Neutral Citation No: [2017] NIQB 80 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* MAG10336 *Delivered:* 30/06/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

16/022390

IN THE MATTER OF AN APPLICATION BY CONOR McNALLY FOR JUDICIAL REVIEW

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

MAGUIRE J

Introduction

[1] The applicant for judicial review in this case is Conor McNally. The respondent is the Department of Justice. The applicant is the son of Stephen Paul McCaul. Mr McCaul is deceased, having died on 13 October 1995. On 6 December 1979 Mr McCaul (whom I shall refer to as the "defendant") was convicted at Belfast Crown Court by His Honour Judge Babington QC of a number of terrorist offences. At the time of his convictions the defendant was 16 years old. The convictions were based solely on admissions that the defendant was alleged to have made at interviews following his arrest on 7 March 1979. At this time the defendant was 15 years old. The use of these admissions was challenged at the defendant's trial, but the judge admitted them in evidence, found them to be reliable and convicted the defendant on the basis of them.

[2] Following the defendant's conviction he was sentenced to 3 years detention. Each of the offences attracted the same sentence and all were to run concurrently.

[3] The defendant thereafter appealed both his convictions and sentence and on 12 September 1980 his appeal came before the Court of Appeal. His appeal against conviction was dismissed but the appeal against sentence was allowed and as a result the original sentence imposed by His Honour Judge Babington was varied to a sentence of 18 months detention in respect of each count, the sentences to run concurrently.

[4] By the date of the defendant's death, he had long since served his sentence.

[5] Some 13 years after his son's death the defendant's father made an application to the Criminal Cases Review Commission ("CCRC"). In this application the defendant's father sought to make the case that the defendant should not have been convicted and that the trial court should not have admitted or relied upon the defendant's alleged confession statements and oral admissions arising out of the interview process.

[6] The CCRC agreed to investigate the matter and decided ultimately that it should refer the case back to the Court of Appeal. Accordingly, it made a reference to the Court of Appeal which came on for hearing as a further appeal on 23 May 2012. On this occasion the Court of Appeal allowed the appeal and quashed the defendant's convictions.

[7] In the aftermath of this successful appeal on 26 July 2012 the applicant, on behalf of his father's estate, sought compensation under the terms of Section 133 of the Criminal Justice Act 1988. On 11 December 2015 the Department of Justice made the decision which is impugned in these proceedings refusing to pay compensation.

[8] In these circumstances these judicial review proceedings were begun on 9 March 2016. The object of the proceedings, from the applicant's point of view, is to have the decision to refuse compensation made by the Department of Justice quashed. In these proceedings Ms Doherty QC and Niamh McCartney BL appeared for the applicant. Mr McGleenan QC and Anne Finnegan BL appeared for the respondent. The court is grateful to both sets of counsel for their very helpful oral and written submissions.

[9] While the above sets out the broad sweep of the applicant's case, it is necessary to fill in some of the significant details.

The original charges against the defendant

[10] There were ten counts on the indictment preferred against the defendant. These were:

Count 1 Hijacking of a bus.

Count 2 Carrying a firearm with intent to commit a hijacking.

Count 3 A second hijacking on 21 January 1979 in respect of a bus registration number COI 1426.

Count 4 Arson on 21 January 1979 whereby it was alleged that the defendant destroyed by fire the bus referred to above *viz* the bus with the registration number COI 1426.

