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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE

_____

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Fitzpatrick (Joseph) and Terence Shiels' Application [2013] NICA 66

IN THE MATTER OF APPLICATIONS FOR JUDICIAL REVIEW BY JOSEPH FITZPATRICK AND TERENCE SHIELS

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IN THE MATTER OF DECISIONS OF THE DEPARTMENT OF JUSTICE

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Morgan LCJ, Girvan LJ and Coghlin LJ

GIRVAN LJ delivering the judgment of the Court

Introduction

[1] These are two appeals raising similar issues. They arise out of two separate judicial review applications, one brought by Joseph Fitzpatrick ("Mr Fitzpatrick") and the other by Terence Shiels ("Mr Shiels"). They challenged decisions made by the Department of Justice refusing to grant them compensation in respect of alleged miscarriages of justice under Section 133 of the Criminal Justice Act 1988. Treacy J at first instance dismissed each application in a judgment given on 30 November 2012.

[2] Ms Quinlivan QC and Mr Hutton appeared for each of appellants. Mr Scoffield QC appeared for the respondent. The court is indebted to counsel for their helpful written and oral submissions.

The factual context

Joseph Fitzpatrick

[3] Mr Fitzpatrick was arrested on 8 March 1977. He was at the time 16 years of age and thus a young person. He was interrogated by the police over two days. He did not have access to a solicitor or to his parents or other appropriate adult. He made admissions in respect of three offences of a terrorist nature (involvement in an arson attack on 26 February 1977; involvement in a gun attack on a soldier on 30 December 1976; and membership of a proscribed organisation).

[4] He was brought to trial at Belfast City Commission. He pleaded guilty to the charges. He was represented by solicitors and counsel. He was sentenced to an effective sentence of five years. He did not at that time appeal against his convictions or sentence.

[5] Many years later he applied to the Criminal Cases Review Commission ("the CCRC"). His case was reopened and an appeal was brought before the Court of Appeal in May 2009. The Court, after a short and essentially uncontested hearing with little argument, quashed his convictions as unsafe.

Terence Shiels

[6] Mr Shiels was arrested on 26 April 1978 on suspicion of involvement in a shooting incident. He was 16 years of age. He was interrogated over two days without access to a solicitor, his parents or other appropriate adult. On 27 April 1978 he made a confession statement in which he admitted possession of a gun and membership of the Fianna, a proscribed organisation. He was charged with membership of a proscribed organisation and possession of a firearm and ammunition.

[7] He was brought to trial before Belfast Crown Court on 28 June 1979. He was represented by solicitors and counsel. He pleaded guilty. He received a suspended sentence. He did not appeal at that time.

[8] Having been refused entry to the United States in 2002 he applied on 19 March 2003 to the CCRC. This led to the re-opening of the case. His appeal was heard together with the case of Mr Fitzpatrick. The Court of Appeal quashed the convictions on the same basis.

[9] In quashing the convictions the Court of Appeal stated:

> "(2) It is not necessary to rehearse the factual background to both appeals, because it is accepted on behalf of the Public Prosecution Service that 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.

(3) In those circumstances it has been correctly conceded by the prosecution that there are *prima facie* grounds for considering that the convictions obtained on the basis of the admissions made by the appellants are unsafe. I should observe that the only evidence against both appellants was their admission of guilt of the offences. The conventional approach to the safety of the conviction has been outlined in a series of cases in which it is stated that where there are *prima facie* reasons to doubt the safety of the conviction, one examines the countervailing factors which may restore the conviction to a conditional safety. But in the present case the appellants submit that such an exercise is inapt for the reason that, if the confessions were wrongly admitted, then there could be no rescue from that situation and there cannot be any reinstatement of the safety of the conviction.

