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(Subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GERARD MAGEE APPLICANT/APPELLANT FOR JUDICIAL REVIEW

AND IN THE MATTER OF SECTION 133 OF THE CRIMINAL JUSTICE ACT 1988

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

Before Weir LJ, Deeny J and Keegan J

DEENY J (delivering the judgment of the court)

[1] This judgment deals with the appeal by Gerard Magee (the appellant) against the judgment of Gillen LJ, [2014] NIQB 142, dismissing the appellant's application to quash the decision of the Department of Justice of 8 January 2014 refusing him compensation pursuant to Section 133 of the Criminal Justice Act 1988 (as amended) because the reversal of his conviction was not on the ground of a new or newly discovered fact. The application arises from events which commenced almost 30 years ago.

[2] Mr Desmond Hutton appeared for the appellant and Mr Peter Coll QC appeared for the Department of Justice. Both counsel presented well researched and thorough written and oral submissions to the court. Mr Hutton submitted at the commencement of his 36 page written submission that the issues in the appeal were narrow. We believe that is correct but the long history of the matter does require some iteration.

[3] On 15 December 1988 the police discovered a large bomb hidden in a culvert under a road near Antrim, apparently designed to be exploded when a military patrol passed over. A number of persons were arrested in connection with the incident, including the appellant, and 11 were charged with terrorist offences, of whom 7 ultimately pleaded guilty.

[4] The appellant was taken to Castlereagh Police Office, the principal location for interviewing terrorist suspects in Northern Ireland at that time. On his arrival there on 16 December 1988 it is common case that he was asked if he wanted a solicitor's advice and that he said that he did. However, a senior police officer, pursuant to the Northern Ireland (Emergency Provisions) Act 1987, authorised a 48 hour delay in the granting of access by the appellant to his solicitor. Before he saw his solicitor on 18 December he was interviewed by two teams of detectives. On the sixth interview on 17 December he made a number of verbal admissions in reply to questions and in the seventh interview he made a written statement of admission i.e. before seeing his solicitor.

[5] He was tried before Murray LJ on 21 December 1990, sitting without a jury. The appellant sought to exclude his admissions and a lengthy *voir dire* followed in which he made allegations of physical abuse of him by two of the interviewing detectives. The trial judge rejected those allegations as untruthful, admitted the admission evidence, convicted the appellant and sentenced him to a lengthy period of imprisonment.

[6] The appellant then appealed to the Court of Appeal for Northern Ireland. We have had the benefit of reading the long and careful judgment of this, the first of four Courts of Appeal to consider the consequences of Mr Magee's involvement in these offences. That judgment was delivered by MacDermott LJ on 16 June 1993 and is of some 30 pages. Mr Magee was represented at trial by senior and junior counsel who challenged the admissibility of the statements on the basis of alleged ill-treatment of Magee by one of the teams of interviewing detective constables. Magee gave evidence at the trial on the *voir dire* but not on the substantive issue as to his guilt or innocence.

[7] At pages 4 and 5 of his judgment MacDermott LJ sets out the visits which the then accused had received while in custody, including that of Mr Eugene Todd, solicitor, at 1pm on Sunday 18 December and the number of interviews conducted. Therefore, both the trial court and the Court of Appeal were fully aware that the prisoner had made admissions before he received the benefit of legal advice. The Court of Appeal considered the evidence not only of Mr Magee but of two medical practitioners who saw and examined him in custody. There was a marked discrepancy between what Magee later claimed and what he said to the doctors at the time. One is reminded in the course of reading this judgment that following the report of the Bennett Committee there were by then cameras in interviewing rooms which were supervised by uniformed inspectors. They gave evidence inconsistent with Mr Magee's contentions. His appeal was then dismissed as was that of certain

other defendant appellants. The Court upheld the view of Murray LJ rejecting the veracity of the appellant's complaints.