Count 5	Carrying a firearm with intent on 21 January 1979 to commit a hijacking.
Count 6	Burglary on 18 January 1979 at 4 Melmore Drive, Derriaghy, Dunmurry. It was alleged that the defendant stole two double barrelled shotguns with cases; a quantity of shotgun ammunition; a silencer for a .22 rifle; a quantity of silver cutlery and silver utensils; an enamelled flower vase; a portable TV; an antique glass; transistor radio; and a towel and a suitcase belonging to a Mr Herron.
Count 7	Possession of firearms and ammunition. This count related to 18 January 1979 and seems to be in connection with the matters referred to in Count 6.
Count 8	Carrying a firearm with intent. This relates to 18 January 1979 at Twinbrook. The defendant allegedly had with him one firearm or imitation with intent to commit an indictable offence, namely robbery.
Count 9	Burglary on 26 January 1979 at a dwelling house at 64 Mosside Road, Derriaghy, Dunmurry where it was alleged the defendant stole a double barrelled shotgun, a quantity of ammunition, a ring; three pens and thirty dollars.
Count 10	Possession of a firearm and ammunition on 26 January 1979. This appears to relate to the matters referred to at Count 9.

The defendant's arrest and interviews

[11] Following the defendant's arrest at 10.55 hours on 7 March 1979 he was interviewed on five occasions at Castlereagh Police Office. The interviews took place at the following times:

Interview 1	14.48-16.10	Shearer/Nesbitt	7 March 1979
Interview 2	19.30-22.18	Shearer/Gribben	7 March 1979
Interview 3	11.00-12.55	Shearer/Gribben	8 March 1979
Interview 4	14.15-16.30	Shearer/Gribben	8 March 1979
Interview 5	19.50-00.10	Shearer/Gribben/ King	8-9 March 1979

[12] Overall the defendant appears to have been held prior to charge in police custody for a total of some 52 hours and 35 minutes.

[13] It was the prosecution case at the defendant's trial that he had made admissions orally during the course of the first four interviews referred to above. It was not however until the fifth interview that he made, it is alleged, written statements of admission. At the fifth and final interview five written statements were alleged to have been made by him, though at this trial only three were sought to be introduced in evidence.

The trial

[14] It appears to have been common case that at the defendant's trial the determining evidence against him consisted of the statements which he was alleged to have made during interviews. The prosecution case was that the admissions made by the defendant during the interview process and in particular the statements he made at the fifth interview were made voluntarily and should be introduced in evidence. It was contended that the admissions were true and that accordingly the defendant should be convicted of the offences to which they related.

[15] The defence case at the trial was that the defendant's statements should not be admitted in evidence as they had been obtained in breach of the Judges' Rules. The defence placed emphasises on the following:

(i) That the defendant was just 15 years of age when he was interviewed.

(ii) That the defendant had a mental age of approximately 7 years.

(iii) That the defendant was receiving special schooling.

(iv) That the defendant, apart from being able to write his name, was otherwise unable to read or write.

(v) That the defendant should not have been interviewed in the above circumstances in the absence of a parent or other independent adult.

[16] In the course of the trial the judge heard evidence from the police officers who had been concerned with the applicant's arrest, detention and interviews. The court also heard from the defendant's mother and from a psychiatrist, Dr Nugent. It was Dr Nugent's evidence that the defendant lacked the intellectual capacity to have provided by way of dictation the statements which it was said he had made and which the police maintained they had simply written down. Dr Nugent also indicated that in his view the defendant, whom he had assessed prior to the trial, would agree very easily to matters put to him and that he would lie and exaggerate. The defendant's mother's evidence was to the effect that it was not possible to rely

on anything her son had said. It was her experience that the defendant would admit to things put to him whether he had done them or not.

The judge's ruling

[17] In his ruling the learned judge noted that it had not been alleged that the defendant had been subjected to ill-treatment but rather that the case before him was that in the course of the interview process there had been breaches of the Judges' Rules. The judge went on to hold that in fact there had been breaches of Rule 4 and Rule 4A of the Judges' Rules. These arose because an independent adult and/or parent had not been present during interviews when, according to the Rules, such a person ought to have been present due to the defendant's age and his mental handicap.

