Neutral Citation No: [2023] NIKB 53 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **COL12092** *ICOS No:* **22/021509/01** *Delivered:* **28/04/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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

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

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

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COLTON J

Introduction

[1] I am obliged to counsel in this case for their helpful written and oral submissions.

[2] By these proceedings the applicant challenges the decision of the Department of Justice ("the DOJ") communicated by letter dated 15 December 2021 by which it concluded that the applicant is not eligible for compensation for miscarriage of justice under section 133 of the Criminal Justice Act 1988 ("the 1988 Act").

The factual context

[3] In 1975, the applicant was convicted of offences of attempting to escape from detention.

[4] In 2020, those convictions were quashed by the Supreme Court on an appeal out of time: *R v Adams* [2020] UKSC 19.

[5] The detention from which the applicant attempted to escape was founded on an interim custody order ("ICO") dated 21 July 1973, purportedly made under Article 4 of the Detention of Terrorists (Northern Ireland) Order 1972. Such detentions were more commonly referred to as "internment without trial."

[6] The ICO, which was signed by the Minister of State, included the following rehearsal:

> "**The Secretary of State** in pursuance of Article 4(1) of the Detention of Terrorists (Northern Ireland) Order 1972, herby orders the detention of:
>
> Gerard ADAMS, 18 Harrogate Street, Belfast
>
> being a person suspected of having been concerned in the commission or attempted commission of an act of terrorism or in the direction, organisation or training of persons for the purpose of terrorism."

[7] More than four decades after his convictions, the applicant sought and was granted an extension of time within which to appeal. When the appeal reached the Supreme Court, Lord Kerr noted at [4]-[6] that:

> "4. At stake on this appeal is the validity of the ICO made on 21 July 1973. Although an ICO could be signed by a Secretary of State, a Minister of State or an Under Secretary of State, the relevant legislation provided that the statutory power to make the ICO arose 'where it appears to the Secretary of State' that a person was suspected of being involved in terrorism. There is no evidence that the Secretary of State personally considered whether the appellant was involved in terrorism. On the assumption (which is common to the parties to the appeal) that he did not, the question arises whether the ICO was validly made.
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> 5. The reason that this matter has come to light so many years after the appellant's convictions is that under the '30-year rule' an opinion of JBE Hutton QC (later Lord Hutton of Bresagh) was uncovered. …
>
> 6. Mr Hutton was the legal adviser to the Attorney General when he gave his opinion. It was dated 4 July 1974 and responded to a request for directions in relation to a proposed prosecution of the appellant and three others involved in the attempted escape on 24 December

> 1973. Mr Hutton concluded that a court would probably hold that it would be a condition precedent to the making of an ICO that the Secretary of State should have considered the matter personally."

[8] The appeal was advanced on the basis that an ICO under Article 4(1) of the 1972 Order, required it to be made by the Secretary of State, on personal consideration of the case of the person in respect of whom the order was to be made. It was contended that the condition precedent of the Secretary of State's personal consideration was not established in evidence at the applicant's trial, and that his convictions were, accordingly, unsafe.

[9] Material disclosed in advance of the applicant's appeal confirmed that, in fact, the Secretary of State had not given personal consideration to the applicant's case. That material was a "note for the record" dated 17 July 1974 concerning a meeting held by the Prime Minister, Mr Wilson. The note stated:

> "The Attorney General explained that following a recent attempt to escape by four prisoners from the Maze Prison, an examination of the papers concerning those prisoners revealed that applications for interim custody orders concerning three of them had not been examined personally by the previous Secretary of State for Northern Ireland, during the Conservative administration."

[10] Finally a further document was disclosed headed "Legality of ICOs", dated 19 July 1974. The note records that "the Attorney General is prepared to rely on the presumption of law that any instrument which appears on the face to have been properly executed (as these ICOs do) must be assumed to comply with any necessary prior procedures." It was on this basis that the decision was made to proceed with the prosecution against the applicant.