[8] The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment "the CPT", following a visit to Northern Ireland in July 1993, produced a report, published on 14 March 1994, which made express criticisms of the Castlereagh Holding Centre:

> "109. … Even in the absence of overt acts of ill-treatment, there is no doubt that a stay in a holding centre may be – and is perhaps designed to be – a most disagreeable experience. The material conditions of detention are poor (especially at Castlereagh) and important qualifications are, or at least can be, placed upon certain fundamental rights of persons detained by the police (in particular, the possibilities for contact with the outside world are severely limited throughout the whole period of detention and various restrictions can be placed on the right of access to a lawyer). To this must be added the intensive and potentially prolonged character of the interrogation process. The cumulative effect of these factors is to place persons detained at the holding centres under a considerable degree of psychological pressure. The CPT must state, in this connection, that to impose upon a detainee such a degree of pressure as to break his will would amount, in its opinion, to inhuman treatment."

[9] The appellant commenced an application against the United Kingdom before the European Commission of Human Rights which was given the number 28135/95. It was transmitted to the European Court of Human Rights on 1 November 1998 and they gave judgment on 6 June 2000. The Court quoted extensively from the Report of the CPT referred to above and concluded that there had been a violation of the appellant's rights under Article 6(1) of the Convention in conjunction with Article 6(3)(c) as regards the denial of access to a solicitor.

[10] Paragraphs 43 and 44 of the judgment of the European Court read as follows:

> "43. 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 of 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.
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> 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] The appellant then raised the matter of his conviction with the Criminal Cases Review Commission. That body referred the matter back to the Court of Appeal in Northern Ireland. Mr Magee's second appeal was heard by Carswell LCJ, McCollum LJ and Kerr J on 15 and 16 January 2001. The judgment of the court *per* Carswell LCJ was delivered on 6 April 2001: [2001] NI 217, quashing the convictions. (Appellant's counsel quoted from a text of this judgment with numbered paragraphs but the official Report does not have numbered paragraphs).

[12] It is sufficient at this stage to note the summary of the decision at pp 217, 218 of the Report in the headnote:

> "Held – Even if there had once been a difference of approach, since the coming into force of the Human Rights Act 1998, the circumstances in which there would be room for a different result before the court and before the ECHR because of unfairness on the basis of the different tests employed would be rare. If a defendant

had been denied a fair trial under Article 6(1) of the Convention it would be almost inevitable that the conviction would be regarded as unsafe. In the instant case, the ECHR had made a direct finding on the facts that the denial of access to a solicitor, against the background of the conditions at Castlereagh, constituted a denial of Art 6(1) in conjunction with Art 6(3) (c) of the Convention. It followed that the court would not be justified in concluding that the conviction was safe in the light of that finding. Accordingly, the appeal would be allowed and the conviction quashed."

[13] This is relevant to the key issue in this appeal as to whether Mr Magee's conviction had been reversed on the ground of a new or newly discovered fact. If it was, then whether or not it showed beyond reasonable doubt that there had been a miscarriage of justice is not a question for us.

[14] It can be seen that the emphasis of the judgment was not on any new facts but on the passing of the Human Rights Act 1998 and the finding of the European Court of Human Rights with specific regard to Mr Magee.

[15] Following the quashing of his conviction the appellant then sought compensation pursuant to law. The relevant provision was Section 133(1) of the Criminal Justice Act 1988 which reads 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 <u>on the ground that a new or newly discovered fact</u> 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." (Emphasis added)

[16] The powers under the Act are now exercised by the Department of Justice. It is not in dispute that the section applies to the "reversing" or quashing of Mr Magee's conviction. The appellant's application for compensation of 24 June 2002 was refused by the then Secretary of State for Northern Ireland by letter of 6 December 2002, both under Section 133 and under the Ex Gratia Scheme which is not relevant here. The Secretary of State concluded that the applicant's conviction had

not been reversed on the ground that new or newly discovered facts showed beyond reasonable doubt that there had been a miscarriage of justice. Rather his conviction had been quashed because of a breach of Article 6 of the Convention coupled with the Court of Appeal's determination that in assessing the safety or otherwise of the convictions the court should, by virtue of the advent of the Human Rights Act 1998, give full effect to Article 6.

[17] Mr Magee then sought judicial review of that decision of the Secretary of State. This was heard by Girvan J, as he then was, whose judgment is reported *sub nomine* In Re Michael Gerard Magee [2004] NIQB 57.