(4) We are inclined to the view that this submission must be correct although we leave for a future occasion a rather more extensive consideration of the issue. We do so because we are satisfied that in any event the countervailing factors in the present case are of such slender significance that they could not operate to displace the view that we have formed that *prima facie* the convictions must be regarded as unsafe. We have reached that conclusion principally because we consider it had been shown at least to a high level of possibility that the statements made by the appellants either in the course of bail applications or on their behalf in pleas of mitigation were culled from the original statements that they had made. If the countervailing factors derived from material which was obtained by objectionable means they cannot truly be regarded as countervailing at all. In those circumstances it is unnecessary for us to resolve the question of principle of whether wrongly

> admitted confessions could ever be rescued by the consideration of counterveiling factors. In this case this is simply not a feasible proposition even if it were in other circumstances theoretically possible."

The judge's conclusions

[10] After a lengthy citation of extracts from the judgments delivered by the Supreme Court in R (on the Application of Adams) v Secretary of State for Justice and Re MacDermott and Another [2011] UKSC 18 ("Adams") the trial judge at paragraphs [61] and [62] stated:

> "[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."

At paragraphs [67] and [68] the judge summarised his reasons for concluding that there had been no miscarriage of justice in the case:

> "[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 Judgement 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 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."

The relevant statutory provisions

[11] Section 133 of the Criminal Justice Act 1988 so far as material 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.
>
> …….
>
> (3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.
>
> (4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.

> (5) In this section "reversed" shall be construed as referring to a conviction having been quashed or set aside —
>
> (a) on an appeal out of time; or
>
> (b) on a reference—
>
> (i) under the Criminal Appeal Act 1995
>
> ……
>
> (6) For the purposes of this section a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted.
>
> (6A) Subject to what follows, in the application of the section in relation to a person (P) convicted in Northern Ireland of a criminal offence, in subsections (1)to (4) any reference to the Secretary of State is to be read as a reference to the Department of Justice in Northern Ireland."

[12] Section 133(1) reproduces in almost identical wording the provisions contained in Article 14.6 of the International Covenant on Civil and Political Rights ratified by the United Kingdom in May 1976. It provides:

> "6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on a ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

[13] The reference to a final decision has been accommodated in Section 133 which defines "reversed" as referring to a conviction which has been quashed on an out of time appeal or on a reference under the 1995 Act.

The case for the Applicants

[14] Ms Quinlivan QC subjected the Supreme Court decision in Adams to a close analysis in order to support her argument that each of the applicants had been the victim of a miscarriage of justice entitling each to compensation under Section 133. Counsel submitted that each of the applicants' cases was a Category 2 miscarriage of justice case within Dyson LJ's categorisation as modified by the majority in Adams. Where it was determined that the confessions were unsafe, so as to be either inadmissible or unreliable, then the evidence against the appellant was so undermined that no conviction could be possibly based upon the confessions. There was no evidence on which to convict. For good measure it was argued that the applicants' case would in any event satisfy any other variant of the test propounded in the discussion about miscarriages of justice by the majority in the Supreme Court in Adams. The evidence against the applicants had been so undermined that no conviction could possibly be based on it.

[15] The appellants submitted that the proper approach to new or newly discovered fact is to ask whether the fact is newly discovered or disclosed to the court on appeal. There is a subsequent question as to whether that newly discovered fact falls to be excluded by the proviso that its earlier non-disclosure was owing to the fault of the defendant. A newly discovered fact can include something the significance of which was not appreciated by the convicted person or by his lawyers in the original proceedings. The relevant knowledge is that of the court. Non- disclosure to the court as a result of the significance of a fact not being appreciated may qualify under the section (see Lord Phillips' analysis). The applicants' convictions were overturned on the basis of newly discovered facts in that the significance of facts known at the time of trial (breach of the Judges' Rules etc) had not been appreciated by the appellant or apparently his lawyers. These facts accordingly were not disclosed to the trial court. The significance of the facts was subsequently appreciated and the facts having been disclosed to the Appeal Court they were the basis for the convictions being quashed.

