so in the presence of three police officers and the other six men in a hallway nine feet to twelve feet wide. Taylor denied making any such admission and his defence was that his presence at the flat was innocent and solely due to sleeping off the effects of the previous nights drinking. He conducted his own defence, unrepresented. "

When the matter finally came before the Court of Appeal Criminal Division in June 1998 three grounds of appeal were advanced on behalf of Mr. Taylor. The first was to the effect that as an

unrepresented defendant he had not received a fair trial. The second was that, at the end of the prosecution case, there had been insufficient evidence against him to leave to the jury. The third was that there was fresh evidence which could have led the jury to acquit him. The Court Of Appeal was unimpressed by the second of these grounds. So far as the "fresh evidence" ground was concerned the Court of Appeal considered that it lent support to Mr. Taylor's case that his presence in the flat had been fortuitous in the sense that he had gone there not to see the occupant but to visit someone else and that he would have returned to his own home but for the lateness of the hour and the fact that he had become intoxicated. However, it was really the "fair trial" ground of appeal which caused the appeal to be allowed. The following extracts from the judgment of the Court of Appeal given by Roch LJ illustrate the matters which were to influence the Court of Appeal:

"At his trial the Appellant represented himself. The transcripts of the trial that have survived do not indicate any application by the Appellant for the trial to be adjourned or for him to have legal representation either in the form of a Dock Brief or by being represented by one of the counsel defending one of the accused. In a statement dated the 26 March this year Mr. Taylor said that prior to the trial he had been remanded in custody; he had appeared in court on two earlier occasions by which time he had been represented by solicitor and counsel, that representation being arranged by his then business partner. He was released on bail, he was not told about the trial until the night before when ringing his solicitor. The solicitor had asked for five hundred pounds which Mr. Taylor could have produced but for the fact that at the time he rang the solicitor at 4.p.m. the banks were closed. The solicitor would not accept a cheque from him and consequently he was unrepresented......The fact that he....was not represented was mentioned to the judge by prosecuting counsel but the judge said that it did not matter. At that point he, the Appellant, had asked for an adjournment but the judge had told him to sit down and address the bench only when spoken to. The appellant says that he did not apply for legal aid because he did not think he would qualify financially....

The first ground of appeal....is essentially a submission that the Appellant's conviction was unsafe taking into account the fact that he was unrepresented in circumstances where he should and could easily have had representation and where, had he had representation, the challenge to the incriminating remarks attributed to him by the police witnesses would have been more effective both during the course of cross examination and whilst final submissions were being made on his behalf to the jury. We consider that there is some force in this submission. In particular, although the point was explored in cross examination by (counsel for another defendant) the remarkable and indeed impossible concurrence of the notes of the two officers in the absence of those notes being made up together or, alternatively, the notes of the police constable being copied directly from the Inspector's note book, both of which matters were denied by the police constable, was a point to be made on behalf of the Appellant and not really relevant to the defence of (that other defendant). Equally there is substance in the point that although the Appellant during his cross examination of the police officers made some challenge to the incriminating statements, and started to make a point based on the impossibility of nine men being in the passageway together with the safe all at the

same time, the cross examination on a reading of it does not seem to have been as effective as cross examination by competent counsel would have been. The lack of representation may also have been responsible for the absence of evidence from Irene Tenga and Catherine Greener confirming the Appellant's account of how he came to visit (the flat) that evening. It would seem that either the surviving transcript is correct that the Deputy Chairman did not remind the Appellant at the end of his evidence of his right to call witnesses or, if the Appellant is correct, that he sought to call Irene Tenga. The Deputy Chairman refused this application in the mistaken belief that Irene Tenga was (a co-defendant's) lawful wedded wife, a misapprehension apparently shared by (that defendant's) counsel and under which the Deputy Chairman appears to have still been during the sentencing process. In either event, it would appear that the Appellant was deprived of the chance of calling evidence which otherwise he would have wished to have called and which should have been called on his behalf."

All this led the Court of Appeal to say:

"In the special circumstances of this case, albeit with considerable hesitation, we have reached the conclusion that this Appellant may not have had a fair trial due to lack of representation and the case which could and should have been represented on his behalf was not placed before the jury."

