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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Fitzpatrick (Joseph) and Shiels' (Terence) Application [2012] NIQB 95

IN THE MATTER OF AN APPLICATION BY JOSEPH FITZPATRICK AND TERRENCE SHIELS FOR JUDICIAL REVIEW

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TREACY J

Introduction

[1] In both cases the applicants challenge the decision of the Secretary of State refusing compensation under s133 of the Criminal Justice Act 1998 ("the 1998 Act") following the quashing of their convictions by the Northern Ireland Court of Appeal.

[2] The applicant Fitzpatrick was arrested on 8 March 1977 and questioned over 2 days. He was 16 at the time and therefore a young person. He was held and interrogated without access to a solicitor, his parents or other appropriate adult. He made admissions in respect of three offences of a terrorist character namely involvement in an arson attack on 26 February 1977, involvement in a gun attack on the army on 30 December 1976 and membership of a proscribed organisation.

[3] The applicant, who was represented by solicitor and counsel, pleaded guilty at Belfast City Commission and was sentenced in November 1977 to an effective sentence of 5 years imprisonment. He did not appeal his conviction.

[4] In March 2005 the Applicant applied to the CCRC. His case was reopened. The court of appeal quashed his convictions in May 2009 declaring the convictions unsafe due to:

> "a. Breaches of the judges rules
> b. Failure to ensure adult presence, failure to notify him of right to legal advice. This was particularly serious given

i. Gravity of offences
ii. Number and length of interviews
iii. Period incommunicado
iv. That he was reported to have been upset
v. The admissions were the only evidence

c. It was therefore concluded that the admissions were unreliable, that there were prima facie grounds to find the conviction unsafe and that there were not sufficient countervailing factors."

[5] Following the quashing of his conviction he applied for compensation.

[6] There were various communications in relation to compensation. Ultimately the SoS concluded that he was not satisfied beyond reasonable doubt that there had either been a miscarriage of justice or that there was any new or newly discovered fact.

[7] The applicant Mr Shiels was arrested on 26 April 1978 on suspicion of involvement in a shooting incident. He was questioned on that and the following day. At the time he was aged 16. He was, like Fitzpatrick, held and interrogated without access to a solicitor, his parents or other appropriate adult. On the morning of the 27 April the applicant made a confession statement during the course of which he admitted possession of a gun and membership of the Fianna. Following these admissions he was charged with membership of a proscribed organisation and possession of a firearm and munitions.

[8] This applicant was represented by solicitor and counsel at his trial. He pleaded guilty before Belfast Crown Court on 28 June 1979 and received a suspended sentence. He did not appeal.

[9] In 2002 he was denied entry to the USA and on 19 March 2003 he applied to the Criminal Cases Review Commission ("CCRC"). His appeal was determined at the same time as Fitzpatricks and in May 2009 the Court of Appeal in Northern Ireland quashed his conviction on the same basis.

[10] On 28 October 2009 he lodged an application for compensation. Although 'minded to refuse' letters were issued at an early stage the applications in each case were subject to further review consequent upon the decision of the Supreme Court in Adams.

[11] Ultimately on 1 December 2011 the application was reviewed by the Department of Justice ("DoJ") and again the applicant was given an opportunity to comment. It was confirmed to the applicant on 9 December 2011 that he was not

entitled on both grounds, that is, no newly discovered fact and no miscarriage of justice in the sense of demonstrable innocence.

Grounds upon which leave is sought

[12] The Relief sought is as follows:

a. Certiorari quashing the decision of the SoS refusing the applicant compensation under s133 of the 1998 Act;
b. Declaration that said decision is unlawful, *ultra vires* and of no force or effect;
c. Mandamus compelling the SoS to grant compensation under s133; and
d. Damages etc.

[13] Further, or in the alternative, the following relief is also sought:

a. Certiorari quashing the decision of the DoJ of 9 December 2011 refusing compensation under s133 of the 1998 Act;
b. A declaration that that decision is unreasonable, unlawful, void and *ultra vires;*
c. Mandamus compelling the DoJ to grant compensation under s133 **AND / OR** mandamus requiring the DoJ to consider the question of his entitlement to compensation under s133 of the 1998 Act in accordance with the law, relevant factors and the decision of the court; and
d. Damages etc.

[14] The grounds on which this relief is sought are as follows:

a. The applicants do qualify for compensation within the meaning of s133 of the 1998 Act;
b. The applicants were the victims of a miscarriage of justice within s133 of the 1998 Act;
c. Due to the circumstances in which the confessions were made the applicants are individuals who 'should not have been convicted' [R(Clibery v SoS] and therefore his conviction was a miscarriage of justice within the meaning of s133 of the 1998 Act. This is particularly so viz. their age and vulnerability at the time of the convictions;
d. The conclusions of the Court of Appeal that the confessions were obtained by objectionable means demonstrates that the Applicants 'should not have been convicted' within the meaning of s133 of the 1998 Act;
e. That the evidence of breaches means that the detention of the applicants breached Art3, Art8 of the Convention and that the applicants did not have a fair trial within the meaning of A6 of the convention. ***The term 'miscarriage of justice' in s133 of the CJA must be (due to s3 HRA) read in a convention compliant manner and a confession obtained in breach of A3/A8 and a conviction obtained in***

breach of A6 amounts to a 'miscarriage of justice' within the meaning of s133 CJA 1988;

f. That in making the decision that the applicants did not suffer a miscarriage of justice within the meaning of s133 the SoS failed to give any / adequate weight to:

    i. Breaches of the Judges' Rules and RUC Code;
    ii. Youth and vulnerability of the applicant;
    iii. The Conclusion of the Court of Appeal;
    iv. Articles 3, 8 and 6 of the ECHR.