[18] Notwithstanding this finding, however, the judge decided that he should accept the evidence of the police officers that the defendant had dictated the statements which had been recorded during the fifth interview and, in particular, the three written statements relied on by the prosecution. In these circumstances the judge viewed the statements as having been provided voluntarily and he rejected the suggestion that their contents had been in turn suggested to the accused. Insofar as Dr Nugent had indicated that the first of the statements could not have been made by the defendant the judge preferred the evidence of the police over that of Dr Nugent. In short the judge was satisfied there was no unfairness to the defendant caused by the arrest and interview process and in the absence of the presence of an independent adult or one of his parents. The judge also accepted the evidence of Detective Inspector Meeke in respect of his reason for not having either parent present at the interviews. The reason given by the Inspector was that the presence of a parent at the interviews would have hindered the investigation. The judge then went to indicate that in the exercise of his discretion he should admit the statements in evidence despite the breaches of Rules 4 and 4A.

[19] Thereafter the judge ruled that he was satisfied beyond reasonable doubt that the statements relied on by the prosecution were true and that the accused was guilty beyond reasonable doubt in relation to each count on the indictment.

The in time appeal

[20] At this appeal in September 1980 the defendant's counsel argued that at the trial the judge had erred in finding that the contents of the admissions of the defendant were not suggested to him and he further argued that the trial judge had misdirected himself as to the grounds on which he should have exercised his discretion to exclude the admissions. It was also suggested by the applicant's counsel that the trial judge's finding that the admissions of the accused were accurate and reliable was against the weight of the evidence.

[21] While the defendant was granted leave to appeal ultimately, as has already been indicated, the appeal against conviction was dismissed. In dismissing the appeal Lord Lowry LCJ speaking for the court indicated that:

> "It is admitted that the learned trial judge had a discretion to admit or exclude the statements.
>
> This court is clearly of the opinion that he asked himself the right question and did not leave out of account anything which he ought to have considered or take into account anything which he should have disregarded.
>
> There is no foundation in the transcript for saying that he took account of the truth of the statements and made that the ground or even one of the grounds for admitting them.
>
> He also observed the correct burden and standard of proof.
>
> Both before and after admitting the statements the learned trial judge had to resolve certain questions of fact in order first of all to exercise his discretion and finally to reach a conclusion on the case.
>
> I have already commented on the pains taken by the learned trial judge during the hearing to prepare for these tasks and now add that he set about the tasks logically and in the proper order.
>
> The judge saw and heard the witnesses and there was no sign whatever from anything he said or did that he disabled himself from taking full advantage of the opportunity which he had of assessing the truth, accuracy and reliability of the evidence and of coming to a proper conclusion. In weighing the evidence of the prosecution witnesses and that of Dr Nugent he had to balance the truth and accuracy of evidence as to fact on the one hand against the reliability of opinion on the other. In making up his mind on the latter (which was not in any event conclusive after taking into account of everything Dr Nugent said in cross-examination) the judge could consider the effect of Dr Nugent's evidence as a whole.

> There is in our opinion no warrant for upsetting the conclusions which led the learned trial judge to admit the evidence.
>
> If the police witnesses were telling the truth (and the learned trial judge was the sole judge of that) there was no basis for accepting an opinion that the appellant could not have dictated his statements …"

The CCRC Reference

[22] The CCRC Reference is dated 30 March 2009. It is a document of some 41 pages in length. In the course of it there is a substantial explanation of events at the trial and on appeal. There is also a lengthy analysis of the evidence before the trial judge.

[23] There is a section in the CCRC Reference which noted that at the original trial and on appeal the defence had offered no challenge based on the fact that the defendant had been interviewed without the benefit of access to legal advice. There was no evidence that the defendant had requested legal advice or that any decision had been taken that he would not be offered access to a solicitor in the event of such a request. However, the Commission noted that at that time in Northern Ireland such a request, if it had been made, in the context of the investigation of acts of terrorism would always produce the same outcome *viz* refusal. In support of this conclusion the CCRC referred to a passage from the Bennett Report.