The first refusal of compensation dated 18 November 1998 was quashed in ex parte Garner and Others on the narrow ground that the Home Secretary had erred in concluding that judicial error or misconduct could not amount to "exceptional circumstances" within the second limb of the ex gratia scheme. In the case of Mr. Taylor the Divisional Court, too, reached its conclusion "with considerable hesitation". It directed the Home Secretary to

"consider whether there was judicial error or misconduct which amounted to exceptional circumstances within the second limb .....and whether a period of custody resulted there from."

Against this background I now turn to the two subsequent decisions refusing compensation being those dated 6 September 1999 and 28 January 2002.

The decision of 6 September 1999.

Although the case for Mr. Taylor had always been that he did not have a fair trial, it was only in the course of the hearing of ex parte Garner and Others that he sought to rely expressly on Article 6 of the ECHR. The decision letter of 6 September 1999 summarised Mr. Taylor's case as being based on "exceptional circumstances arising from the conduct of the trial judge" and "the exceptional length of time it has taken for Mr. Taylor to be granted a proper right of appeal". The letter sought to make two preliminary points on behalf of the Home Secretary, each of them said to be founded on the judgment in Garner. The first was that:

"Even if there is a breach of Article 6....,this does not necessarily give rise to exceptional circumstances."

The second was to the effect that the length of time which it took for the conviction to be overturned was

"a factor which would be relevant to the amount of compensation payable if Mr. Taylor's application were successful but it has not bearing on his eligibility for compensation. That view is supported by the Garner judgment which held that, in identifying the circumstances in which ex gratia payments may be made, the 1985 statement 'focuses .... on matters leading to custody' and 'contains no references to the criteria relevant to the amount of compensation'."
The letter goes on to characterise the trial judge's fault in preventing Mr. Taylor from calling a witness as being more in the nature of an oversight or the result of a misapprehension than a deliberate act. The letter concludes:

"Whilst it is perhaps implicit from the basis on which the Court of Appeal quashed Mr. Taylor's conviction that the trial judge was at fault for not ensuring that he was represented, the fact remains that the court made no specific criticism of the judge in this respect. Indeed the court indicated no judicial error as such. The crucial question is whether the trial judge's failure to ensure that Mr. Taylor was represented constitutes a sufficient ground for paying ex gratia compensation. ....The court emphasised in Garner that it would be 'a very rare case indeed where judicial misconduct...is of the exceptional nature which the second limb of the statement requires'. The Secretary of State has given very careful consideration to whether there was judicial error or misconduct amounting to exceptional circumstances for the purposes of the ex gratia scheme but he does not consider that the trial judge's misconduct, if such it was, in Mr. Taylor's case was 'so gross' or 'of such quality' as to give rise to exceptional circumstances under the second limb of the 1985 statement.
The Secretary of State has also considered the additional alleged errors and instances of 'wilful judicial misconduct' by the trial judge which Mr. Taylor has advanced. However, in the light of the fact that these other grounds were not considered by the Court of Appeal, and thus were not the subject of any findings, he does not consider that there are sufficient grounds upon which he could be satisfied that they either contributed to the conviction in this case or were of a nature constituting exceptional circumstances for the purpose of the ex gratia compensation scheme.
It follows from the above that the Secretary of State's decision not to pay ex gratia compensation to Mr. Taylor stands."
On 9 October 2001 Mr. Taylor's solicitors sent a further submission to the Treasury Solicitor for consideration by the Secretary of State. The submission was some seventy pages long and was accompanied by other documents in support. That was some five weeks before the scheduled hearing of the application for judicial review but, in the event, that hearing date was vacated. The final letter on behalf of the Secretary of State refusing compensation was dated 28 January 2002. In addition to dealing with the claim under section 133, which is now abandoned, it addressed both limbs of the ex gratia scheme. The first limb was addressed on the basis of the submissions made on behalf of Mr. Taylor to the effect that, for various reasons, there had been serious default by the police officers. The letter stated that in order for an applicant to qualify for an ex gratia payment

under the first limb, the Secretary of State must be satisfied not simply that there was serious default per se but that there was serious default from which the wrongful conviction resulted. That was taken from the judgment of the Divisional Court in Garner. The letter stated:

"We accept that a negligent default can constitute a serious default if there is a high degree of negligence. However we do not accept that your contentions....are justified or that in any event the matters which you have raised amount, either individually or cumulatively, to a 'serious default'. In relation to the officers' notes, whilst it is true that the Court of Appeal described the concurrence of the making up of those notes as 'impossible', it made no criticism of the police officers. Indeed, the court accepted that that point had been properly left to the jury (subject to it being properly cross examined). Nor is there any other material before us to establish that the police were lying or acting improperly in relation to the notes, as you assert, or that the conflict might not have had an innocent explanation. As to Inspector Payne's evidence, the fact that the plan shows that the true width of the hallway was 3.9 feet does not of itself indicate that he was lying as opposed to being mistaken. Indeed, we note that the contention that the inspector was lying was not advanced before either the Court of Appeal or Divisional Court as part of the first application for judicial review. ....That view was upheld by the Divisional Court in Garner when it was said that the Court of Appeal 'did not make findings suggesting that there was serious default within the first limb of the statement'.
In any event, whether or not any or all of these matters amount to serious default, the fact remains that Mr. Taylor's conviction was not reversed on these grounds and there is therefore no basis on which the Secretary of State could be satisfied that it was the alleged default, rather than the lack of legal representation, which resulted in the conviction."
The letter then addresses the second limb of the ex gratia scheme in relation to which the submission on behalf of Mr. Taylor had raised the conduct of the police officers and the alleged shortcomings of the trial judge. The letter observed that it is the whole of the ex gratia scheme and not just the second limb that is concerned with "exceptional circumstances". The first limb, it was said, is merely an example of such circumstances. It went on:

"It is highly unlikely that conduct on the part of the police...that is not sufficiently serious to satisfy the particular example of exceptional circumstances described in the first limb of the statement would nevertheless be sufficiently serious to constitute other exceptional circumstances for the purpose of the second limb.....we do not accept that the conduct of the police ....satisfies the particular example of exceptional circumstances for the purpose of the first limb...neither, for the same reasons, do we accept that they amount to other exceptional circumstances for the purpose of the second limb."
The letter then dealt with the question raised by Garner, namely "whether there was judicial error or misconduct which amounted to exceptional circumstances within the second limb....and whether a period of custody resulted therefrom". It is necessary to set out the approach of the Secretary of State at some length:

".....The Secretary of State is entitled to focus his attention on judicial error or misconduct on the basis of which the Court of Appeal quashed the conviction and which could thus be said to have 'caused a period to be spent in custody'. The basis on which the Court of Appeal quashed Mr. Taylor's conviction was that he may not have had a fair trial due to the fact that he was not legally represented. It is perhaps implicit from this that the trial judge was at fault for not ensuring that he was represented but the fact remains that the Court made no specific criticism of the judge in this respect and indeed indicated no judicial error as such. If the judge's failure to ensure Mr. Taylor was represented was so grave as to merit the description of being 'gross' and 'exceptional', we find it difficult to accept that the Court of Appeal would have been content to allow the appeal simply on the basis that he may not have had a fair trial. .....We remain of the view that the judge's failure to ensure that Mr. Taylor was represented is not of such quality as to amount to exceptional circumstances.

We have nevertheless considered the additional alleged errors of a trial judge which you have advanced (over and above the failure to give him representation and to allow him to call witnesses...) i.e. bias, lack of help concerning previous convictions, failure to provide help on the law, failure to insist on a answer and failure to assist on production of the plan. However, in the light of the fact that these other grounds were neither advanced before nor considered by the Court of Appeal, and were not the subject of any findings, we do not consider that there are sufficient grounds, either established by the Court of Appeal or otherwise, upon which the Secretary of State could be satisfied that they either contributed to the conviction in this case or were of a nature constituting exceptional circumstances for the purpose of the ex gratia compensation scheme.

.....The Court of Appeal's judgment does not limit the considerations that the Secretary of State can take into account in determining whether or not to make an ex gratia payment and we have considered carefully whether there are any other exceptional circumstances in which ex gratia compensation might be paid to Mr. Taylor. We have taken into account all of your further submissions on his behalf but (whether taken together or separately) we do not consider that they raise any new issues sufficient to depart from the Secretary of State's decisions of 6 September 1999.