[15] The following further grounds are relied upon:

a. That the SoS unreasonably and erroneously concluded that the Applicants were required by s133 to show that they were demonstrably innocent and refused compensation on the basis that this had not been shown;
b. That the SoS unreasonably and erroneously failed to conclude that the Applicants were proper candidates for compensation under s133 given that they had shown that they had been convicted of a criminal offence and their convictions had been reversed in circumstances where a new or newly discovered fact:

    i. Had so undermined the evidence against them so that no conviction could possibly be based upon it; and/or
    ii. Had shown conclusively that the state had not been entitled to punish the applicants; and/or
    iii. Had shown on the facts as they then stood revealed that it should be concluded beyond reasonable doubt that the Applicants should not have been convicted; and/or
    v. Had shown that the Applicants did not have a case to answer or that no reasonable jury properly directed could have convicted either applicant;

c. That the DoJ unreasonably and erroneously failed to conclude that the Applicants were proper candidates for compensation under s133 in that they had shown that they had been convicted of a criminal offence and his conviction had been reversed in circumstances where the facts apparent to the Court of Appeal:

    i. Had so undermined the evidence against the Applicant's so that no conviction could possibly be based upon it; and/or
    ii. Had shown conclusively that the state had not been entitled to punish the applicants; and/or

iii. Had shown on the facts as they then stood revealed that it should be concluded beyond reasonable doubt that the applicants should not have been convicted; and/or
iv. Had shown that the applicants did not have a case to answer or that no reasonable jury properly directed could have convicted either applicant;

d. That the DoJ in its decision of 9 December unreasonably and erroneously failed to conclude that the Applicants were proper candidates ... on the grounds that the applicants had not shown that the reversal of their convictions occurred in circumstances where a new or newly discovered fact or facts had been relied upon and in so erring the DoJ moreover:

i. Failed to appreciate that newly-discovered facts includes facts the significance of which was not appreciated by the convicted person and/or his advisers during the trial or appeal process;
ii. Failed to appreciate that newly discovered facts should be equated with newly disclosed facts and that the relevant facts should be facts which have been newly brought into the public domain and to the attention of the court;
iii. Failed to appreciate that the focus of attention in relation to newly discovered facts should be what was or was not known to the trial court;
iv. Failed to appreciate that newly discovered facts might have been facts known to the defendant and or his advisers at the relevant time;
vi. Failed to approach the question of newly discovered facts in a manner that coincided with the judgment of the Court of Appeal on the deployment before that Court of fresh evidence in accordance with s25 of the Criminal Appeal Act (NI) 1980.

Statutory Framework

[16] S133 of the 1998 Act provides:

> "(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-

> disclosure of the unknown fact was wholly or partly attributable to the person convicted.
> (2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State."

Arguments

[17] The applicants contend that their cases fall within the 'second category' of the ***MacDermott*** case: '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'. All judges in that case agreed with that formulation.

[18] The applicants argue that there was a 'new or newly discovered fact' in terms of the definition in the ***MacDermott*** case ie 'a fact the significance of which was not appreciated by the convicted person or his advisors' or any of the alternative constructions of same.

[19] Specifically the applicants contend that their cases are in Category 2 miscarriage of justice because:

a. It falls within the definition at para55;
b. Where the only evidence of the applicants' guilt before the trial court had been his 'plea of guilty' and the prior confession upon which the 'plea of guilty' had been based and from which had been 'culled' the determination that the conviction was unsafe was related directly to the safety, and admissibility of those confessions';
c. Where it was determined that the confessions were unsafe so as to be either inadmissible or unreliable then the evidence against the applicant was so undermined that no conviction could be possible based upon it, ie there was no other evidence;
d. On this basis the Court of Appeal leads to the conclusion that the case is within Category 2;
e. However it would also satisfy the tests at para 96, para 116, para 178 or para 210.

[20] In concluding otherwise the decision was unreasonable.

[21] Furthermore the applicants submit that the proper approach to 'new or newly discovered fact' is governed by the following propositions:

a. A newly discovered fact includes a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings;

b. The proper focus for whether a fact is newly-discovered is to determine whether it has been newly discovered to the courts;
c. Therefore the circumstance that the fact was 'known' to the defendant and/or his lawyers at the time of the original trial does not prevent this fact from being deemed 'newly discovered' for the purposes of s133, provided that its significance was not appreciated at the relevant time;
d. Alternatively the issue might be approached so as to coincide with the circumstances in which fresh evidence is admitted in appeals (s25 Appeal Act 1980) although in practical terms this might amount to the same thing as focussing on whether the fact is newly discovered to the courts.

[22] The facts were not disclosed to the trial court at the relevant time.

Respondent

[23] For a claim under s133 to succeed the applicant must show that:

a. The conviction was quashed on the basis of a new or newly discovered fact; **and**
b. This shows beyond reasonable doubt that there has been a miscarriage of justice.

[24] Neither of these limbs has been satisfied even after Adams/MacDermott (2011) 3 All ER 65.

[25] The new/newly discovered test has the effect of limiting the sort of case in which compensation is payable: it must be a case where the ground of reversal is the existence of a new/newly discovered fact (probably had in contemplation fresh evidence).