[16] Counsel argued that the judge's paraphrasing of the Category 2 case was erroneous. It directs the focus wrongly to the question whether the claimant should have been prosecuted (see Lord Kerr at paragraph [178]). The judge was also wrong to conclude that the Supreme Court was unanimous as to the definition of newly discovered fact. The judge's statement "that these were not in my view cases where the relevant facts were not known" was said from this wrong standpoint. It addressed the knowledge of the applicants rather than the knowledge of the court. There was no evidential basis for the judge's conclusion that these were not cases where the significance of facts was not appreciated by the defence legal advisors during the trial. A fact may be known to legal advisors and be newly discovered when it is disclosed on appeal if the defendant did not know or appreciate the significance of the fact. All the evidence suggested that no legal significance was attributed to the relevant facts in the case. It is the essential purpose of Section 133 to provide compensation where the State in fact in hindsight had no right to punish

a person. The fact that the unlawful punishment followed a plea of guilty should not be considered legally relevant. The Court of Appeal's decision in quashing the convictions suggested that the pleas were essentially valueless.

The Respondent's Case

[17] Mr Scoffield QC argued that in these two cases there was no new fact at all but simply a legal ruling on facts known all along after the significance of facts changed because of developments in the standards of fairness. If the appeal had been allowed on the basis of fact, it was not new or newly discovered fact because it was known to the appellants or their lawyers at the time of conviction and could have been made available to the court. If there is a new fact the failure of the appellants to raise it with the trial court brings the appellants within the proviso to Section 133 because the non-disclosure was wholly or partly attributable to the appellants because of their pleas of guilty. In the case of Mr Fitzpatrick he knew all the relevant facts, he informed his solicitor of his alleged mistreatment and his solicitor was likely to have known all the relevant information. His own counsel called one of the interviewing officers to give evidence in mitigation. He made no complaint against the police, pleaded guilty and pursued no appeal at the time. Likewise, in the case of Mr Shiels he knew all the relevant facts. He appeared to accept that he was entitled to a solicitor during questioning and was alert to the importance of that. Notwithstanding his and his lawyers' knowledge of all the relevant facts he made no complaint against the police but decided to plead guilty and did not appeal. There has been, in fact, no change in the factual position; rather there has been a change in legal standards of fairness governing the issue. A legal ruling on facts known all along is a clearly established distinction in the field of compensation. The Supreme Court in Adams has not jettisoned that principle. That decision said nothing about a case where it was clear that both the defendant and his lawyers knew the relevant facts. Lord Phillips' extended definition of new facts to apparently cover a later discovery of a new significance in known facts was only espoused by four of the nine justices sitting. In any event, in this case the real point was the significance of the facts had changed with time. The extended definition would in any event only apply where a defendant does not tell his lawyers the facts because he does not realise it will make a difference (since he will not be penalised for a lack of legal knowledge) or where the lawyers do not tell the court the relevant fact because they do not realise it will make a difference. Neither is the case here. The appellants cannot make good their assertion that the court was not aware of the relevant facts. Even if that was the test, which counsel did not accept, the trial judges would have read the depositions which made the position fairly clear and would generally have been aware of the practice in terrorist cases at the time. The only judges who expressly agreed with Lord Phillips in relation to the court's knowledge being the relevant knowledge were Lord Clarke and Lord Hope, although Lord Hope ruled out cases as here, where the material is available to the court but just not deployed. Lady Hale says that it is the knowledge of the persons convicted and Lord Kerr says it is the knowledge of the person who prays it in aid (which he thought Lord Phillips had decided). In any event the non-disclosure was