[11] The Court of Appeal dismissed the applicant's appeal: [2018] NICA 8. The court agreed with the contention that the *Carltona* principle applied and that the Minister of State was entitled to make the decision to issue the ICO. Weatherup LJ, giving the judgment of the court, said at para [51]:

> "[51] This court has not been satisfied that there is material or information available that displaces the *Carltona* principle. Accordingly, we are satisfied that the decision to make the ICO could have been made by an appropriate person on behalf of the Secretary of State. We are satisfied that the Minister was an appropriate person."

[12] At the appeal hearing, as an alternative to reliance on the *Carltona* principle in resisting the appeal the respondent also relied on the presumption of regularity by

which the ICO signed by the Minister in accordance with Article 4(2) was sufficient to satisfy the presumption on the face of the document that it was lawfully made in the absence of proof to the contrary.

[13] On this issue the Court of Appeal made clear at para [54] that, had it found in favour of the applicant's argument on *Carltona*, it would have rejected the respondent's resistance to the appeal on the basis of the presumption of regularity:

> "The presumption is that all things are presumed to have been lawfully done, unless proved to the contrary. However, this presumption is displaced where there is evidence to the contrary. In the present case it is apparent that the Secretary of State did not consider the appellant's case on the making of the ICO. Accordingly, the respondent may not rely on the presumption of regularity as to the making of the ICO by the Secretary of State personally."

[14] At the Supreme Court the respondent's argument based on the presumption of regularity was abandoned.

[15] The applicant's convictions were quashed by order of the Supreme Court in accordance with its judgment delivered on 13 May 2020.

[16] Lord Kerr, delivering the unanimous judgment of the court analysed the relevant legislation as follows:

> "**The relevant legislation**
>
> [28] Article 4(1) of the 1972 Order provides:
>
> > 'Where it appears to the Secretary of State that a person is suspected of having been concerned in the commission or attempted commission of any act of terrorism or in the direction, organisation or training of persons for the purpose of terrorism, the Secretary of State may make an order (hereafter in this Order referred to as an 'interim custody order') for the temporary detention of that person.'
>
> [29] The language in this paragraph is clear and precise. Its apparent effect is unambiguous. It is the Secretary of State who must consider whether the person concerned is suspected of being involved in terrorism etc. Absent the possible invocation of the *Carltona* principle,

there could be no doubt that resort to the power to make an ICO was reserved to the Secretary of State alone.

[30] Article 4(2) provides:

> 'An interim custody order of the Secretary of State shall be signed by a Secretary of State, Minister of State or Under Secretary of State.'

[31] Considered together, paragraphs 1 and 2 of article 4 have two noteworthy features. First there is the distinct segregation of roles. In paragraph 1 the making of the Order is provided for; in paragraph 2, the quite separate function of signing the ICO is set out. If it had been intended that the *Carltona* principle should apply, there is no obvious reason that these roles should be given discrete treatment. It would have been a simple matter to provide in paragraph 1 that the Secretary of State 'may make [and sign]' an ICO. The question therefore arises, why was provision made for the different roles in two separate paragraphs of the article. The answer appears to me to be self-evident: it was intended that the two functions called for quite distinct treatment.

[32] The second noteworthy feature of article 4(2), when read together with 4(1), is that the ICO to be signed is that of the Secretary of State. Why would this stipulation be required if an ICO could be made by a minister of state? Why not simply state that, 'An interim custody order … shall be signed by a Secretary of State, Minister of State or Under Secretary of State?' The use of the words, 'of the Secretary of State' surely denotes that the ICO is one which is personal to him or her, not a generic order which could be made by any one of the persons named in paragraph 2. If a minister of state made the ICO and then signed it, could he be said to sign the order of the Secretary of State? Surely not."