[26] Prior to evidence there were a range of cases which developed a distinction between new/newly discovered and a legal development in the case where there is a legal ruling in respect of facts which have been known all along. In the latter situation, courts have held that there was no new or newly discovered fact with the consequence of compensation. The Adams [(2011) 3 All ER 65 judgement does not change this position.

a. The issue in that litigation was not focused on the question of the ground on which the Appeal Court reversed the conviction and, in particular, was not focused on the issue of whether the ground was a new fact or facts or something else, for example, a legal ruling on facts known all along;
b. Rather, the Adams litigation is concerned with the question of whether a fact is or is not a new fact and to whom it must be new;

c. There is no discussion of Bateman [unrep, COA, 17th May 1994], McFarland [2004] NI 380 or Magee [2007] NICA 34 in any of the speeches on this point, notwithstanding that all of these cases were before the court. This clearly suggests that the court, consistently with a and b above, was not concerned with the distinction between a decision based on a new fact and one based on a legal ruling on facts already known.
d. If the C had been intending to upset the effect of the line of authorities it could have said so and, indeed, could plainly have been expected to say so.

[27] Therefore, nothing has swept away earlier case law. There is no reason to jettison the Magee reasoning drawing a distinction between the Court of Appeal's reversal of a conviction on the basis of a new/newly discovered fact and a reversal on the basis of a legal ruling on facts known all along.

[28] The applicant presents a false analysis. The applicant and his representatives know the relevant facts at all times. They probably were aware that on the facts there could be a ruling that the judge's rules had been breached. But the legal effect of such a breach would have been open to question. It is the significance of the legal effect of a breach which might not have been appreciated or understood at the time, not the significance of the facts per se.

[29] All that happened was a legal ruling on the facts already known.

[30] In relation to the miscarriage of justice issue, the difference between these cases and Adams is that in these cases both applicants pleaded guilty and did not contest the charges against them at trial as McCartney and MacDermott did, including by challenging the admissibility of the confession evidence. In these circumstances, the respondent is entitled to take the view that the Phillips extension has not been satisfied (ie that new/newly discovered fact or facts 'so undermines the evidence ... that no conviction could possibly be based on it.')

Discussion

[31] In Adams [2011] UKSC 18**,** the Supreme Court by a majority of 5–4 have agreed a definition of 'Miscarriage of Justice' for the purposes of s133. In coming to this definition various extrinsic materials were considered and it was concluded that these materials did not assist the court in discovering what the meaning of that term was intended to be. The only assistance that the majority of the court gleaned from this exercise was that the majority of signatories to the original International Convenant on Civil and Political Rights 1966, to which this domestic provision gives effect, had rejected provisions limiting the concept of 'miscarriage of justice' to cases where the applicant has been shown to be conclusively innocent. See, for example, Lord Phillips at para19-21:

"19. ... Of most significance is the rejection by 22 votes to 11 with 40 abstentions of an amended provision initially proposed by Israel, with input from France and Afghanistan. This reads:

> 'The judicial recognition of the innocence of a convicted person shall confer on him the right to request the award of compensation in accordance with the law in respect of any damage caused him by the conviction.'

20. While this provides no positive indication of precisely what the state parties intended "miscarriage of justice" to mean, it makes it difficult to argue that they intended it to mean 'conviction of the innocent'. Lord Bingham suggested at para 9 in Mullen that the phrase 'miscarriage of justice' may have commended itself to the parties because of the latitude of interpretation that it offered and it seems to me that this may well be the case.

21. It is, I believe, possible to make some more positive conclusions about what it was that the states who were involved in the drafting of article 14(6) were trying to achieve. They were concerned with the emergence of a new fact after the completion of the trial process, including review on appeal. Article 14(5) provides that everyone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law. Article 14(6) applies to the discovery of a new fact after that final decision. Compensation was only payable where the new fact demonstrated *conclusively* that there had been a miscarriage of justice. Thus miscarriage of justice had to be the kind of event that one could sensibly require to be proved conclusively."

[32] Further, the court considered the definition of that term put forward in Mullen [2004] UKHL 18. Lord Phillips concluded at para34:

> "Lord Steyn's conclusion in Mullen that 'miscarriage of justice' was restricted to the conviction of an innocent person was largely founded on his misreading of the French text of article 14(6) and of

> the position in France. Shorn of that support, his speech does not provide compelling justification for his conclusion."

[33] The majority of that court instead decided to pursue a fresh approach to the question.

[34] It is useful at this point to quote Lord Phillips extensively in order to understand the nature of the exercise that is required by s133 and the object of that exercise. (Paras 36 – 37)

> "*The nature of the exercise*
>
> 36. The wording of section 133, following that of article 14(6), might suggest that the terms of the judgment of the court that reverses the conviction will establish whether the entitlement to compensation has been made out. It speaks of a conviction being reversed '*on the ground that* a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice' (emphasis added). That is not, however, the test for quashing a conviction in this jurisdiction. The words 'on the ground that' must, if they are to make sense, be read as 'in circumstances where'. Section 133(1) provides that the compensation will be paid by the Secretary of State, and section 133(2) provides for a two year time limit for application for compensation to the Secretary of State. Thus it is for the Secretary of State to decide whether the requirements of section 133 are satisfied, an exercise which is, of course, subject to judicial review. The Secretary of State first has to consider whether a new or newly discovered fact has led to the quashing of a conviction. If it has, he then has to consider whether that fact shows beyond reasonable doubt that there has been a miscarriage of justice, applying the true meaning of that phrase. The Secretary of State will plainly have regard to the terms of the judgment that quashes the conviction, but ultimately he has to form his own conclusion on whether section 133 is satisfied.
>
> *The object of the exercise*
>
> 37. I think that the primary object of section 133, as of article 14(6), is clear. It is to provide entitlement to compensation to a person who has been convicted

> and punished for a crime that he did not commit. But there is a subsidiary object of the section. This is that compensation should not be paid to a person who has been convicted and punished for a crime that he did commit. The problem with achieving both objects is that the quashing of a conviction does not of itself prove that the person whose conviction has been quashed did not commit the crime of which he was convicted. Thus it is not satisfactory to make the mere quashing of a conviction the trigger for the payment of compensation. It was this problem which led to the adoption of the imprecise language of article 14(6), which has been reproduced in section 133. In interpreting section 133 it is right to have in mind the two conflicting objectives. It is necessary to consider whether the wording of the section permits a balance to be struck between these two objectives and, if so, how and where that balance should be struck. I turn to consider Dyson LJ's four categories having in mind these considerations. I shall deviate from the order in which he set them out."