plainly wholly or partly attributable to the appellants because they pleaded guilty. The correct approach is that if any relevant party (defendant, lawyer or court) did know the facts and appreciate their significance they cannot properly be said to be new or newly discovered facts. If the defendant's lawyers know the facts and do not deploy them, the defendant may have a remedy against them. If the defendant knows the facts and their significance and does not disclose it, he cannot expect compensation. If the court knows the facts and the significance, the defendant likewise cannot expect compensation. The appellants' cases are Category 3 cases at best and do not qualify for compensation. Lord Phillips' test had no proper application in a case when a plea of guilty is entered. If the test to be applied relates to the time of conviction, the cases are clearly Category 3 cases (the court might have reached a different conclusion). There is thus no entitlement to compensation. If the test falls to be applied as of today, the ground of reversal is not because of any new fact but simply a change in the legal standards. Counsel contended that the test as to whether there had been a miscarriage of justice must be addressed as at the time of the convictions, taking into account how the new facts would have fed into the trial process at the time. Lord Kerr's analysis focussed on the question whether, if the judge had been fully acquainted with all the material information, the appellant should not have been convicted. In the present cases there is no new fact to be inserted into a hypothetical re-run of the 1977 trials. It is impossible to apply both current standards of fairness and 1977 standards. Fitzpatrick pleaded guilty 8 months after his arrest and made a conscious decision to plead guilty. Sheils actively changed his plea. He accepts that he took advice in order to get a lesser sentence. In this case the convictions were based on guilty verdicts. The original category 2 cases depended on there having been a trial ("at the time of trial"). It would be a strange result to conclude that someone who pleaded guilty should be compensated for having done so.

Discussion

[18] Prior to the Supreme Court decision in the three appeals in Adams there were two schools of thought on what constituted a miscarriage of justice for compensation purposes. One, espoused by Lord Steyn in R (Mullan) v Secretary of State for the Home Department [2005] 1 AC 1, was that the expression was confined to cases where the claimant for compensation could prove beyond reasonable doubt that he was innocent. The other school of thought was that it had a wider meaning. This was a view espoused by Lord Bingham in that case. The majority view in Adams clearly rejects Lord Steyn's narrower school of thought. The concept was a wider one. The question for determination in those appeals was how much wider.

[19] The Supreme Court drew on Dyson LJ's categorisation of cases in which the Court of Appeal allows an appeal against conviction. His category 1 type case relates to cases where the appeal demonstrates beyond reasonable doubt the innocence of the accused (e.g. where new DNA evidence shows that he could not have committed the crime). His category 2 case is one where fresh evidence shows that no reasonable jury could properly have convicted the accused (e.g. where the

fresh evidence wholly undermines the creditworthiness of a witness whose evidence has been central to the conviction). Category 3 cases are ones where the fresh evidence is such that the conviction cannot safely stand but the court could not say that no fair minded jury could properly convict if there was a trial which included the fresh evidence. Category 4 cases are cases where a conviction is quashed because 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. Although at times expressing themselves in somewhat different terms it is tolerably clear that the majority view was that the interpretation of a compensatable "miscarriage of justice", which was capable of universal application, that it was where a new fact or newly discovered fact so undermined the evidence against the defendant that the conviction could not possibly have been based on it. Lord Phillips' test was formulated in paragraph [54] thus:

> "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."

Lord Hope adopted the same test at paragraph [97]. Lady Hale understood Lord Phillips' test to apply if a person should not have been convicted because the evidence against him had been "completely undermined". Lord Kerr at paragraph [177] was content to accept Lord Phillips' test. He considered that a claimant would have to show that, on the basis of the facts as they are now known, he should not have been convicted or the conviction could not possibly be based on those facts. Lord Clarke considered that compensation is payable where, in the light of the new or newly discovered fact, no reasonable jury properly directed could have convicted ,or where the new or newly discovered fact would have led the judge to stop the case on the grounds of abuse. While it is not clear why it was felt necessary for the majority to express themselves in these different terms, there is in substance no difference between them in relation to the applicable test. The majority view, accordingly, was that Dyson LJ's categories 3 and 4 do not qualify as compensatable within section 133 though Lord Clarke would allow compensation in some category 4 cases. A category 1 case clearly does as does a category 2 case (the latter being subject to the majority's modification).

