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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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Magee's (Michael Gerard) Application [2014] NIQB 142

IN THE MATTER OF AN APPLICATION BY MICHAEL GERARD MAGEE FOR JUDICIAL REVIEW

AND IN THE MATTER OF SECTION 133 OF THE CRIMINAL JUSTICE ACT 1998

AND IN THE MATTER OF A DECISION OF 8 JANUARY 2014 BY THE DEPARTMENT OF JUSTICE IN NORTHERN IRELAND

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GILLEN LJ

Introduction

[1] The applicant is Michael Gerard Magee who in this matter challenges the decision of 8 January 2014 of the Department of Justice (the respondent) refusing his application for compensation pursuant to s. 133 of the Criminal Justice Act 1988 (the 1988 Act).

[2] The applicant seeks a declaration that the decision was unreasonable, unlawful and void and also an order of certiorari quashing the decision of the Department. Leave was granted by this court on 5 June 2014.

Statutory background

[3] Section 133(1) of the Criminal Justice Act 1988 provides as follows:

> "133. Compensation for miscarriages of justice
>
> (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.….
>
> (3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State."

[4] Also of relevance is Section 133(5) which, where relevant, provides as follows:

> "(5) In this section 'reversed' shall be construed as referring to a conviction having been quashed—
> (a) on an appeal out of time; or
>
> (b) on a reference—
>
> (i) under the Criminal Appeal Act 1995.
> …"

[5] The concept of miscarriage of justice, for reasons which will become clear in the course of this judgment, does not arise for determination in this case. I observe however that with effect from 13 March 2014, under the provisions of section 175 of the Anti-Social Behaviour, Crime and Policing Act 2014, section 133 of the 1988 Act has been amended in the following fashion:

> "175. Compensation for Miscarriages of Justice
>
> (1) In Section 133 of the Criminal Justice Act 1988 (Compensation for Miscarriages of Justice) after sub-section (1) there is inserted –
>
> (1ZA) For the purposes of sub-section (i), there has been a miscarriage of justice in relation to a person convicted of a criminal offence in … Northern Ireland, if and only if, the new or newly discovered facts show beyond reasonable doubt that the person did not commit the offence (and references to the rest of this Part to a miscarriage of justice are to be construed accordingly).

Background facts

[6] On 21 December 1990 the applicant was convicted of a number of scheduled offences before a judge sitting without a jury at Belfast Crown Court. The evidence against the appellant consisted of oral admissions and a written statement made by him during police questioning at Castlereagh Holding Centre ("Castlereagh"). He had made a specific request to see a solicitor on arrival at Castlereagh. The decision had been taken to delay his access to a solicitor and he was questioned for more than 48 hours without such access. The applicant's defence had been that he had suffered ill-treatment from interviewing police officers. The trial judge rejected these allegations of mistreatment and the applicant failed to make out the case that the statements of admission should be excluded. The applicant did not make out the case before the trial judge that the statement should be excluded on the basis that the police operated a general intimidatory environment at Castlereagh or that he had been denied access to a solicitor. He was sentenced to 20 years imprisonment.

[7] He unsuccessfully appealed to the Northern Ireland Court of Appeal on 16 June 1993. Once again no particular objection was taken to the absence of a solicitor during the interview process or to the intimidatory regime at Castlereagh or the conditions of detention therein.

[8] The appellant instituted proceedings before the European Court of Human Rights alleging a breach of Articles 3 and 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act) ("the Convention").

[9] The European Court held on 6 June 2000 that in the circumstances of his detention there had been violation of Article 6(1) read in conjunction with Article 6(3)(c) because he had been denied access to a solicitor during his detention. The court considered that the central issue raised by the applicant's case was his complaint that in a coercive environment in Castlereagh he had been prevailed upon to incriminate himself without the benefit of such legal advice.