[35] S133 thus has several hurdles which must be overcome in order to prove entitlement to compensation under that section. Namely:

a. Reversal of a conviction
b. On the ground that a new or newly discovered fact
c. Shows beyond reasonable doubt
d. That there has been a miscarriage of justice

The Definition of a Miscarriage of Justice

[36] In addressing the issue of a miscarriage of justice and to find a suitable balance between the objectives of that section (see above), Lord Phillips addressed the four categories of cases in which the Court of Appeal would reverse a decision (as propounded by Dyson LJ in his decision in the Adams case in the Court of Appeal) with a view to excluding some of these categories from the ambit of the term 'miscarriage of justice' for the purposes of s133.

[37] These categories are set out below. I have set them out in the order that they are considered in the judgement for ease of reference:

a. Category 4: 'Where something has 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'

b. Category 3: 'Where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant.
c. Category 1: Where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted.
d. Category 2: Where the fresh evidence is such that, had it been available at the trial, no reasonable jury could properly have convicted the defendant.

[38] On the issue of whether these outcomes could constitute a miscarriage of justice for the purpose of s133 he came to the following conclusions:

> "*Category 4: where something has 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*
>
> 38. This category is derived from Lord Bingham's speech in *Mullen.* As I have explained, I do not believe that he put it forward as falling within the scope of section 133. As I understand it, the category embraces an abuse of process so egregious that it calls for the quashing of a conviction, even if it does not put in doubt the guilt of the convicted person. I would not interpret miscarriage of justice in section 133 as embracing such a situation. It has no bearing on what I have identified as the primary purpose of the section, which is the compensation of those who have been convicted of a crime which they did not commit. If it were treated as falling within section 133 this would also be likely to defeat the subsidiary object of section 133, for it would result in the payment of compensation to criminals whose guilt was not in doubt.
>
> *Category 3: Fresh evidence rendering the conviction unsafe*
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> 39. Dyson LJ propounded this test as requiring consideration of whether a fair-minded jury could properly convict if there were to be a trial which included the fresh evidence. This raises the question, which I shall consider further when I come to category 2, of whether section 133 requires the Secretary of State to consider the reaction to fresh evidence of a fair-minded jury. Put another way, the

> situation under consideration is one where the fresh evidence reduces the strength of the case that led to the claimant's conviction, but does not diminish it to the point where there is no longer a significant case against him.
>
> 40. I would not place this category within the scope of section 133 for two reasons. The first is that it gives no sensible meaning to the requirement that the miscarriage of justice must be shown 'beyond reasonable doubt', or 'conclusively' in the wording of article 14(6). It makes no sense to require that the new evidence must show conclusively that the case against the claimant is less compelling. It is tantamount to requiring the Secretary of State to be certain that he is uncertain of the claimant's guilt.
>
> 41. My second reason is that, if category 3 were adopted as the right definition of 'miscarriage of justice', it would not strike a fair balance between the two objectives of section 133. The category of those who are convicted on evidence which appears to establish guilt beyond reasonable doubt, but who have their convictions quashed because of fresh evidence that throws into question the safety of their convictions, will include a significant number who in fact committed the offences of which they were convicted. This is the inevitable consequence of a system which requires guilt to be proved beyond reasonable doubt."

[39] In relation to Category one (ie where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted), Lord Phillips concluded that this would clearly fall within the ambit of the term. The problem with this category is that a declaration of innocence is beyond the competence of a criminal court. Lord Phillips quoted the following from the Court of appeal for Ontario in R v Mulins-Johnson [2007] ONCA 720; 87 OR (3d) 425:

> "24. Just as the criminal trial is not a vehicle for declarations of factual innocence, so an appeal court, which obtains its jurisdiction from statute, has no jurisdiction to make a formal legal declaration of factual innocence. The fact that we are hearing this case as a Reference under section 696.3(3)(a)(ii) of the *Criminal Code* does not expand that jurisdiction. The terms of the Reference to this court are clear: we are

> hearing this case 'as if it were an appeal'. While we are entitled to express our reasons for the result in clear and strong terms, as we have done, we cannot make a formal legal declaration of the appellant's factual innocence."

[40] This jurisprudential knot is a key issue and I shall return to these arguments in a moment.