[18] The judge sets out at paragraph [6] the submissions of Mr Treacy QC on behalf of the present appellant contending that the following could be characterised as new or newly discovered facts within the meaning of Section 133:

> "(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;
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> (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;
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> (iii) the decision of the European Court that the conditions in Castlereagh constituted an intimidating atmosphere specifically designed to sap the applicant's will and make him confess to his interrogators; and
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> (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 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."

[19] Girvan J then went on to point out that "with the benefit of hindsight" Mr Magee's conviction should not have been quashed. The judge quoted from Carswell LCJ in R v Latimer [2004] NICA 3, at paragraph 74:

> "Our decision in R v Magee has however been overtaken in domestic law by the decisions of the House of Lords in R v Lambert [2002] 2 AC 545 and R v Kansal No.2 [2002] 2 AC 69. The effect of these decisions is that retrospective

> effect of the Human Rights Act 1998 and the direct enforcement of convention rights do not apply where a defendant convicted before the Act came into operation on 2 October 2000 brings an appeal after that date. In that respect our decision in R v Magee was wrong in that we had held that the 1998 Act did apply retrospectively to the case. It also follows that the appellant in the present appeal cannot found a claim that his conviction should not have been admitted upon the ground that the conditions of detention at Castlereagh were in breach of his convention rights."

[20] We, the fourth Court of Appeal to consider the consequences of Mr Magee's conviction, are therefore in the ironic position of deliberating on whether the Secretary of State was wrong to refuse him compensation for reversal of his conviction when on the law as it has since been established that conviction should not in fact have been reversed.

[21] In the event Girvan J proceeded to conclude that the reversal of the conviction was not on new or newly discovered facts or their discovery but "was the result of a legal ruling on facts which had been known all along". He dismissed the application.

[22] Despite the clear decision of Girvan J an appeal was mounted to the Court of Appeal in Northern Ireland, the third Court of Appeal. The court, Kerr LCJ, Campbell LJ and Sir Michael Nicholson rejected the appeal and upheld the judgment of Girvan J. The court expressly found, at paragraph [33], that there were no new or newly found facts. The court pointed out that the appellant had not disputed before the European Court that his statements of admission were true.

> "The court [ECHR] did not dispute the trial judge's finding that the confessions were voluntary. The court took issue with the absence of legal advice for 48 hours. The Court of Appeal in Northern Ireland quashed the conviction on that ground alone, recognising that at the time of trial the trial judge could not take that into account because of the emergency legislation. The fact that the regime at Castlereagh was oppressive was known to all. It was designed to be oppressive in order to deal effectively with the interrogation of terrorist suspects."

[23] That put an end to the matter until the Supreme Court delivered its decision in R (Adams) v Secretary of State for Justice; In Re McDermott and McCartney [2011] UKSC 18. The appellant's advisers discerned in the discussion of "new or newly discovered facts" in the judgment of Lord Phillips an argument that the law had

been sufficiently altered as to justify the Department of Justice revisiting the decision to refuse compensation to Mr Magee despite the findings of Girvan J and the third Court of Appeal in Northern Ireland. I shall return to that argument shortly.

[24] The appellant's solicitors then wrote to the Department of Justice seeking such a reconsideration of the decision. By letter of 8 March 2012 the Department declined to reconsider the earlier decision of the Secretary of State taken in 2002 to refuse compensation under s.133 of the Criminal Justice Act 1988. In that letter the following was stated:

> "The Minister of Justice, David Ford MLA, has considered carefully your request that Mr Magee's application be re-opened. However, the Minister has concluded that, Mr Magee's application having been decided upon in 2002, the Department has no *powers* to entertain a re-application, or the re-opening of an old application, on his behalf. The decision of the Secretary of State that Mr Magee is not eligible for compensation therefore still stands." (Emphasis added)

[25] The appellant and his advisers then sought judicial review of that decision of the Department and the matter was heard by Stephens J. He delivered judgment on 28 May 2013: [2013] NIQB 59. It is sufficient to say that at paragraph [46] he concluded as follows:

> "I consider that the Secretary of State performed his duty under Section 133 in 2002 but that does not mean that the Department of Justice is now *functus officio*. Certain administrative decisions may be irrevocable but this is not one of them. I consider that the Department of Justice in Northern Ireland has a discretionary power to reconsider the 2002 decision. It has a duty to exercise that discretion."