[10] Paragraph 43 of the judgment of the European Court stated:

> "Apart from his contacts with the doctor, the applicant was kept incommunicado during the breaks between bouts of questioning, conducted by experienced police officers operating in relays. It sees no reason to doubt the truth of the applicant's submission that he was kept in virtual solitary confinement throughout this period. The court has examined the findings and recommendations of the European Committee for the Prevention of Torture

> and Inhuman or Degrading Treatment and Punishment in respect the Castlereagh Holding Centre … It notes that the criticism which the CPT levelled against this centre has been reflected in other public documents. The austerity of the conditions of his detention and his exclusion from outside contact were intended to be psychologically coercive and conducive to breaking down any resolve he may have manifested at the beginning of his detention to remain silent. Having regard to those considerations the court is of the opinion that the applicant, as a matter of procedural fairness, should have been given access to a solicitor at the initial stages of the interrogation as a counterweight to the intimidating atmosphere specifically devised to sap his will and make him confide in his interrogators. Irrespective of the fact that the domestic court drew no adverse inferences under Article 3 of the 1988 Order, it cannot be denied that the Article 3 caution administered to the applicant was an element which heightened his vulnerability to the relentless rounds of interrogation on the first days of his detention.
>
> 44. In the court's opinion, to deny access to a lawyer for such a long period and in a situation where the rights of the defence were irretrievably prejudiced is – whatever the justification for such denial – incompatible with the rights of the accused under Article 6 …"

[11] On 25 July 2000 the Criminal Cases Review Commission(the CCRC) referred the applicant's case back to the Court of Appeal in Northern Ireland pursuant to Section 10 of the Criminal Appeal Act 1995.

[12] On 6 April 2001, the Court of Appeal quashed the applicant's conviction as unsafe: R v Magee (2001) NI 217. At p228h et seq and p231g respectively Carswell LCJ said:

> "…….. In this reference we have to consider the effect of the argument now put before us, which was not advanced to the trial judge, that he should have exercised his discretion to refuse to admit the statements made by the appellant on the ground that it was unfair in all the circumstances of the case, and taking into account the atmosphere of Castlereagh, to decline to allow him access to legal advice for the

period of forty eight hours after his arrest. Such an argument could not have succeeded if made at the time of the appellant's trial in 1990 or his appeal to this court in 1993. Parliament had by enacting section 15 of the Northern Ireland (Emergency Provisions) Act 1978 and its successor at section 45 of the 1991 Act specifically authorised the deferment of access to legal advice in certain circumstances for a maximum period of time. The courts therefore could not interpret section 8(3) of the 1978 Act or its successor as giving authority to exclude a statement made by the person detained, which would have defeated the will of Parliament: see *Re Russell's Application* [1996] NI 310 at 323 and 336, per Hutton LCJ. Since the trial judge was not asked to exercise his discretion to exclude the statements on the ground of denial of access to legal advice, this court as an appellate tribunal has now to exercise the discretion conferred on him: see, eg, R v Docherty [1999] 1 Cr App R 274 at 281. If the law applying in 1990 had remained unchanged to the present time, we should be bound to reach the same conclusion that we could not exclude the statements on that ground.

The legal landscape has, however, been fundamentally changed by the enactment of the Human Rights Act 1998, which is now in force. By section 7(1)(b) the appellant is entitled to rely on his Convention rights set out in Article 6 in any legal proceedings (which by section 7(6) includes an appeal against the decision of a court). By section 22(4), section 7(1)(b) applies to proceedings brought by or at the instigation of a public authority whenever the action in question took place. Section 2(1)(b) requires the court determining a question which has arisen in connection with a Convention right to take into account any judgment of the ECHR."

" … It is probably fair to say that the appellant's advisors would have been well aware that to attempt at trial to found a case on lack of legal advice or conditions in Castlereagh would have had no chance of success and so did not advance such a ground for exclusion of the statements. …"

[13] The court went on to conclude that in determining the appeal the court had to judge the safety of the conviction by applying the standards of today accepting the correctness of the decision in R v Bentley (1999) Criminal Law Review 330 and R v Johnston (2002) All ER (D) 2026. The court came to the conclusion that in light of the European ruling and its own analysis, the conviction was unsafe.

[14] On 24 June 2002 the applicant applied to the Secretary of State for Northern Ireland for compensation for a miscarriage of justice pursuant to Section 133 of the Criminal Justice Act 1988. This application was refused by the Secretary of State on 6 December 2002 on the ground that the statutory test had not been met.