[41] In relation to Category 2, which is the most important category in terms of the present applicants, Lord Phillips decided (at paras 51 – 55) as follows:

> "*Category 2: Fresh evidence such that, had it been available at the trial no reasonable jury could convict the defendant*
>
> 51. This category applies to the evidence, including the fresh evidence, the test that a judge has to apply when considering an application at the end of the prosecution case for dismissal of a charge on the ground that the defendant has no case to answer. It focuses on the evidence before the jury. If the fresh evidence were always evidence of primary fact, or new expert evidence, the test might be satisfactory. The position is not, however, as simple as that. The new evidence that leads to the quashing of a conviction is very often not primary evidence that bears directly on whether the defendant committed the crime of which he was convicted, but evidence that bears on the credibility of those who provided the primary evidence on which he was convicted. Both of the appeals before the Court fall into this category. So does the example of category 2 given by Dyson LJ: fresh evidence which undermines the creditworthiness of the sole witness for the prosecution. Here one can run into a problem that is peculiar to the criminal procedures that apply in common law jurisdictions.
>
> 52. Under common law procedures the evidence that is permitted to be placed before the jury is screened by a number of rules that are designed to avoid the risk that the jury will be unfairly prejudiced and to ensure that the trial is fair. Thus section 78 of the Police and Criminal Evidence Act 1984 gives the judge a general jurisdiction to exclude evidence on the grounds of fairness and section 76A of the same

Act contains a little code governing the admissibility of a confession. So does section 8(2) of the Northern Ireland (Emergency Provisions) Act 1978, which was applicable to the critical evidence adduced against the defendants in the second appeal. Often it will be appropriate for the judge to hold a voir dire in order to decide whether or not evidence can be admitted. The question of whether there is evidence upon which a jury can properly convict is taken after the judge has screened from the jury evidence which, under the relevant procedural code, he has ruled to be inadmissible. That is often a difficult judicial task. I do not believe that section 133 should be so interpreted as to impose on the Secretary of State the task of deciding whether the fresh evidence would have rendered inadmissible the primary evidence to which it related, in order to answer the question whether there would have been a case upon which a reasonable jury could convict.

53. There is a further difficulty with category 2. The question of whether a reasonable jury could properly convict falls to be answered having regard to the fact that a jury must be satisfied of guilt beyond reasonable doubt. Section 133 requires the Secretary of State to be satisfied beyond reasonable doubt that a miscarriage of justice has occurred. Category 2 thus operates as follows: compensation will be payable where the Secretary of State is satisfied beyond reasonable doubt that no reasonable jury could have been satisfied beyond reasonable doubt that the defendant was guilty. This does not seem a very sensible test.

54. The final point to make about category 2 is that it applies a test the result of which depends critically on common law procedural rules. As the test is derived from article 14(6), it would be preferable if it were one more readily applicable in other jurisdictions.

55. For these reasons I do not consider the second category, as formulated by Dyson LJ, provides a satisfactory definition of "miscarriage of justice". I would replace it with a more robust test of miscarriage of justice. 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. This is a matter to which the test of satisfaction beyond reasonable doubt can readily be applied. This test will not guarantee that all those who are entitled to compensation are in fact innocent. It will, however, ensure that when innocent defendants are convicted on evidence which is subsequently discredited, they are not precluded from obtaining compensation because they cannot prove their innocence beyond reasonable doubt. I find this a more satisfactory outcome than that produced by category 1. I believe that it is a test that is workable in practice and which will readily distinguish those to whom it applies from those in category 3. It is also an interpretation of miscarriage of justice which is capable of universal application."

[42] Lord Hope adopted similar reasoning at paras96-98:

> "96. If one accepts, as I would do, Lord Bingham's reasons for doubting whether Lord Steyn was right to find support for his reading of article 14(6) in the French text and in para 25 of the explanatory committee's report on article 3 of the Seventh Protocol, one is driven back to the language of the article itself as to what the words "miscarriage of justice" mean. Taken by itself this phrase can have a wide meaning. It is the sole ground on which convictions can be brought under review of the High Court of Justiciary in Scotland: Criminal Procedure (Scotland) Act 1995, section 106(3). But the fact that these words are linked to what is shown "conclusively" by a new or newly discovered fact clearly excludes cases where there *may* have been a wrongful conviction and the court is persuaded on this ground only that it is unsafe. It clearly includes cases where the innocence of the defendant is clearly demonstrated. But the article does not state in terms that the only criterion is innocence. Indeed, the test of "innocence" had appeared in previous drafts but it was not adopted. I would hold, in agreement with Lord Phillips (see para 55 above) that it includes also cases where the new or newly discovered fact shows that the evidence against the defendant has been so

undermined that no conviction could possibly be based upon it. In that situation it will have been shown conclusively that the defendant had no case to answer, so the prosecution should not have been brought in the first place.

97. There is an important difference between these two categories. It is one thing to be able to assert that the defendant is clearly innocent. Cases of that kind have become more common and much more easily recognised since the introduction into the criminal courts, long after article 14(6) of the ICCPR was ratified in 1976, of DNA evidence. It seems unlikely that the possibility of demonstrating innocence in this way was contemplated when the test in article 14(6) was being formulated. Watson and Crick published their discovery of the double helix in 1951, but DNA profiling was not developed until 1984 and it was not until 1988 that it was used to convict Colin Pitchfork and to clear the prime suspect in the Enderby Murders case. The state should not, of course, subject those who are clearly innocent to punishment and it is clearly right that they should be compensated if it does so. But it is just as clear that it should not subject to the criminal process those against whom a prosecution would be bound to fail because the evidence was so undermined that no conviction could possibly be based upon it. If the new or newly discovered fact shows conclusively that the case was of that kind, it would seem right in principle that compensation should be payable even though it is not possible to say that the defendant was clearly innocent. I do not think that the wording of article 14(6) excludes this, and it seems to me that its narrowly circumscribed language permits it.