It follows from the above that the Secretary of State's decision not to pay ex gratia compensation to Mr. Taylor stands."

The Grounds of Challenge

On behalf of Mr. Taylor, Mr. Irvin has formulated grounds of challenge in the form annexed to the Claim Form (as amended), in his Skeleton Argument and in a "Summary of Main Points". Essentially, his criticisms of the decision of the Secretary of State amount to the following:

(i) the Secretary of State has relied too heavily on the judgment of the Court of Appeal Criminal Division and has made little or no effort to ascertain other facts for himself;

(ii) the Secretary of State has confused judicial error and judicial misconduct;

(iii) the Secretary of State ought to have aggregated matters raised under the first limb in relation to the behaviour of the police officers with the material taken into account in relation to the second limb in order to have decided whether there were "exceptional circumstances";

(iv) the Secretary of State ought to have taken into account the delay of thirty two years before the conviction was quashed, not least because the quashing after thirty six years was not "just satisfaction" for the purposes of Article 6;

(v) the Secretary of State erred by not taking into account a breach of Article 6 (whether deemed to have been remedied or not) in considering the totality of "exceptional circumstances"; and

(vi) the decision of the Secretary of State is Wednesbury unreasonable and/or cannot survive an appropriately intense review. I shall now consider these grounds of challenge in turn.

Ground 1: Over reliance on the judgment of the Court of Appeal Criminal Division

The sole responsibility of the Court of Appeal Criminal Division was to consider the grounds and the submissions before it so as to determine whether the conviction was "unsafe" in accordance with section 2(1) of the Criminal Appeal Act 1968 [as amended]. It would have been inappropriate for the Court of Appeal to inquire into other matters which may be relevant to a compensation claim but had nothing to do with the appeal before it. In these circumstances, submits Mr. Irvin, the Secretary of State has placed undue emphasis or excessive reliance upon the judgment of the Court of Appeal.

It is certainly not the case that the Secretary of State considered himself limited to the findings of the Court of Appeal. The letter of 16 November 1999 observed in relation to the ex gratia scheme:

"The Secretary of State has a wide discretion and will consider whatever submissions are made to him, as indeed he has done in this case. But it is fair to say that, in any application for compensation arising from the reversal of a conviction, the findings of the Court of Appeal will be a significant factor in deciding whether to make an ex gratia payment. That is not to say that, in considering whether an applicant qualifies for an ex gratia payment, the Secretary of State will automatically reject any evidence that was not before, or within the findings of, the Court of Appeal."
This is further reflected in letter dated 28 January 2002 in which it was stated:

"The Court of Appeal's judgment does not limit the considerations that the Secretary of State can take into account in determining whether or not to make an ex gratia payment and we have considered carefully whether there are any other exceptional circumstances in which ex gratia compensation might be paid to Mr. Taylor."

Mr. Irvin submits that this was no more than paying lip service to matters which did not fall within the four corners of the judgment of the Court of Appeal. In my judgment, that is an unsustainable submission. It is obvious from the documents that the Secretary of State did not confine himself to matters decided by the Court of Appeal. He considered all matters put before him. It is clear from other passages that in relation to allegations of judicial misconduct and the allegation of serious default on the part of the police, he attached significance to the fact that some of these matters were not raised in the Grounds of Appeal and others were resolved by the Court of Appeal without findings of specific misconduct by the judge or serious default by the police. In my judgment, the Secretary of State was entitled to take this approach in relation to an investigation and trial which had taken place almost forty years earlier. The transcript of the trial is incomplete and in places it does not confirm Mr. Taylor's allegations. What the Secretary of State was required to do was to make "an evaluative judgment" of the material, to use the words of the Divisional Court in Garner. I do not consider that he was under an obligation to set in motion a fact finding investigation which, given the passage of time, would almost certainly have been imperfect. It seems to me that the approach of the Secretary of State was to direct himself that, in principle, he was not confined to considerations arising out of the judgment of the Court of Appeal but, having considered the other matters placed before him, he was unpersuaded by them. Accordingly, in the circumstances of this case, he decided to place heavy emphasis on the judgment of the Court of Appeal. I consider that he was entitled so to do.