[26] Further to the Order of Stephens J the matter was then reconsidered by the Department of Justice. The decision that followed from that was set out in a 'minded to refuse' letter of 9 September 2013. I set out the relevant portions:

> "… Under Section 133 compensation is payable to an applicant where 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. We believe the grounds on which Mr Magee's convictions were quashed were *not* based on a new, or newly discovered, fact. Rather, his convictions were quashed by the Court of

Appeal on 6 April 2001 on the basis that the court could not regard the conviction as safe when the European Court of Human Rights had held that the criminal proceedings against the claimant had involved a breach of Article 6 of the European Convention on Human Rights. There was no 'new or newly discovered fact' within the meaning of Section 133.

In your letter of 9 June 2011 you assert that the decision of the Supreme Court in R (Adams) v Secretary of State and in Re McDermott has altered the law relating to Section 133 with the consequence that Mr Magee is now entitled to compensation. In particular, you say that the ruling has materially affected the interpretation of a 'new or newly discovered fact' and that it now makes it clear that this includes a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings. In support of this you note that Lord Phillips adopted the approach of the Irish legislation to the meaning of the term 'newly discovered fact' and this was endorsed by Lord Kerr.

In the Supreme Court Lord Phillips extended 'new or newly discovered fact' to facts known about during the trial or appeal but where knowledge of the significance of those facts was lacking. We believe that the Supreme Court judgment does not overturn the existing case law to the effect that there is no 'new or newly discovered fact' where there is a legal ruling on facts which have been known all along. In Mr Magee's case it was the significance of the legal effect of the denial of access to a solicitor which might not have been appreciated at the time of his trial – not the significance of the facts themselves. That legal effect resulted from the Human Rights Act 1998 enabling reliance on Convention rights in domestic legal proceedings. Mr Magee's convictions were quashed on the ground of a legal ruling and facts which had been known all along – not on the basis of a new or newly discovered fact.

As we are not satisfied that the reversal of Mr Magee's conviction was on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice our view is that Mr Magee is not eligible for compensation."

The appellant's solicitors replied but the Department confirmed refusal of compensation by letter of 8 January 2014.

[27] The appellant then sought and was granted leave to judicially review the decision of the Department to that effect. This matter came before Gillen LJ sitting as a judge at first instance and he delivered judgment on the matter on 19 December 2014. It is his decision that is challenged in this court, as he dismissed the application.

[28] Gillen LJ in his judgment, [2014] NIQB 142, dealt with the relevant legislation, the facts and the considerable body of case law drawn to his attention. He concluded as follows:

> "[44] The instant case is an illustration … 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.
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> [45] In all the circumstances therefore I dismiss the application."

[29] It is worth observing that, apart from two peripheral matters relating to the inapplicability of the miscarriage of justice test to this application and the inapplicability of "significance" to the application, there was no actual criticism of this erudite judgment by Mr Hutton at the appeal hearing. Nevertheless, an appeal has been brought against the decision requiring a judgment of this court.

Consideration

[30] There is a decision of the Court of Appeal in Northern Ireland in 2007 upholding the right of the Department of Justice to refuse compensation to Mr Magee pursuant to Section 133 of the Criminal Justice Act despite the reversal of his conviction by the same court in 2001. That decision of the third Court of Appeal is, under the doctrine of *stare decisis,* binding on this court as it was on the court below. There ought to have been no challenge to that binding decision unless the appellant could show that the law had been changed by the decision of the Supreme Court in the case of Adams *op. cit.* in a way that impacted on the correctness of that decision of the third Court of Appeal.

[31] However, Mr Hutton in his submissions to the Court of Appeal relied on the contention that there were new or newly discovered facts which caused the conviction to be reversed and that the view of what constituted new or newly discovered facts had been legally altered by the decision of the Supreme Court in Adams. However, he acknowledged that the words of Lord Phillips on this topic, to which I will turn in a moment, did not express the ratio decidendis of the decision of the Supreme Court.