98. The range of cases that will fall into the category that I have just described is limited by the requirement that directs attention only to the evidence which was the basis for the conviction and asks whether the new or newly discovered fact has completely undermined that evidence. It is limited also by the fact that the new or newly discovered fact must be *the* reason for reversing the conviction. This suggests that it must be the sole reason, but I do not see the fact that the appellate court may have given

> several reasons for reversing the conviction as presenting a difficulty. All the other reasons that it has given will have to be disregarded. The question will be whether the new or newly discovered fact, taken by itself, was enough to show conclusively that there was a miscarriage of justice because no conviction could possibly have been based on the evidence which was used to obtain it."

[43] Lady Hale said at paras 115-116:

> "115. As I understand it, Lord Phillips' formulation, with which both Lord Hope and Lord Kerr agree, would limit the concept to a person who should not have been convicted because the evidence against him has been completely undermined. Unlike Lord Clarke, therefore, he would not include a person who should not have been convicted because the prosecution was an abuse of process. I agree with Lord Phillips that the object of this particular exercise is to compensate people who cannot be shown to be guilty rather than to provide some wider redress for shortcomings in the system.
>
> 116. I do sympathise with Lord Brown's palpable sense of outrage that Lord Phillips' test may result in a few people who are in fact guilty receiving compensation. His approach would of course result in a few people who are in fact innocent receiving no compensation. I say "a few" because the numbers seeking compensation are in any event very small. But Lord Phillips' approach is the more consistent with the fundamental principles upon which our criminal law has been based for centuries. Innocence as such is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt. This is, as Viscount Sankey LC so famously put it in Woolmington v Director of Public Prosecutions [1935] AC 462, at p 481, the 'golden thread' which is always to be seen 'throughout the web of the English criminal law'. Only then is the state entitled to punish him. Otherwise he is not guilty, irrespective of whether he is in fact innocent. If it can be conclusively shown that the state was not entitled to

> punish a person, it seems to me that he should be entitled to compensation for having been punished. He does not have to prove his innocence at his trial and it seems wrong in principle that he should be required to prove his innocence now."

[44] And Lord Kerr at para178:

> "178. Lord Hope has pointed out that requiring the Secretary of State to apply a test which refers to what a reasonable jury would do is not appropriate since this is a matter best left to the courts. Lord Clarke, on the other hand, suggests that a test which requires the Secretary of State to focus on whether the claimant should never have been prosecuted runs the risk of the inquiry wrongly focusing on the propriety of the decision to prosecute by reference to the circumstances that obtained when the decision was taken. There is substance in both concerns. I believe that a simple test can cater for these concerns and will also faithfully reflect the intention of article 14 (6) and section 133 that only truly deserving applicants should be included in the compensatory scheme. The test which I would have proposed was: whether, on the facts as they now stand revealed, it can be concluded beyond reasonable doubt that the applicant should not have been convicted. Lord Phillips has suggested that the test should be worded in the following way: the new fact shows 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. This appears to me to achieve the same result as the test which I would have proposed and I am therefore quite content to subscribe to his formulation. The proper application of either test ties entitlement to compensation firmly to the true factual situation. Procedural deficiencies that led to irregularities in the trial or errors in the investigation of offences will not suffice to establish entitlement to compensation. A claimant for compensation will not need to prove that he was innocent of the crime but he will have to show that, *on the basis of the facts as they are now known*, he should not have been convicted or that conviction could not possibly be based on those facts.

> Of course, if innocence can be proved, the test, on either formulation, will be amply satisfied."

[45] Finally, Lord Clarke at paras215 – 216:

> "215. I recognise that Lord Phillips rejects category 2 as a test and that he has suggested an alternative test. However, section 133 inevitably requires the Secretary of State to consider the effect of the new or newly discovered fact upon the other evidence before the court and thus on the validity of the conviction. This involves the evaluation of the evidence in its legal context. It also expressly requires the Secretary of State to decide whether in the light of all the evidence the claimant has shown beyond reasonable doubt that there has been a miscarriage of justice. In considering all these questions, the Secretary of State can of course always take such advice as is appropriate. I remain of the view that category 2 is an appropriate formulation of the test and that the position is or should be as stated above. Compensation is only payable where, in the light of the new or newly discovered fact, no reasonable jury, properly directed, could have convicted or, subject perhaps to the point made in para 215 above *(i.e. the original Dyson formula)*, where the new or newly discovered fact would have led the judge to stop the case on the ground of abuse in the trial process."

[46] Thus, it can be concluded after Adams that the definition of a miscarriage of justice for the purpose of s133 should fall within each of these definitions. I would summarize the tests by saying that a miscarriage of justice will have occurred if:

a. the new or newly discovered fact subtracts so greatly from the case against the defendant that the issue would never have passed the threshold test and gone to trial, or
b. having got to trial, the new or newly discovered fact would have so subtracted from the probative value of the evidence tendered against the defendant that it would never have been allowed to be put in front of the jury AND in the absence of that evidence the prosecution case CONCLUSIVELY fell below the threshold burden of proof that it would have been thrown out because there was no case to answer.

[47] If, on the other hand, after the new or newly discovered fact does not destroy the prosecution case as adumbrated above, there shall have been no miscarriage of justice.

'Innocencce' and the implications of a Category 2 Miscarriage of Justice

[48] Although *factually* it may appear that an individual has been proved innocent on appeal due to a new or newly discovered fact, this is not something which the court has any authority to pronounce. Therefore, Lord Dyson's Category 1 must be a legal mirage. Legally, categories 1 – 4 are really points on a sliding scale of the extent to which, for the purposes of miscarriage of justice compensation, a 'not guilty/conviction unsafe' verdict corresponds with a moral/pragmatic/common-sense view that the defendant is in *fact* 'innocent' (albeit presumed so as a matter of law).