Ground 2: Judicial error and judicial misconduct

This ground of challenge asserts that the Secretary of State approached the question of judicial misconduct as an exceptional circumstance on a seriously mistaken footing. The mistake, it is said, was to misunderstand the decision of the Divisional Court in Garner in relation to judicial misconduct. The suggestion is that judicial misconduct, as opposed to mere judicial error, is by definition exceptional and to require "exceptional judicial misconduct" is to require the exceptional within a category which is already exceptional and is thus a standard almost impossible to achieve. The judgment of the Divisional Court in Garner justifies the repeated view of the Secretary of State that not every manifestation of judicial error or misconduct must necessarily result in compensation. This is not what the Divisional Court had in mind. The error of approach which it identified in the first refusal of compensation was expressed thus:

"But in failing further to consider in each case whether judicial misconduct was so gross as to give rise to exceptional circumstances, the Respondent has improperly fettered the exercise of his discretion. It will, no doubt, be a very rare case indeed where judicial misconduct has caused a period to be spent in custody and where the misconduct is of the exceptional nature which the second limb of the statement requires. "

In my judgment, it is simply not the case that any finding of judicial misconduct must necessarily amount to exceptional circumstances and therefore result in compensation. The following passage

from the letter dated 28 January 2002 is significant:

"The basis on which the Court of Appeal quashed Mr. Taylor's conviction was that he may not have had a fair trial due to the fact that he was not legally represented. It is perhaps implicit from this that the trial judge was at fault for not ensuring that he was represented but the fact remains that the Court made no specific criticism of the judge in this respect and indeed indicated no judicial error as such. If the judge's failure to ensure that Mr. Taylor was represented was so grave as to merit the description as being "gross" and "exceptional" we find it difficult to accept that the Court of Appeal would have been content to allow the appeal simply on the basis that he may not have had a fair trial."

In my judgment it was permissible for the Secretary of State to approach the matter in that way. In so doing he remained faithful to what was said in Garner. This is further supported by the fact that the Court of Appeal had allowed Mr. Taylor's appeal "albeit with considerable hesitation" and his success in the Garner case was also granted "with considerable hesitation". His appeal against conviction was allowed on the basis that, because he was unrepresented, he may not have had a fair trial. It is certainly not self evident that his conviction had resulted from judicial misconduct of a "gross" or "exceptional" kind. The Secretary of State was entitled to conclude that it had not.

Ground 3: the cumulative effect of the behaviour of the police officers and that of the trial judge

The complaint here is that the Secretary of State, having decided that it was not a serious default on the part of police officers which resulted in the conviction, ought nevertheless to have added appropriate findings about the behaviour of the police officers to his consideration of the conduct of the judge under the second limb so as to consider whether, taking a broad view, there were exceptional circumstances. In my judgment, there is nothing in this ground of challenge. In the letter dated 28 January 2002 the Secretary of State, having permissibly decided that the conviction had not resulted from the serious default of the police officers when considering the first limb, went on to reconsider the conduct of the police officers in relation to the second limb, again permissibly finding that it did not give rise to exceptional circumstances. The final observation of the Secretary of State was :

"we have taken into account all of your further submissions on his behalf but (whether taken together or separately) we do not consider that they raise any new issues sufficient to depart from the Secretary of State's decision of 6 September 1999."

In my judgment, it would require a very schematic reading of the Secretary of State's decisions to conclude that he had not considered all matters cumulatively in order to satisfy himself that there were not exceptional circumstances. Such an approach to the interpretation of his letters would be inappropriate. I am satisfied that he considered all matters separately and cumulatively.

Ground 4: failure to take into account the delay of thirty six years before the conviction was

quashed.