[20] Since it is not the case, and is not suggested, that the appellants could show that they were innocent, the question in this case is whether they could establish that they fell within the category 2 type of case.

[21] Section 133 refers to a new or newly discovered fact, not to fresh evidence. It must be a fact which shows beyond reasonable doubt or conclusively that there was a miscarriage of justice, because the evidence which was used to obtain the conviction was so undermined by the new or newly discovered fact that no conviction could possibly have been based upon it (see Lord Hope at paragraph

[102]). The question which arises in these appeals is whether any new or newly discovered fact has emerged since the convictions of the appellants to show conclusively that there was a miscarriage of justice as properly understood applying the Adams test. The appellants' case in essence is that while the facts relating to the circumstances in which the appellants' confessions were obtained were known to both the appellants and to their lawyers, nevertheless, the concept of a new or newly discovered fact includes a fact, the significance of which was not appreciated by the convicted person or his lawyers or the court during the trial. In pursuing this argument the appellants lay great weight on Lord Phillips' conclusion at paragraphs [60] to [63] of his judgment that a newly discovered fact under Section 133 has, in effect, the same meaning as the terms as defined in Section 9(6) of the Criminal Procedure Act 1993 in Ireland. The appellants' argument proceeds along the lines that the appellants did not know or appreciate that the confession statements were obtained in circumstances which should have led the trial judge to exclude them. If they had been excluded the appellants could not possibly have been convicted since the case turned on the confessions.

[22] In Adams the court was not dealing with cases in which the defendants had entered pleas of guilty to the charges. The court was thus not dealing with the situation which applies in the present cases. The majority ratio as established in Adams does not apply to such cases. The Supreme Court heard no argument in relation to such cases for the simple reason that that was not relevant to the cases. The judgments in Adams must be read in light of this fact.

[23] The adoption by Lord Phillips of the interpretation of newly discovered facts being the same as that to be found in the Irish provision is not without its problems. As the case in Mullan itself graphically illustrates there are dangers in resorting to a foreign legal system as a guide to the proper interpretation of domestic law. Section 9 of the Irish Criminal Procedure Act 1988 has not apparently been the subject of any reported adjudication. The structure of Section 9 of the Act is different from that in Section 133. Under Section 9(6)(b) a newly discovered fact means: "where a conviction was quashed by the court on appeal, a fact which was discovered by the convicted person or came to his notice after the conviction to which the appeal relates or a fact the significance of which was not appreciated by the convicted person or his advisors during the trial". Thus, unlike in the United Kingdom, it would appear that an in-time appeal in Ireland may lead to the compensatable quashing of a conviction by reason of the discovery of new facts between trial and appeal. Subject to the rest of Section 9 it appears that that is a situation which could give rise to there having been a miscarriage of justice within the section. It seems clear that the discovery of a new fact can only refer to a fact of an evidential nature. An error by the trial judge in admitting evidence could not qualify as a newly discovered fact. If the facts were known at the trial and the defendant erroneously argues the law at first instance or the judge erred in law in his ruling, the ascertainment by the Appeal Court of that error resulting in the quashing of the conviction cannot have been intended to give rise to a claim to compensation under Section 9 since the appeal process has prevented any miscarriage of justice

occurring. If properly analysed, Lord Phillips' adoption of the Irish statutory definition in fact does not assist the appellants. 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.

Has there been a new or newly discovered fact?

[24] What led the Court of Appeal to its conclusion in R v Fitzpatrick and Shiels was the view that, applying current standards of fairness, the confession statements would have been ruled inadmissible. It was not addressing the question whether, applying the standards applicable at the time of trial, the confession statements would have been excluded. In fact it seems clear from the authorities such as R v McCaul [12 September 1980] (not cited to the court in R v Fitzpatrick and Shiels) that a trial judge's decision to admit a confession statement notwithstanding breaches of the Judges' Rules in circumstances analogous to those in the present case would not necessarily or probably have led to the quashing of the convictions. In R v Brown and Others [2012] NICA 14 Morgan LCJ giving the judgment of the court reviewed the authorities and concluded:

> "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 and 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 the trials. None of the parties before us contended that there 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."