[49] Under the category 2 definition in Adams, individuals will be compensated where their trial should never have begun or should have been thrown out because the quality of the evidence was such that no case could have been made out. As Lady Hale says, in these circumstances, the state had no right to prosecute them. Their 'innocence' of the crime should never have been called into question.

[50] The purpose of compensation is to try and 'make up' for a wrong suffered. In Category 2 cases a legal wrong has been suffered and the state should hold itself to account for failing to uphold the rule of law. However, the potential factual consequence of compensation for victims of category 2 miscarriage of justice is discomfiting. As Lord Phillips says at para 55 'This test will not guarantee that all those who are entitled to compensation are in fact innocent'. This is particularly discomfiting as this compensation comes from public monies.

[51] It appears to me that decision makers in this compensation context are up against the limits of the laws ability to do justice in these cases. There is no justice in compensating a guilty man for the sentence he served. However, the court is not omniscient. Factual guilt and innocence are ultimately unknowable in any particular case. However, once it is shown that there was no legal basis for calling an individual's innocence into question in the first place or if an individual was put on trial and convicted in circumstances were it is later proved beyond reasonable doubt that the trial and conviction should never have occurred, S133 exists to ensure that compensation is payable.

[52] In this narrow interpretation of category 2 miscarriage of justice a reasonable balance is met. While justice in any particular case cannot be guaranteed, one can at least be sure that the quality of justice in an overall sense is preserved and the state has the opportunity to hold itself to account for previous failures which will hopefully mitigate against any wrongful payments that may be made.

The Obligations of the Secretary of State in relation to a miscarriage of justice

[53] For clarity then, what is the decision that the Secretary of State must make? If the existence of a category 1 situation or the narrow meaning of a Category 2 situation is proved beyond reasonable doubt, he must conclude that a miscarriage of justice has occurred. In reaching this conclusion he must have due regard to the judgment of the court of appeal and consider all relevant information and discard all irrelevant matters. He must decide for himself, in a lawful manner, whether either of these categories has been proved to the requisite standard.

Newly Discovered Fact

[54] The Supreme Court was unanimous in relation to the definition of a 'Newly Discovered fact'. In the Adams case the applicants contention was that there was material which was not deployed by his representatives in the trial, which, if it had been deployed it may have resulted in the jury not being satisfied of his guilt. The question for the court then was, was the non-deployment of this information a 'newly discovered fact'.

[55] In the Irish legislation which gives effect to Art14(6) a newly discovered fact is defined at s9(6) of the Criminal Procedure Act 1993 as:

> "'newly-discovered fact' means—
>
> (a) where a conviction was quashed by the Court on an application under section 2 or a convicted person was pardoned as a result of a petition under section 7, or has been acquitted in any re-trial, a fact which was discovered by him or came to his notice after the relevant appeal proceedings had been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings…."

[56] Lord Phillips adopted this 'generous interpretation' of the term. He further commented on the rationale of adopting same as follows:

> "62. This proviso is significant in more than one way. First, the use of the word "non-disclosure" would seem to equate the new "discovery" with "disclosure". The latter word has a broad ambit and, in context, suggests to me the bringing of a fact into the public domain and, in particular, the disclosure of that fact to the court. Secondly, I read the provision as excluding a right to compensation where the person convicted has deliberately prevented the disclosure of the relevant fact, or

> where the non-discovery of that fact is otherwise attributable to his own fault.
>
> 63. We are envisaging a situation where a claimant has been convicted, and may well have served a lengthy term of imprisonment, in circumstances where it has now "been discovered" that a fact existed which either demonstrates that he was innocent or, at least, undermines the case that the prosecution brought against him. If he was aware of this fact but did not draw it to the attention of his lawyers, and he did not deliberately conceal it (which would bring the fact within the proviso), this will either be because the significance of the fact was not reasonably apparent or because it was not apparent to him. Many who are brought before the criminal courts are illiterate, ill-educated, suffering from one or another form of mental illness or of limited intellectual ability. A person who has been wrongly convicted should not be penalised should this be attributable to any of these matters. It is for those reasons that I would adopt the same interpretation of "newly discovered fact" as the Irish legislature."

[57] Therefore, a fact will be 'newly discovered' if it is newly brought into the public domain, particularly in relation to disclosure to the court. This will be so *unless* the defendant deliberately did not or prevented the disclosure of the fact to the court. It will even be so if the content of the fact was known to the defendant but he did not know the significance of its content.

[58] Lord Hope opined at para107 that the true focus of Art14(6) and thus s133 was that 'the focus of attention is on what was known or not known to the trial court, not to the convicted person. The assumption is that the trial court did not take the fact into account because it was not known or had not been discovered at the time of the trial. *If this was attributable in whole or in part to the convicted person because he deliberately chose not to reveal what he knew to his defence team compensation must be denied to him. ...* ***Material that has been disclosed to the defence by the time of the trial cannot be said to be new or to have been newly discovered when it is taken into account at the stage of the out of time appeal'***

[59] Lady Hale agreed with Lord Phillips at para117 as did Lord Kerr at para180. Lord Clarke concurred at para229 that 'the relevant knowledge is that of the trial court' and agreed with Lord Hope that 'material disclosed to the defence by the time of the trial cannot be said to have been newly discovered when it is taken into account at the stage of the out of time appeal.' Lord Judges reasoning is that the

relevant knowledge is that of the trial court and Lord Brown and Lord Walker agree with the Lord Judge on this point.

[60] Therefore in the wake of Adams the relevant knowledge is that of the trial court. That is, was the fact in question considered at the trial and, if not, why not?

Applying these definitions to the present cases

Was there a 'new or newly discovered fact'?