[32] This topic of whether or not this was the ratio decidendis of Adams was fully discussed by Gillen LJ in his judgment. I set out the relevant paragraphs:

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

[33] I would only respectfully add to that assessment of the matter the observation that Lord Hope, at paragraph 107, would appear to have put the matter differently again, reinforcing the point that the *dictum* of Lord Phillips was not the view of the majority and nor was it the *ratio* of the decision of the Supreme Court.

[34] Counsel sought to draw us into the question adverted to by Lord Phillips, and relevant in that case, of the situation where the appellant's legal advisers overlooked or failed to appreciate the significance of facts, facts which had not been deliberately concealed by the appellant. But such consideration is irrelevant when one bears in mind that the newness of the fact in this context, as Mr Hutton conceded, must be the newness to the court which reversed the conviction i.e. that it was not known to the original trial judge and to the first Court of Appeal but was a fact or facts which became known to the second Court of Appeal which quashed the conviction. The appellant has set out very fully in his skeleton argument alleged new facts, summarised above at paragraph [20] by his senior counsel in an earlier case. They are said to go to the coercive nature of Castlereagh combined with the absence of access to a solicitor. It is indisputable that the latter fact was known to the appellant and everybody else concerned and, as pointed out above, expressly referred to at the time of the trial. It might be thought absurd to suggest that counsel and the trial judge and the Court of Appeal were not aware that Castlereagh was an interrogation centre for suspected terrorists. Even if one does not speak of the matter as robustly as Sir Michael Nicholson did in the third Court of Appeal, it was known that the prisoners were held day after day and interviewed at length. It is an exaggeration to say they were in solitary confinement given that they were seeing detectives, uniformed police officers, doctors and, sooner or later, their solicitors but the CPTs description of the centre was not viewed by any of the judges as a new fact of which they were previously unaware. In our view the Report is not a fact but the opinion of the authors. All involved in the original trial and appeal would have been aware of the salient facts of Mr Magee's detention as they emerged in his *voir dire*.

[35] However, it is not necessary to reach a final view on that matter because it is quite clear on a reading of the judgment of the second Court of Appeal that it did not reach its decision to quash the conviction on the basis of 'new or newly discovered facts'. It did so on the basis of the view taken by the ECHR and the coming into force of the Human Rights Act 1998.

Carswell LCJ recited, in detail, the facts summarised above including the schedule of interviews and the findings of the learned trial judge. He addressed the allegations of ill-treatment and what was reported to the doctors. He addressed the issue of the recording of the admissions. The judgment goes on to quote passages quoted from the European Committee Report (CPT) and, extensively, from the judgment of the European Court of Human Rights quoted in part above. At page 228(h) the Lord

Chief Justice addresses the admissibility of the statement against the denial of access to legal advice for 48 hours. He goes on as follows at page 229(c):

> "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 Art 6 in any legal proceedings (which by s.7(6) include an appeal against the decision of a court). By s.22 (4), s.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.
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> In determining this appeal now against the appellant's conviction we have to judge its safety by applying the standards of today, as we held in R v Gordon [2001] NIJB 50, accepting the correctness of the decisions in R v Bentley [1999] Crim LR 330 and R v Johnson [2000] 2 All ER (D) 2026, (2000) *Times*, 21 November. … We consider that it was the clear intention of Parliament that the standards incorporated into our law by the 1998 Act should be applied from the time when it came into force, and that one cannot in this manner except appeals against pre-Act convictions from the process of application of the Convention."

[36] The judgment proceeds at pages 230 and 231 to accept the *dictum* of Lord Woolf CJ in R v Francom [2000] Crim LR 1018. It reads:

> "In cases such as the present, the Court of Appeal should approach the issue of lack of safety of the conviction in exactly the same way as the ECHR approached lack of fairness."

[37] In reaching his conclusion Carswell LCJ states the following at page 231(j):

> "The ECHR has made a direct finding on the facts of this case that the denial of access to a solicitor, against the

> background of the conditions in Castlereagh, constituted a violation of Art 6(1) in conjunction with Art 6(3) (c) of the Convention. We consider that we would not be justified in concluding that the conviction was safe in the light of this finding. We note that the court said in paragraph 38 of its decision that it was confining itself to the particular facts of the instant case."