[17] Having concluded that the segregation of the two functions (the making and signing of ICOs) could not be other than deliberate, Lord Kerr allied this analysis to the consideration that "the power invested in the Secretary of State by Article 4(1) was a momentous one." He pointed out that:

> "[38] The provision did nothing less than give the Secretary of State the task of deciding whether an

> individual should remain at liberty or be kept in custody, quite possibly for an indefinite period."

Lord Kerr concluded:

> "[41] The making of the ICO in respect of the appellant was invalid. It follows that he was not detained lawfully. It further follows that he was wrongfully convicted of the offences of attempting to escape from lawful custody and his convictions for those offences must be quashed."

The application for compensation

[18] Following the reversal of his convictions, by letter dated 25 June 2020, the Minister of Justice was advised that the applicant sought compensation for miscarriage of justice under section 133(1) of the Criminal Justice Act 1988.

[19] Section 133(1) which enacts Article 14(6) of the International Covenant on Civil and Political Rights 1966, imposes a duty on the DoJ to pay compensation:

> "… when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction ..."

Section 133(6A) provides that in relation to a person convicted in Northern Ireland of a criminal offence, in sub-sections (i)-(iv) any reference to the Secretary of State is to be read as a reference to Department of Justice in Northern Ireland.

Refusal

[20] By letter dated 15 December 2021 the DoJ confirmed its view that compensation should be refused in the applicant's case.

[21] To fully understand the reasoning behind the decision this letter should be read in conjunction with an earlier letter of 10 June 2021. That letter records:

> "Therefore, the identified issue was one relating to the test for conviction rather than whether new or newly discovered evidence undermined the evidential basis for the conviction.

> Nor is the discovery in 2009 of the opinion of Senior Crown Counsel a new or newly discovered fact. It may have served to bring the matter to your client's attention and highlighted the pre-existing legal argument, but it did not by itself lead to the quashing of the conviction. The conviction was quashed on foot of a subsequent legal ruling (prophesised in the opinion) by the Supreme Court that personal consideration by the Secretary of State had been required and then following from that and based upon the omnipresent fact that there was no such evidence, the charges were fatally flawed and quashed.
>
> In other words, the operative basis of the quashing is an interpretation of what is required in law as opposed to a new or newly discovered fact. All that is new in this case is that in 2009 your client gained insight into that potential legal argument by then seeing it set out in Senior Crown's Counsel's opinion. The operative factor in the quashing of the conviction was a fact, it was not a new or newly discovered fact as it would have been known to your client (and indeed the court itself) from the time of the trial that there was no evidence before court of personal consideration by the Secretary of State.
>
> Even if the 2009 discovery were to amount to a new or newly discovered fact, the convictions were not quashed on the ground of that fact and that fact of itself does not show beyond reasonable doubt that there has been miscarriage of justice. The reality is that in 1975, in 2009, and up to 2020 that there was no evidence before the court of personal consideration by the Secretary of State. Accordingly, the fundamental basis on which the convictions were quashed was the ruling by the Supreme Court on the legal issue, as opposed [to] what you submit to be a newly discovered fact that there had been no personal consideration by the Secretary of State."

[22] I note that in the letter of 10 June 2021 the Department erroneously stated that "It cannot definitively be said that the Secretary of State did not consider (the ICO)." In its final letter of 15 December 2021, the Department accepted that this was incorrect. In doing so the letter of 15 December continued:

> "… This does not detract from the crux of the matter, which is whether the convictions were quashed on the ground that a new or newly discovered fact shows

beyond reasonable doubt there has been a miscarriage of justice …"

[23] The letter of 15 December 2021 then proceeds to set out the reasoning behind the decision as follows:

> "You hold that the newly discovered fact in your client's case is that 'the Minister of State who signed the ICO did so without the case being considered by the Northern Ireland Secretary and according to the Supreme Court judgment this was held to be unlawful.' However, at the time of the trials and the convictions it was the case that there was no evidence before the court for such personal consideration by the Secretary of State. All that is 'new' is that the Supreme Court has made a legal ruling that this personal consideration by the Secretary of State had been required by the legislation. This gives rise to the apparent lacuna in the evidence adduced at the trial. Following from that and based upon the omnipresent fact that there was no such evidence, the convictions were fatally flawed and quashed by the Supreme Court.
>
> It is of course important to recall here that the applicant does not suggest that a positive case was made in the trials that the Secretary of State had in fact given personal consideration, and that the actual position that he had not done so had only come to light at some later point as a result of a new or newly discovered fact. Indeed, in the out of time criminal appeal process it was accepted that there was no evidence of personal consideration by the Secretary of State and there was an assumption common to the two parties to the appeal that he had not done so. (see Supreme Court judgment, para 4).
>
> The Department maintains that the identified issue in respect of which the convictions were overturned is one relating to whether the evidential test for conviction had been properly made out in law rather than whether a new or newly discovered fact undermined the evidential basis for the convictions. The reasoning advanced to that effect in my letter of 10 June still applies and there is nothing in your letter of 6 July which serves to alter this view. This is further borne out by reference to the grounds of appeal relied upon by your client and noted

at paragraph 24 of the judgment of the Court of Appeal, in particular ground 1(iv):

> 'The prosecution failed to adduce proof of the above condition precedent to the making of the interim detention order under which the applicant was held; in the absence of any such proof the conviction of the appellant was wrong in law on the evidence available to the learned trial judge.'

The operative factor in the quashing of the convictions was the legal ruling in the Supreme Court that personal attention by the Secretary of State was an essential requirement of the lawful making of the ICO. That is not a new or newly discovered fact. Alternatively, if the operative factor in the quashing of the convictions could be construed as amounting to a fact, it is not a new or newly discovered fact because at the time of the trials there was an absence of evidence of personal consideration by the Secretary of State (paragraph 4 of the Supreme Court judgment).

In conclusion our position is that your client's conviction was quashed on the basis of a legal ruling on facts known all along, and not on the ground that a newly discovered fact shows beyond reasonable doubt that there has been a miscarriage.

I therefore confirm the Department determines that Gerard Adams is not eligible for compensation under section 133."

The applicable law

[24] As a starting point it is important to understand that it is for the Secretary of State (in this jurisdiction the Department of Justice) to decide whether the requirements of section 133 are satisfied.

[25] Thus, section 133(3) provides:

> "The question whether there is a right to compensation under this section shall be determined by the Secretary of State."

[26] Section 133 was considered by the Supreme Court in *Re McCartney and MacDermott's Applications* [2012] AC 47. These were appeals from this jurisdiction heard together with the case of *R(Adams) v Secretary of State for Justice*.

[27] In the *McCartney and MacDermott* judgment Lord Phillips who delivered the leading judgment in considering the nature of the exercise at hand says at para [36]:

> "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."

[28] This issue is important because criminal convictions are quashed on the ground that they are unsafe, and not, on the ground that there has been a miscarriage of justice. Weatherup J put it this way in *Re Walsh's Application* [2012] NIQB 55:

> "[24] The exercise that the Minister is undertaking is to look at all the facts as they now stand revealed. The current known facts include the further facts that are available from the decision of the Court of Appeal quashing the conviction and any other new facts that have emerged from the earlier appeals. Overall, it is necessary to take account of all the remaining evidence so that a comprehensive assessment of all current facts is completed.
> …
>
> [26] However, the task is to decide the issue by taking into account what the Court of Appeal quashing the conviction has stated but without being governed by what has been stated or not stated. The Court of Appeal in hearing the appeal is performing a different task and applying a different test to the task being undertaken and the test being applied by the Minister. The Court of Appeal is determining the safety of the conviction. The Minister is determining whether the applicant could possibly have been convicted on the evidence now

revealed. Perhaps this is a task best suited to a judge accustomed to making an assessment of evidence in criminal proceedings, rather than a Minister, no doubt advised by legally qualified officials, but Parliament has decided in section 133 of the Act that this is a decision for a Minister.