[61] It is clear from the facts that are available in both applicants' cases that the details of their detention were not opened for consideration by the trial court for the prosaic reason that both applicants pleaded guilty. Both were legally represented. These were not in my view cases where the relevant facts were not known. Nor were they cases were their significance was not appreciated by the defence legal advisers during their trial. The truth of the matter is that the standards of what was regarded as fair then and what is regarded as fair now in the trial context have, in the intervening decades, undergone a significant transformation. In each case the probability is that the experienced defence lawyers gave sound strategic advice based on their then understanding of what was or was not a winnable trial point. The soundness of that advice is illustrated by the later decision of Lowry LCJ in R v McCaul in 1980 where the Court of Appeal, reflecting the prevailing legal norms, upheld the admission of a confession from a 16 year old youth in circumstances arguably more compelling than the present cases. The strange consequence of the applicants argument is that, if correct, these applicants can secure compensation because they pleaded guilty thus enabling them to say that the relevant facts were newly discovered because they were not opened to the court whereas in the case of McCaul such an argument couldn't be deployed because the defendant pleaded not guilty unsuccessfully relying on similar matters before the trial and appeal court. He is ineligible because he pleaded not guilty and raised the relevant matters at the time whereas the applicants who pleaded guilty and didn't raise the relevant matters are eligible on the basis that the matters were unknown to the court.

[62] The courts of the time were well aware of the circumstances in which people were then detained, inter alia, without legal representatives being present during interview and so forth. The lawyers instructed were also well aware. There was in my view no factual ignorance of relevant matters. It wasn't that their significance was overlooked either. It was rather that the prevailing standards did not invest such matters with the significance with which they are now correctly invested. The facts were always known as was their significance or more accurately their lack thereof. The requirements of a fair trial may have changed as compared with contemporary standards but that is not by itself sufficient to bring the present cases within S133. Indeed if the applicants arguments were correct the compensation gateway would I believe be opened well beyond anything envisaged by S133. This is not a floodgates argument but a recognition of parliamentary intent. It is entirely

unrealistic, having regard to the standards, knowledge and practice of the time, to try and bring these cases under the rubric of a new or newly discovered fact.

[63] The point is I believe reinforced by the CCRC statement of reasons which contains the following synopsis of the case law governing confession statements at the time :

> "Northern Irish case law suggests that, in the late 1970s, a court was unlikely to exercise its discretion to exclude a confession statement in a terrorist case simply because that statement had been obtained in breach of the Judges' Rules. Thus in R v McCormick [1977] NI 105 McGonigal LJ concluded that maltreatment by the investigating officers of an accused person in a terrorist case would not necessarily result in any later statement being ruled inadmissible. In R v McCaul [1980] 9 NIJB Lord Lowry CJ refused to interfere with the trial judge's decision to rule admissible confession statements which had been taken from a 16 year old youth (who was unable to read or write, who was a pupil at a special school and who was said to have a mental age of 7) during an interview or interviews at which no parent or other adult was present, stating: '..it is admitted that the learned trial judge had a discretion to admit or exclude the statements. This court is clearly of the opinion that he asked himself the right question and did not leave out of account anything which he ought to have considered or take (sic) into account anything that he should have disregarded."

Was there a miscarriage of justice?

[64] Clearly there is nothing in any of the materials that would suggest that either of the men fall within category 1. That there is no new or newly discovered fact that undermines the evidence of the trial court that one can be confident that the court of appeal reversal is co-extensive with a factual/moral/common sense belief in the innocence in either man.

[65] What remains to be considered then, is whether there has been a Category 2 miscarriage of justice.

[66] To recall, my summary of the test in Adams is that a Category 2 miscarriage of justice will have occurred where:

a. the new or newly discovered fact subtracts so greatly from the case against the defendant that the issue would never have passed the threshold test and gone to trial, or
b. having got to trial, the new or newly discovered fact would have so subtracted from the probative value of the evidence tendered against the defendant that it would never have been allowed to be put in front of the jury AND in the absence of that evidence the prosecution case CONCLUSIVELY fell below the threshold burden of proof that it would have been thrown out because there was no case to answer.

[67] In both cases the alleged newly discovered fact is the conditions of detainment in particular 'that the appellants were detained and questioned by the police in circumstances which breached the legal rules prevailing at the time.....there were breaches of the Judges' Rules in both cases. Both appellants were young men at the time of their arrest and detention. Neither was given access to legal advice; neither was accompanied by an appropriate adult, and it is quite clear that the circumstances of their detention (and, more specifically the circumstances in which they came to make admissions) constituted a breach of the Judges' Rules.' [From CANI Judgment 2009]. As previously explained I do not accept for the reasons set out that these constitute new or newly discovered facts.

[68] As pointed out in my summary of the test in Adams at para 82(b) above a miscarriage of justice will have occurred where, having got to trial, the new or newly discovered fact would have so subtracted from the probative value of the evidence that it would never have been allowed to be put in front of the jury (or Diplock judge) **and** in the absence of that evidence the prosecution case **conclusively** fell below the threshold burden of proof that it would have been thrown out because there was no case to answer. Even if, contrary to my previously expressed conclusion, the matters relied on constituted a new or newly discovered fact it did not so subtract from the probative value of the evidence tendered against the defendant that it would never have been allowed to be put before the jury/Diplock court. This high threshold has not been met in this case.

[69] For the above reasons, I cannot conclude that a Category 2 miscarriage of justice has not been shown as neither limb a) or b) of my summary of the Adams test have been satisfied. The decisions refusing compensation are not unlawful and the judicial reviews are dismissed.