It is of course exceptional for someone to have to wait thirty six years to have an unsafe conviction quashed. Mr. Irvin submits that that ought to loom large in any consideration of whether there are "exceptional circumstances" in relation to the second limb of the ex gratia compensation scheme. This argument was advanced in Garner. However, it received the following reply from the Divisional Court:

"With regard to the consequences of a conviction or charge, the respondent is, in our view, entitled to treat these as relevant to the amount of compensation but irrelevant to whether or not any compensation should be paid. The Statement identifies the circumstances in which payments may be made and, in doing so, focuses as it seems to us on matters leading to custody. It contains no references to the criteria relevant to the amount of compensation. We see no warrant for construing the circumstances for payment by reference to factors effecting amount. "
Mr. Irvin invites me to depart from this reasoning but I do not consider it appropriate to do so. Accordingly, this ground of challenge must fail.

Ground 5: Article 6

Mr. Irvin submits that the Secretary of State erred by not taking into account a breach of Article 6 in considering the totality of "exceptional circumstances". Although the Human Rights Act 1998 only came into force thirty six years after Mr. Taylor's trial, it is clear from his letters that the Secretary of State has been prepared to consider Article 6 of the ECHR when addressing the compensation claim. This is most apparent in the letter of 6 September 1999. It therefore became a matter which impacted on the exercise of his judgment. In Garner, the Divisional Court considered Article 6 in relation to another applicant whose appeal against conviction had been allowed only a few months after his trial. The court stated:

"It would have been open to (the Secretary of State) to conclude at the outset that, even if there was a breach, this did not give rise to exceptional circumstances. In any event, the authorities demonstrate that there is no breach provided that, looking at the proceedings as a whole, the appeal cured the trial defects. There is nothing in the European Court of Human Rights jurisprudence to suggest that, absent compensation, there is an unremedied breach of Article 6(1) when a conviction is quashed on appeal. "
The Secretary of State had this well in mind as is apparent from the letter of 6 December 1999. Mr. Irvin observes that the Divisional Court in Garner did not expressly consider the significance of Article 6 in relation to Mr. Taylor and so did not have regard to the thirty six year delay before the quashing of his conviction for this purpose. The letter of 6 September 1999 causes me to find that the reasoning of the Secretary of State on Article 6 was as follows. Assuming that there was a breach of Article 6, this does not necessarily give rise to "exceptional circumstances"; if there was a

breach, it was remedied by the Court of Appeal Criminal Division, albeit thirty six years after conviction; that delay "is a factor which would be relevant to the amount of compensation payable if Mr. Taylor's application was successful but it has no bearing on his eligibility for compensation". This latter point, of course, is based on the passage in Garner confining "exceptional circumstances" to those which lead to custody, which I identified earlier. In my judgment the Secretary of State's consideration of these matters was consistent with Garner and was free from legal error.

Ground 6: The Wednesbury challenge

I refer to this final ground of challenge as "the Wednesbury challenge" because, in my judgment, the appropriate public law criterion in this case is the Wednesbury one, rather than any more intense form of review whether based on proportionality or otherwise. I say this because, upon the foregoing analysis, this is not strictly a case founded on Convention rights. I make it clear, however, that if I were to apply a more intense form of review, the conclusion would remain the same. As the Divisional Court said in Garner, it was for the Secretary of State to make "an evaluative judgment". They added:

"It will, as Sir Thomas Bingham MR made plain in ex parte Bateman and Howse, be an even rarer case in which the court will interfere with the Secretary of State's evaluative judgement in this respect."

The respect which is there referred to was in relation to judicial misconduct. At a later passage in the judgment, the Divisional Court stated:

"...leaving aside the absence of consideration of judicial error or misconduct, the respondent was entitled to conclude that (Mr. Taylor) was not within the ex gratia scheme. The Court of Appeal did not make findings suggesting that there was serious default within the first limb of the Statement."

All this points to the difficulty which Mr. Taylor faces in relation to this ground of challenge. In the light of my findings in relation to the other grounds of challenge, and particularly in relation to the allegation of judicial misconduct, I can see no room for a finding of irrationality. I am satisfied that the Secretary of State considered all that he was required to consider, did not consider anything which he ought not to have considered and reached a decision which was open to a reasonable Secretary of State. I do not say that it was necessarily the only decision that was open to him but it was, in my judgment, a permissible decision.

Conclusion

It follows from what I have said that I do not find any of the grounds of challenge to be made out and, accordingly, this application for judicial review fails. Mr. Taylor may not have been treated generously but I am satisfied that he has been treated lawfully.