[27] While the decisions of the courts provide the material on which the Minister will make a decision, it is for the Minister to make the assessment. The Minister must form his own view in relation to the material. I refer to Lord Kerr at paragraph 169 of the report in *Adams*:

> 'In my opinion, the decision as to whether the statutory conditions have been fulfilled is one for the Secretary of State to make and he may not relinquish that decision to the Court of Appeal. True, of course, it is that the material on which the decision is taken will derive in most cases from the judgment of the Court of Appeal. True it also is that it would not be appropriate for the Secretary of State to depart from the reasoning that underlies that judgment unless for good reason it is shown to be erroneous, but the Secretary of State must make his own decision based on all relevant information touching on the question whether there has been a miscarriage of justice.'"

[29] Having identified the correct approach, based on all relevant information touching on the question whether there has been a miscarriage of justice does the applicant meet the requirements of section 133? There is no doubt he has been convicted of a criminal offence. Equally, there is no doubt that his conviction has been reversed. What then of the remaining criteria?

"On the ground that"

[30] Has the reversal been "on the ground that" a new or newly discovered fact shows beyond reasonable doubt there has been a miscarriage of justice?"

[31] In this context the proper interpretation of "on the ground that" is a central issue in this case. This is related to the different task being performed by the DoJ and the appellate courts. Lord Phillips dealt with this in the *McCartney and McDermott* judgment again at para [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.'"

[32] Further support for such a reading of 'on the ground that' is found on consideration of section 133(2) and (5A).

[33] Section 133(2) imposes a time limit for applications for compensation, but notably provides that time does not start to run until the conviction is reversed.

[34] As a result of the addition of section 133(5A), where a retrial is ordered a conviction will not be treated as having been reversed unless and until the person is acquitted of all offences at the retrial or the prosecution indicates that it has decided not to proceed with the retrial.

[35] Lord Hope considered these developments in *McCartney and McDermott* at para [103]-[104]. He noted the import of section 133(5A) as follows:

> "What it does, as it seems to me, is to allow for the possibility that something may emerge either before or during the retrial which would require compensation to be paid. ... It is only where a new fact or a newly discovered fact shows conclusively that the person was innocent or that the prosecution should never have been brought that there will be a right to compensation. This will not be the case where a retrial has been ordered, and it may not be apparent from the jury's verdict at the retrial. The fact that it returned a verdict of not guilty will not be enough. But if new facts emerge during the retrial process that have the effect of showing conclusively that the person was innocent, or that the prosecution should never have been brought, they can be taken into account, even though they emerged after the date when the conviction was reversed by the Court of Appeal."

[36] The availability of a facility to consider a new or newly discovered fact that emerges after the quashing of a conviction makes it clear that the phrase "on the

ground that" is not to be understood as referring to the grounds upon which the conviction was quashed, although obviously, that is a matter which must be taken into account by the Department in making its decision.

Miscarriage of justice

[37] What amounts to a miscarriage of justice has been clearly established in this context by the Supreme Court in the *McCartney and MacDermott* case. The court identified four categories of cases to be considered in dealing with the concept of miscarriage of justice:

- The first category is where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted.

- The second category is where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant.

- The third category is 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.

- The fourth category is 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] The Supreme Court confirmed that only categories 1 and 2 were to be included in the concept of miscarriage of justice.

[39] The definition of miscarriage of justice has now to be read in light of the effect of section 133(1ZA) of the 1998 Act (added on 13 March 2014) which provides:

> "For the purposes of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence, in England & Wales or, in a case where subsection (6H) applies, Northern Ireland, if, and only if, the new or newly discovered facts shows beyond reasonable doubt that the person did not commit the offence (and references in the rest of this part to a miscarriage of justice are to be construed accordingly)."