[15] That decision was challenged in an application for judicial review and dismissed by Girvan J on 16 December 2004. An appeal against this was refused by the Court of Appeal on 7 June 2007.

[16] On 11 May 2011 the Supreme Court of the United Kingdom (UKSC) delivered judgment in the case of R(Adams) v Secretary of State for Justice; in Re McDermott & McCartney [2011] UKSC 18(Adams' case). I shall deal with the salient issues in this case later in this judgment but suffice it is to say at this stage that the applicant contends that in light of that judgment and the interpretation of s.133 of the 1988 Act contained therein the applicant can now pass the statutory test to satisfy his claim for compensation under the terms of the legislation.

[17] The respondent took the view that it did not have power to entertain an application for the re-opening of the old application but this decision was quashed on 8 March 2012 before Stephens J.

[18] The respondent department reconsidered the matter and finally on 8 January 2014 refused the application for compensation on the ground that there was no "new or newly discovered "fact even on the enhanced interpretation of that phrase set out in Adams' case .

The Authorities

[19] I pay tribute to the care, thoroughness, scholarly analysis and brisk efficiency which Ms Quinlivan QC, who appeared on behalf of the applicant with Mr Hutton, and Mr Coll, who appeared on behalf of the respondent, had invested in their respective arguments both written and oral. They cited a number of cases which provided a rich terrain for authoritative interpretation of the 1988 Act. I have harvested from that array of cases those that I have found most instructive:

R v Secretary of State for the Home Department ex parte Bateman and Howse (1994) 7 Admin LR 175

[20] Ms Howse had been convicted for breaches of certain by-laws which subsequently were declared ultra vires and invalid by the House of Lords. Her

convictions having been quashed, her application for compensation under the legislation was refused in judicial review. Mr Bateman, having been convicted of dishonesty offences, had his convictions overturned in the Court of Appeal on a reference on the grounds that statements of witnesses had been wrongly admitted in the evidence at his trial. He challenged a refusal of compensation under the relevant legislation by judicial review.

[21] At page 182G Sir Thomas Bingham MR said in the Court of Appeal:

> "Both Ms Howse and Mr Bateman argue that there was, in each of their cases, a new or newly discovered fact. Ms Howse points to the overruling of the regulations as ultra vires as the new or newly discovered fact in her case. Mr Bateman points at the ruling that the evidence should not have been admitted. In each case the ground of reversal was not in my judgment the discovery of a new or newly discovered fact, but a legal ruling on facts which had been known all along."

Re McFarland's Application (2004) NI 380

[22] In this matter, during the course of an inappropriate meeting between counsel for the applicant and the magistrate, it was indicated by the magistrate that if the defendant contested the case it would be referred to the High Court for sentencing and thus the sentence might be appreciably more than if the matter was determined before the Magistrates' Court. On foot of this, Mr McFarland pleaded guilty but subsequently successfully challenged his conviction on judicial review on the grounds of the magistrate's behaviour with the conviction being quashed. He sought compensation under the ex gratia scheme since his conviction had not been "reversed" in the sense indicated in section 133(5) of the 2008 Act. Notwithstanding this, section 133 was the focus of attention at the hearing in which he contested the refusal of compensation. The case eventually reached the House of Lords where at paragraph [11] Lord Bingham said:

> "Mr McFarland did not know at the time that the magistrate had misunderstood his committal power but this, even if a newly discovered fact, was not the ground on which the conviction was quashed: the magistrate's intimation would have been no less objectionable had he had the power which he believed himself to have. …. As was said by the Court of Appeal in R v Secretary of State for the Home Department, ex parte Bateman ….

> '.. The ground of appeal of the reversal was not .. the discovery of a new or newly discovered fact, but a legal ruling on facts which had been known all along'."