[38] In R v Secretary of State for the Home Department ex parte Bateman and Howse, Court of Appeal (Civ) 17 May 1994, the Court of Appeal in England had to consider a situation where Ms Howse had been convicted for breaches of certain by-laws which were subsequently declared *ultra vires* and invalid by the House of Lords. Her convictions having been quashed she sought compensation under the legislation but was refused. Mr Bateman having been convicted of dishonesty offences later had his convictions overturned in the Court of Appeal in England on the grounds that the statements of witnesses against him had been wrongly admitted in evidence at his trial. Nevertheless, he too was refused compensation. When the matter came before the Court of Appeal in England Sir Thomas Bingham MR delivered the judgment of the court. At page 182g he says the following:

> "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. In my judgment Leggat LJ [in the Divisional Court] was right to say, as he did at page 14E of the transcript:
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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…""

[39] This issue was further considered in the case before the House of Lords of Re McFarland's Application for Judicial Review [2004] UKHL 17; [2004 NI 380]. I cannot improve on the summary of this case set out in the decision of Gillen LJ:

> "[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'."

[40] As Lord Scott of Foscote, Lord Rodger of Earlsferry and Lord Walker of Gestingthorpe all agreed with Lord Bingham and as this was clearly central to the point to be determined by them, it is a binding decision on this and other courts. If I may be forgiven for saying so it is a decision with which one respectfully agrees. There is a longstanding distinction in our criminal law between questions of fact which are to be determined by the tribunal of fact, whether jury or judge sitting alone, and questions of law which are for the judge alone. A distinction of the kind made by Lord Bingham is, as one would expect, a logical extension of that longstanding distinction.

[41] Therefore, 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. The Department was therefore entitled to refuse the application for compensation without going on to consider whether, in any event, there could be said to be a miscarriage of justice where the defendant had subsequently admitted to the truth of the statements which he had made admitting the offences. For the avoidance of doubt, the case with which we are dealing pre-dates the coming into force of Section 175 of the Anti-Social Behaviour, Crime and Policing Act 2014, which amends Section 133 of the Criminal Justice Act 1988, and enacts a more stringent test.

[42] It is important to note that neither McFarland nor Bateman and Howse nor Re Magee, [2007] NICA 34, are referred to in the judgments of the Supreme Court in Adams. That reinforces the view that the observations by Lord Phillips and the other justices were not directed to the issue before this court i.e. whether a conviction was reversed on 'new or newly discovered facts' as opposed to a change in the law between the original trial and the reversal of a conviction by an Appellate Court. There was no change in the law in that regard.

[43] In deference to the cogent submissions of Mr Peter Coll QC for the respondent I record his helpful citation of R (Murphy) v Home Secretary [2005] 2 ALL ER 763 where a Divisional Court in England concluded that a new or newly discovered fact had to be the principal, if not the only, reason for the quashing of the conviction. It was argued that that follows logically from the wording of Section 133(1) of the 1988 Act:

> "… on the ground that a newly discovered fact shows beyond reasonable doubt there has been a miscarriage of justice …" (Emphasis added)

[44] Although the matter was not fully argued before us we are inclined to agree that that is a proper reading of the statute. We do not accept Mr Hutton's submission that it would be in some way proper to 'disaggregate' the elements in the judgment of Carswell LCJ in the second Court of Appeal. But even if one were to do so, any possible aspects of the confinement in Castlereagh which might be factually new, as opposed to governed by the opinion of the CPT or finding of the ECHR, could not be said to be the sole or principal grounds for the quashing of the conviction. That was based on the change of law, including the decision of the ECHR. The decision of the ECHR is clearly based on the denial of access to a solicitor for 48 hours against the overall context of the confinement in Castlereagh. Therefore, the appellant's argument would fail in any event.

[45] Further, we agree that the decision that we have arrived at is in accord with the decision of this court in Re Fitzpatrick and Shields [2013] NICA 66 paras [24]-[26].

[46] We therefore conclude that we should dismiss this appeal from the judgment at first instance which upheld the decision of the Department of Justice to refuse

compensation on the ground that the appellant's conviction had not been reversed on the ground of new or newly discovered facts.