It is recognised by the appellants in the case of R v Brown and others that the statements of admission were properly admitted applying the standards 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 Shiels. 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.

[25] In R v Secretary of State for the Home Department ex parte Bateman and Howse [EWQBD 5 May 1993] Leggat LJ said:

> "The suggestion that the reversal of a conviction on the ground that evidence was wrongly admitted or on the ground that the by-law under which the charge 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 of a point of law …"

This view was upheld by the Court of Appeal in the same case [EWCA 1 July 1994] where Sir Thomas Bingham MR said:

> "In each case the ground of reversal was not, in my judgment, a discovery of a new or newly discovered fact, but a legal ruling on facts which had been known all along."

In Re McFarland's Application [2004] UKHL 17 Lord Bingham endorsed the distinction holding 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 legal light. Those authorities remain good law and nothing that was said in Adams calls them into question.

[26] The appellants can point to no new fact or newly discovered fact for the purposes of Section 133 and accordingly the trial judge was right to dismiss the applications.

The effect of the appellants' pleas of guilty

[27] There is an additional reason why the appellants cannot succeed in their applications. The fact that the appellants pleaded guilty to the charges in question and were convicted on foot of those pleas creates a quite different context from the one which arose in Adams. An unequivocal plea of guilty is a clear and public admission of guilt. Where a plea is entered and accepted by the court, the resultant conviction flows from the plea which is an admission. By pleading guilty the defendant has accepted that there was a factual and evidential basis establishing his guilt.

[28] In Adams Lord Hope at paragraph [102] said that he would limit compensatable 2 cases to cases where the new or newly discovered fact shows conclusively that there was a miscarriage of justice because the evidence that was used to obtain the conviction was so undermined by the new material that the conviction could not possibly have been based on the evidence. He said:

> "This would include cases where the prosecution depended on a confession statement which was later shown by a new or newly discovered fact to have been inadmissible because *as the defendant maintained all along* it was extracted from him by improper means." [Italics added]

Lord Hope's example clearly relates to a case where a defendant has maintained that his confession was inadmissible and a new fact comes to light to show that he was right. This cannot be a reference to a case where the defendant has pleaded guilty, for where a defendant has unequivocally pleaded guilty the conviction does not depend on the prior confession statement but on the plea and admission of guilt.

[29] In a case where a defendant's will was overborne or he was induced, misled or tricked into pleading guilty new evidence might establish that the plea should be treated as invalid and ineffective. At the stage of trial a defendant can apply to vacate his plea. He cannot do so after he is sentenced. The trial court's discretion to allow a change of plea should be sparingly exercised (see Blackstone D12.96; see South Thames Side Magistrates Court ex parte Rowland [1983] 3 All ER 689). At the appellate stage a defendant may in certain circumstances establish that his plea of guilty was not free and unequivocal and move on to establish the lack of safety of the conviction. That is not the situation in these cases. Whether that would open the door to a claim for compensation under Section 133 or whether his remedy lies against his legal advisor is not a matter for determination in these cases. In R v Lee [1984] 1 WLR 578 the Court of Appeal recognised that in certain very exceptional cases a defendant who entered a guilty plea without equivocation might establish that the resultant conviction was unsafe. That was a case in which the appellant's counsel had had concerns about his client's ability to properly decide whether to plead guilty and counsel had raised his concerns with the judge before the trial commenced though psychiatric evidence showed that the defendant was fit to plead. It was alleged that the pleas were unsafe and were out of accord with the evidence proposed to be called to establish that the conviction was in fact unsafe. The court gave leave to hear that evidence. While the ruling granting such leave was reported, there does not appear to be any report of what subsequently happened. Ackner LJ at page 584 recognised the exceptionality of that case, stating:

> "The occasions on which this court will allow evidence to be called after there has been an unequivocal plea of guilty will be very rare. We

> regard this case, as indeed do both counsel, as wholly exceptional, if not unique."