R (Adams) v Justice Secretary: Re McDermott and McCartney's Applications (2011) NI 42

[23] Much ink has been spilt and time invested dissecting the judgments in this case. Following a reference by the CCRC, Adams' conviction for murder had been quashed on the grounds that crucial evidence in the case had been given by a witness who, unknown to the accused, had struck a deal with the police. His defence legal team had overlooked information containing this fact in documents disclosed by the prosecution and accordingly this matter was not raised at the trial. The refusal of the Secretary of State to award him compensation under Section 133 made its way to the House of Lords where inter alia, the issue of "new or newly discovered fact" was considered.

[24] At paragraphs [55], [60] and [63] Lord Phillips said:

> "55. …. 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 on it. This is a matter to which the test of satisfaction beyond reasonable doubt can readily be applied. The 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."
>
> 60. Ireland has given effect to Article 14.6 by Section 9 of the Criminal Procedure Act 1993. Section 9(6) of that Act provides:
>
> > '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….'
>
> I would adopt this generous interpretation of 'newly discovered fact'.
>
> 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 these reasons that I would adopt the same interpretation of 'newly discovered fact' as the Irish legislature."

[25] Lord Judge, one of four dissenting voices in the overall result of the two conjoined appeals, said of the concept of "new or newly discovered fact" at paragraph [266]:

> "… It therefore follows that merely because the defendant himself is personally ignorant of a particular fact, it is not 'new' or 'newly discovered' when the defendant personally ceases to be ignorant of it. On the other hand, when the prosecution has complied with all its obligations in relation to disclosure of material to the defence lawyers, and they, for whatever reason, do not deploy material which appears to be adverse to the prosecution and which would assist the defendant, that material

> should not automatically be excluded from the ambit of the section on the basis of prosecutorial compliance with its disclosure obligations. Rather the approach should coincide with the circumstances in which fresh evidence is sought to be deployed before the court in accordance with Section 23 of the Criminal Appeal Act 1968. This normally predicates that there should be a reasonable explanation for the earlier failure to adduce the evidence at the trial.
>
> [267] In the present case, it is clear from the judgment of the Court in Adams that the conviction was quashed on the basis of fresh evidence in circumstances in which, notwithstanding that the prosecution had fully performed its responsibilities in relation to disclosure, Adams's legal team had failed adequately to respond and fulfil theirs. In my judgment that failure or omission was a new or newly discovered fact within the ambit of Section 133."

[26] Lord Brown expressly agreed with Lord Judge's approach on the new or newly discovered fact issue (see paragraph [282]), Lord Rodger agreed with Lord Brown and Lord Walker agreed with Lord Judge and Lord Brown.

[27] This spread of opinion has led Davis LJ to remark in Re Andukwa v Secretary of State for Justice [2014] EWHC 3988 at [53]:

> "The approach of Lord Phillips to and his conclusions as to the meaning and effect of, 'new or newly discovered fact' as used in s. 133 was not, as I see it, the approach of the majority on this particular issue."

R v Brown and Others [2012] NICA 14

[28] These were appeals on a reference from the CCRC in cases where the appellants, charged with serious offences, had been convicted on the basis of admissions extracted when the appellants were 15 or 16 in circumstances where they had no access to a solicitor during their detention before making their admissions. None was accompanied by a parent or independent person during interview. At paragraph [18] Morgan LCJ said:

> "The cases to which we have referred demonstrate that admissions made in breach of the Judges' Rules were admissible under the Emergency Provisions legislation unless obtained by torture or inhuman or degrading treatment. The residual discretion to

> exclude such admissions would not be exercised to render statements obtained in breach of the Judges' Rules inadmissible on that ground only. That was the law at the time of these trials. None of the parties before us contended that this was a change of case law although all parties recognised that the standards of fairness had significantly altered as a result of legislative changes arising from PACE and the Human Rights Act 1998.
>
> [19] In their oral submissions, all of the appellants accepted that the statements of admission were properly admitted applying the standards of fairness appropriate at the time of these trials. We consider that the question of admissibility has to be judged both now and then against the background of the legislative regime put in place under the Emergency Provisions legislation."

[29] I pause to observe that this case carries an echo of the judgment of Lord Carswell in the applicant's Court of Appeal hearing in 2001 (see paragraph 12 of this judgment).