[40] This subsection, however, applies only to cases in which an applicant was convicted in cases involving protected information requiring determination by the Secretary of State and so the categories set out in *McCartney and MacDermott* remain relevant.

[41] The import of the Supreme Court judgment resulting in the reversal of the applicant's conviction is clear. The evidence relied upon by him in the appeal "shows clearly that the defendant is innocent of the crime of which he has been convicted." Applying the reasoning of Weatherup J in *Re Walsh's Application* the applicant could not have been convicted on the evidence revealed to the Supreme Court. In the words of Lord Hope the evidence "shows conclusively that the person was innocent" and "that the prosecution should never have been brought." The applicant can therefore establish that subject to the issue of the proper interpretation of "on the ground that" and "a new or newly discovered fact" he meets the test for a miscarriage of justice in the context of section 133 of the 1988 Act.

A newly discovered fact/a legal ruling on facts which have been known all along

[42] The applicant's application was advanced on the basis that:

> "… The newly discovered fact is that the Minister of State who signed the ICO did so without the case being considered by the Northern Ireland Secretary of State."

[43] The applicant says that that fact became apparent when the note for the record dated 17 July 1974 was disclosed to the applicant as a result of investigations following consideration of Mr Hutton's opinion dated 4 July 1974.

[44] The real issue in this case is whether the respondent is correct in its contention that the effect of the Supreme Court decision was "a legal ruling on facts which had been known all along." In other words, the conviction was not reversed, as the applicant contends, "on the grounds of a new or newly discovered fact."

[45] In this respect the Department relies on a line of authority emanating from the Court of Appeal in England and Wales in the case of *R v SSHD ex parte Bateman & Howse* [1994] 7 Admin LR 175.

[46] Ms Howse had been convicted of breaching by-laws that were subsequently declared *ultra vires* and invalid by the House of Lords. Her convictions were accordingly quashed. Mr Bateman had been convicted of dishonesty offences, but his convictions were quashed on the basis that the statements of witnesses against him had been wrongly admitted in evidence at the trial. In the court's judgment at para 21 Sir Thomas Bingham MR said:

> "In each case the ground of the 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."

[47] He approved the observation of Leggatt LJ in the court below that "there was no new fact; there was merely a decision on a point of law …"

[48] The expression "new or newly discovered fact" has been the subject of substantial judicial consideration since, including in this jurisdiction.

[49] This jurisprudence was considered by Maguire J in typically comprehensive fashion in his judgment in the case of *McNally* [2017] NIQB 80 at paras [57] to [68].

[50] Having referred to the decision in *Bateman and Howse* he turns to some judgments in this jurisdiction:

> "[57] Thus those words were considered in R v Secretary of State for the Home Department ex parte Bateman and Howse on 5 May 1993 when Leggat LJ stated:
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> > `The suggestion that the reversal of a conviction on the ground that evidence was wrongly admitted, or on the ground that the byelaw under which the charge was brought was ultra vires, constituted a new or newly discovered fact is simply wrong in law. There was no new fact; there was merely a decision on a point of law …'
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> [58] This view was later upheld by the Court of Appeal in the same case when Sir Thomas Bingham MR (as he then was) said:
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> > `In each case the ground of the 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.": (1994) 7 Admin LR 175 at 182.'
>
> [59] In the Northern Ireland case of Re McFarland's Application [2004] UKHL 17 Lord Bingham held that the appellant's conviction had not been quashed on the grounds of new or newly discovered fact. In that case the relevant facts had also been known all along. What had occurred was that the quashing court regarded them in a certain light. The decision in Bateman and Howse was applied by the House of Lords.
>
> [60] In the case of In Re Michael Gerard Magee [2004] NIQB 57 Girvan J (as he then was) rejected the submissions of counsel on behalf of the applicant

contending that the following could be characterised as new or newly discovered facts:

> `(i) The conclusion by the CPT that the material conditions in Castlereagh coupled with the intensive and prolonged character of the interrogation process placed persons detained therein under a considerable degree of psychological pressure which if sufficient to break the will of a detainee would amount to inhuman treatment;
>
> (ii) The decision of the European Court that the applicant's Article 6 rights had been breached and that he had not had a fair trial;
>
> (iii) The decision of the European Court that the conditions in Castlereagh constituted an intimidating atmosphere specifically devised to sap the applicant's will and make him confess to his interrogators; and
>
> (iv) The decision of the European Court that the conditions in Castlereagh coupled with the administration of the Article 3 caution were in breach of the applicant's right to a fair trial and was a newly discovered fact which could not have been within the knowledge of the applicant or the trial judge at the time of his trial.'

[61] Girvan J held that the reversal of Mr Magee's conviction was the result of a legal ruling on facts which had been known all along.

[62] Girvan J's decision was the subject of an appeal to the Court of Appeal. That court also held that in the circumstances there were no new or newly discovered facts: see [2007] NICA 34.

[63] The matter next came before the Northern Ireland courts in the case of In the Matter of Applications for Judicial Review by Joseph Fitzpatrick and Terence Shields. These applications involved facts with marked

similarities to the present case, as in each case what was at issue were old convictions based upon admissions which led to convictions which on CCRC references many years later were quashed by the Court of Appeal because of, *inter alia*, breaches of the Judges' Rules in respect of the interrogation of young persons. Neither of the applicants when interviewed was accompanied by an appropriate adult and neither was given access to legal advice. Following the denial of compensation in each case a judicial review ensued.

[64] At first instance Treacy J ([2012] NIQB 95) rejected the case put forward by each applicant. At paragraph [67] and [68] the judge stated as follows:

> `[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.' … 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 so 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.'

[65] On appeal to the Court of Appeal the appellants' cases were also dismissed. Girvan LJ delivered the judgment of the court. In his judgment (reported at [2013] NICA 66) he drew support from the way in which the Northern Ireland Court of Appeal had dealt with the present defendant's (*ie* Mr McCaul's) case and at paragraph [24] specifically referred to the decision of the Court of Appeal in R v Brown and Others [2012] NICA 24, which is the judgment of the court which *inter alia* dealt with the case of the present defendant. In that paragraph Girvan LJ stated as follows:

> 'It is recognised by the appellants in the case R v Brown and Others that the statements of admission were properly admitted applying the standard of fairness appropriate at the time of the trial. It was a result of the changes in the standards of fairness and procedural safeguards that led to the quashing of some of the convictions in the case of R v Brown and Others and which led to the quashing of the convictions in the case of R v Fitzpatrick and Shields. The 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 information which, if it had been known at the time of the trial, would have demonstrated that there was no case against

> the defendant that would stand up to proper legal scrutiny.'
>
> [66] The above passage in the Court of Appeal's judgment in a similar case to the present is plainly of great importance.
>
> [67] The final case which sheds light on the meaning of the phrase new or newly discovered fact is in the form of further litigation by Gerard Magee in respect of the failure by the Department of Justice to provide him with compensation. This refusal gave rise to a further judicial review challenge in 2014. However, that challenge was unsuccessful both before the trial judge ([2014] NIQB 142 per Gillen LJ) and before the Court of Appeal ([2016] NICA 19 per Deeny J). At both levels it was held that the facts of the case leading to the overturn of the applicant's convictions were not new or newly discovered facts but were in the nature of changes in legal standards subsequent to the trial and conviction of the applicant.
>
> [68] In the Court of Appeal at paragraph [41] Deeny J stated as follows:
>
> > '… In the light of the case law and of the conclusion actually reached by the second Court of Appeal which 'reversed' Mr Magee's conviction, it seems clear to us that the Department of Justice was correct in arriving at the conclusion that there was no 'new or newly discovered fact' within the meaning of Section 133.'"