[30] In the present case the appellants did not seek to adduce any evidence to establish that the pleas were anything other than unequivocal. The significance of the fact that they pleaded guilty was not raised before the court in R v Fitzpatrick and Shiels. Before the Court of Appeal in that appeal no new or newly discovered fact was established to call into question the appellants' unequivocal pleas.

[31] The fact that an appellant was fit to plead, had received expert advice, had been aware of what he was doing and had intended to plead guilty would be highly relevant to the safety of the conviction. As pointed out in Blackstone at paragraph D26.9 the most common basis on which an unequivocal plea of guilty is challenged is where there has been an incorrect ruling on a point of law which allows the appellant no escape from a guilty verdict. If an appellant has simply been influenced to enter a plea of guilty because of a decision to admit evidence which meant that his prospects of acquittal were slim, the conviction would not normally be considered unsafe. The position is stated thus in R v Green [1997] Criminal Law Review 659:

> "Where the admissibility of a confession is in issue and the trial judge rules that it should be admitted, as he did in this case, the truth of the contents of the confession, although having no relevance to the *voir dire*, remains a matter to be tried by the jury. A plea of guilty in those circumstances serves as an admission of the truth of the contents of the confession. It is not a plea entered where there is no remaining issue to be tried by the jury because it remains open to the defence to invite the jury not to rely on the truth of the confession despite the fact that, contrary to submissions, the trial judge ruled that it was admissible."

In R v Chalkey [1998] QB 848 at 864 F-G Auld LJ stated:

> "In appeals against conviction following a plea of guilty, the somewhat mechanical test of whether a change of plea to guilty was founded upon a particular feature of the trial, namely a wrong direction of law or material irregularity, gives way to the more direct question whether, given the circumstances prompting the change of plea to guilty, the conviction is unsafe. However, even when put that way the good sense of preferring the narrower interpretation, which we have identified, of the

> expression "founded upon" lingers on. Thus, a conviction would be unsafe where the effect of an incorrect ruling of law on admitted facts was to leave an accused with no legal escape from a verdict of guilty on those facts. But a conviction would not normally be unsafe where an accused is influenced to change his plea to guilty because he recognises that, as a result of a ruling to admit strong evidence against him, his case on the facts is hopeless. A change of plea to guilty in such circumstances would normally be regarded as an acknowledgement of the truth of the facts constituting the offence charged."

[32] Those were cases where a defendant changed his plea in the course of a trial because of an adverse ruling. The principle applies with even greater force where the defendant elects to enter a plea without proceeding even to the stage of obtaining an adverse ruling. It was open to the defendants to plead not guilty, to seek to exclude the confession statements and, even if they were admitted after a *voir dire* (which was very likely at the time that the trials took place), they could still have contested the truth and content of the confessions in the course of the trial. By pleading guilty they admitted the truth of the facts constituting the offences charged.

[33] These authorities were not drawn to the attention of the Court of Appeal in R v Fitzpatrick and Shiels nor did the court have the benefit of any arguments on the effect of Section 6 of the Northern Ireland (Emergency Provisions) Act 1973 or any of the arguments raised or debated in the judgment of the court in R v Brown and Others [2012] NICA 14. Little argument was presented to the court in R v Fitzpatrick and Shiels and the Crown's apparent concession of the lack of safety of the convictions, without drawing the attention of the court to any of the authorities referred to, led to what was in effect an unreserved judgment argued on an inadequate basis. The decision clearly did not address the question whether there had been a miscarriage of justice for the purposes of Section 133.

Disposal of Appeal

[32] Accordingly, we conclude that the judge was right to dismiss the applications and the appeals are dismissed.