Re Fitzpatrick and Another [2013] NICA 66

[30] In these two related appeals, the defendants, being 16 years old at the time, had pleaded guilty to serious offences. They had made admissions to police notwithstanding they had not been afforded access to either legal advice or an appropriate adult when interviewed in breach of the applicable Judges' Rules. Their cases, years later, were referred by the CCRC to the Court of Appeal who quashed the convictions. Subsequently each claimed compensation under Section 133 of the 1988 Act and challenged by judicial review the refusal of the Department of Justice to award them compensation.

[31] At paragraph [23] Girvan LJ said:

> "There is a clear distinction between the correction of a conviction because of new factual material not known at the trial and the correction of a conviction because of a different view on the law as applied to the same factual situation which was known to the trial court.
>
> [24] …. A change in legal standards subsequent to the trial and conviction of a person whose conviction was in accordance with the law at the time of the trial

> cannot be viewed as the discovery of a new fact demonstrating that a miscarriage of justice has occurred for the purposes of Section 133. What Section 133 contemplates is the discovery of an evidential based piece of factual material which, if it had been known at the time of trial, would have demonstrated that there was no case against the defendant that would stand up to proper legal scrutiny."

[32] Girvan J cited with approval what had been said on this matter in Bateman's case and McFarland's case.

R (On the Application of Simon Ebunji Andukwa and the Secretary of State for Justice) [2014] EWHC 3988 (QB)

[33] This case was drawn to my attention by counsel subsequent to the conclusion of this case and very shortly before I was due to hand down the judgment. Consequently I delayed judgment to afford the parties an opportunity to comment thereon. The case concerned an applicant who had pleaded guilty to an offence of possession of a false identity card with intent and was sentenced to a period of imprisonment by the Crown Court. Some years later it was identified that he all along may have had a good defence under Section 31 of the Immigration and Asylum Act 1999, a point not appreciated by anyone at the time. On reference by the CCRC, the Court of Appeal quashed the conviction. The applicant was refused compensation under Section 133 of the Criminal Justice Act 1988 and sought judicial review of the matter before Davis LJ and Stewart J.

[34] Davis LJ said at paragraphs [73] and [74]:

> "[73]……..The judgment (*Fitzpatrick's case)* states in terms that, for the purposes of S.133, the discovery of a new fact can only refer to a fact of an evidential nature. It states in terms that on facts known at trial an erroneous argument on the law by the defendant's lawyers can ground no claim thereafter for compensation. It emphasises the distinction between the correction of a conviction because of a new factual material not known at trial and the correction of a conviction because of a different view in the law applied to the same factual situation known at trial.
>
> [74] This court is not formally bound, I apprehend, by the decision in Fitzpatrick and Shiels. But when it comes to this reserved decision of the Court of Appeal of Northern Ireland, where the authorities were fully addressed and the judgment was fully reasoned, I

> simply would not be prepared to differ from it, at least unless I was convinced that it was wrong, I am not prepared to differ from it. On the contrary, I think, if I may respectfully say so, that the decision was right."

The Submissions

[35] The submissions of counsel can be briefly stated. Ms Quinlivan submitted:

- Lord Phillips' broad definition in Adams allows for circumstances wherein the relevant "new fact" operates so as to undermine other evidence in the case and render that evidence unreliable/a miscarriage of justice. If the new fact had not been appreciated and as a result it had not been disclosed to the original trial court then the applicant was not to blame and it remained a new fact.

- Lord Judge's approach was that the question of a new fact should be analogised to the treatment given to the introduction of "fresh evidence" on a criminal appeal.

- A new fact therefore need not operate in isolation in order to satisfy the subsection. A new fact that allows the introduction of legal argument as to what is admissible is capable of satisfying the subsection of 133 provided that the facts giving rise to the legal argument are prima facie new facts discovered/disclosed to the court. The denial of legal advice in the particular circumstances of the oppressive regime in Castlereagh Holding Centre were such new facts.