Assessment

[51] The court bears in mind that it is for the applicant to establish that he meets the statutory requirements and "he bears the onus of proof" – *Hallam* [2020] AC 279 at para 123.

[52] The newly discovered fact relied on, namely that the ICO had not been personally considered by the Secretary of State is clearly a fact of an evidential nature. It only became apparent when the note for the record was disclosed. It was not known to the defence or perhaps more importantly to the trial judge at the time of the applicant's conviction. Therefore, this fact, of an evidential nature, was not known at the trial. This is not a case where the trial judge concluded that the ICO was valid, notwithstanding the fact that it had not been considered by the Secretary

of State. Had that point been argued and he nonetheless came to the conclusion that the ICO was legally valid, and the Supreme Court subsequently took a different view on the law then in those circumstances the applicant would not meet the section 133 test. However, in this case the contrary was the position in that, as is clear from the Attorney General's note since disclosed, to the effect that "… The Attorney General is prepared to rely on the presumption of law that any instrument which appears on the face to have been properly executed (as these ICOs do) must be assumed to comply with any necessary prior procedures."

[53] This is not a case where the Supreme Court was correcting some error of law by the court which convicted the applicant. It was not a case where, as a result of the changes in the standards of fairness and procedural safeguards a conviction was quashed. It does not involve a change in legal standards.

[54] Returning to the test set out by Girvan LJ in *R v Brown & Ors* what has occurred here is the discovery of an evidential based piece of factual information which, if it had been known at the time of the trial, and had the law been properly applied at that time, would have demonstrated that there was no case against the applicant.

[55] There is a clear distinction between the correction of a conviction because of new factual material not known at trial and the correction of a conviction because of a different view on the law applied to the same factual situation known at trial. It cannot be sustained that the applicant's conviction has been overturned because of a different view on the law applied to the same factual situation at the trial. The trial judge and the defence were unaware of the true factual situation.

[56] The Attorney General may well have been correct that "on balance a court would probably hold that the requirement relating to an ICO were satisfied if the Secretary of State had considered the case and that it was not essential the Secretary of State should personally consider the papers." At the time of the trial, no evidence was available to the applicant or to the court by which the presumption of regularity could be displaced.

[57] The position taken by the prosecution in the 1970s – notwithstanding knowledge of the true position – was not disavowed on the applicant's out of time appeal in 2018. At that time, however, the Court of Appeal made clear that such a position was not properly open to the prosecution given that it was by then apparent from the disclosed note for the record that there had, in fact, been no personal consideration by the Secretary of State. The Court of Appeal's conclusion that the presumption of regularity was displaced by evidence to the contrary was available to it only because of that newly discovered fact.

[58] Importantly however this issue was not addressed by the trial judge because he, like the applicant's lawyers, was unaware of the fact that the Secretary of State had not considered the case personally. Thus, the Supreme Court judgment did not

bring about any change in the law since the court did not have the opportunity to consider the issue having regard to the prosecution's failure to disclose a material evidential matter.

[59] It is important to note that the conviction was quashed by the Supreme Court as per para [4] of the judgment on the common assumption that the ICO had not been personally considered by the Secretary of State. It may well be that the Supreme Court would have reversed the applicant's conviction on the narrower ground that there was no evidence of personal consideration at the trial. However, the fact that the Secretary of State did not personally consider the applicant's case means that the applicant's conviction has been reversed "in circumstances where" that fact shows beyond reasonable doubt that there has been a miscarriage of justice.

Conclusion

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

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

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

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

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

[65] The court therefore makes the following order:

(i) An Order of Certiorari removing into this honourable court and quashing the decision of the DoJ by which it concluded that the applicant is not eligible for compensation for a miscarriage of justice under section 133 of the Criminal Justice Act 1988.

(ii) A declaration that the said decision is unlawful, ultra vires and of no force or effect.

(iii) An order that the application be reconsidered and redetermined in accordance with law.