- Fitzpatrick's case can be distinguished not only because that involved pleas of guilty but also because the instant case involved newly discovered material which was not discovered to the original court which is the only relevant body to whom the material must be "new". In the instant case it was newly opened only to the Court of Appeal in 2001. Counsel distinguished Andukwa where there had been a fresh legal argument on facts known all along to the court and thus s133 was not engaged.

- The safety of the convictions is to be judged according to the standards which now apply. To adopt a separate approach in the instant case would be to deny the notion that any change in law should apply to all subsequent and pending proceedings. The Minister should not form conclusions that are in conflict with the Court of Appeal.

[36] Mr Coll contended:

- The applicant's convictions were not quashed on the basis of new or newly discovered facts. It was the later significance of the legal effect of the denial of access to solicitor/conditions at Castlereagh which were crucial rather than the significance of the facts themselves as understood at the time of the trial/appeal.

- The alleged new facts are not in fact "new facts" but rather they are constants that were ever present. The wider law and legal standards have changed with the effect that they have taken on a significance that they did not have at the relevant time.

- Anduka's case identified that even an error of law by a trial judge would not be enough to ground a claim for compensation if the facts were known and hence there is no reason why a subsequently identified error as to the law by the defendant's advisers should be a basis for compensation.

Conclusion

[37] I consider that this application must be dismissed for the following reasons.

[38] I commence with two axioms. First, in this case, the alleged newly discovered facts – refusal to grant access to a solicitor and the coercive atmosphere in Castlereagh – were known to the applicant and his lawyers at the time of the trial and the subsequent appeals.

[39] Secondly the legal effects and significance of these facts were known as they existed at the time. As Carswell LCJ outlined in the decision of the Court of Appeal in 2001 (see paragraphs [12] and [28]-[29] of this judgment), any argument based on them could not have succeeded by virtue of Section 15 of the Northern Ireland (Emergency Provisions) Act 1978. As he indicated, the appellant's advisors would have been well aware that to attempt at trial to found a case on such matters would have had "no chance of success and so did not advance such a ground for exclusion of the statements".

[40] Accordingly this is not a case where either the facts themselves or the significance of the facts *at the time of the trial* had not been discovered.

[41] Ms Quinlivan's argument that these facts were not known to the court is of no substance. In doing so she seeks to extract more from Adams' case than it has to offer. It seems inescapable that if these facts were not known to the court it was because counsel recognized that to raise them would have been a waste of time and indeed, even had the court been aware of them, they would not have influenced in any way the outcome of the trial at that time. The court would have been bound to respond as adumbrated by Carswell LCJ. Any other conclusion would have been beyond its legal reach. To accede to the applicant's assertion would therefore be contrary to the current inclination of all the relevant authorities.

[42] This is not one of the cases where counsel had overlooked the matter or misunderstood the law. Nor is it a case where the court would have reacted any differently if the material had been raised. It was an instance where, as in Bateman's case, the ground of the reversal was not the discovery of new or newly discovered facts but a legal ruling on facts which had been known all along, or which would have made not the slightest difference to outcome if raised, that led to the quashing of the conviction.

[43] Unlike Adams' case, this is not an instance where the person convicted or his counsel did not know or did not appreciate the significance of the information in question. They fully appreciated it but, rightly in the view of the Court of Appeal, concluded that there was no chance of it succeeding. The significance of the information was that it had no significance. This was not an erroneous argument on the law or even a legal oversight made by the defendant's lawyers. It is not a case of counsel failing to grasp the significance of the points or the court being deprived of a significant fact. It therefore does not fall within the wider definition adumbrated by Lord Phillips or for that matter Lord Judge's fresh evidence approach in Adams' case.

[44] The instant case is an illustration-- as in Fitzpatrick's case-- of where a change in legal standard subsequent to the trial and conviction of an applicant whose conviction was in accordance with the law at the time of trial cannot be viewed as the discovery of a new fact demonstrating that a miscarriage of justice has occurred for the purposes of section 133 of the 2008 Act. These facts were not evidential based pieces of factual information which, if they had been known at the time of trial, would have demonstrated no case against the defendant that would have stood up to proper legal scrutiny.

[45] In all the circumstances therefore I dismiss this application.