[24] At paragraph 94 of the CCRC Reference it was indicated that the contention that the statements should not have been admitted in evidence was not in itself new. However, as regards that contention the Commission went on to say:

> "a. That it is apparent from the analysis … above, that since Mr McCaul's trial there has been a significant change in the 'standards of fairness' which the courts will now apply when considering whether or not a statement made by a 15 year old with mental vulnerabilities without the benefit either of an appropriate adult or a legal representative ought to be admitted into evidence;
>
> b. That it is apparent from the analysis … above, that there has been a significant change in the willingness of the courts to conclude that a person's mental vulnerabilities might make that person more likely to make false confessions."

[25] However, notwithstanding those points at paragraph 95 the Commission went on:

> "The Commission recognises that the arguments set out in this statement of reasons are substantially the same as those which were previously considered by [the Court of Appeal], presided over by the then Lord Chief Justice, Lord Lowry. It follows that, for the court to now allow the appeal, the court would have to reach a different conclusion, on largely the same facts, as did the court at the first appeal. … This need not prevent an appeal succeeding …"

[26] In the Commission's statement of reasons the overall position in respect of the defendant's application was described in this way:

> "96. In light of the unchallenged evidence as to Mr McCaul's vulnerability, and his age, the Commission takes the view that it could quite properly be argued that:
>
> (i) The trial judge's decision to admit Mr McCaul's statements into evidence (and to convict him of a number of serious offences on the basis of those statements) notwithstanding his conclusion that those statements had been obtained in breach of the Judges' Rules, was wrong when judged by modern standards of fairness; and
>
> (ii) Even on the evidence adduced at Mr McCaul's trial, there was a real risk that rather than freely dictating the confession statements, Mr McCaul had in fact simply agreed with suggestions put to him by the interviewing officers.
>
> 97. In these circumstances there is, in the Commission's view, a real possibility that the Northern Ireland Court of Appeal could be persuaded that there are *prima facie* grounds for concluding that [Mr McCaul's] convictions were unsafe and that, given the absence of any 'counterveiling factors' (such as were referred to by the court in Mulholland) which displace that

> preliminary conclusion, those convictions should be quashed."

The decision of the Court of Appeal quashing the convictions

[27] The CCRC Reference in the defendant's case was considered by the Court of Appeal alongside three other references. The conclusions of the court in respect of each of these cases is reported under the name of R v Brown and Others [2012] NICA 14. In each case the appellants had been arrested and interviewed in the 1970s under emergency provisions legislation. Each had made statements of admission which were subsequently relied upon at their trials and formed decisive evidence against them. Each had been aged 15 or 16 at the time. None of them had access to a solicitor during their detention before making their admissions and none were accompanied by a parent or independent person during interview.

[28] In the course of its consideration of the references the court devoted substantial attention to the legal principles governing the admissibility of confessions at the time of the various trials.

[29] In his judgment Morgan LCJ described the principles governing the admission of confessions at the time of trial. Having described the terms of the relevant portion of the Northern Ireland (Emergency Provisions) Act 1978 and the interpretation given by the courts to this and its predecessor provision, Section 6 of the Emergency Provisions Act 1973, he set out the following at paragraph [18]:

> "We have spent some time reviewing the law on the admissibility of statements of admission under the emergency legislation because of a suggestion in decisions of this court in R v Mulholland [2006] NICA 32 and R v Fitzpatrick and Shiels [2009] NICA 60 that the test for admissibility was governed by the Judges' Rules. Accordingly it was submitted that any breach of the Judges' Rules indicated a departure from the applicable legal standard at the time. We have no reason to doubt the correctness of the outcome of the appeals in Mulholland and Fitzpatrick and Shiels but in neither case was the case law to which we have referred opened to the court. The cases to which we have referred demonstrate that admissions made in breach of the Judges' Rules were admissible under the emergency provisions legislation unless obtained by torture or inhuman or degrading treatment. The residual discretion to exclude such admissions would not be exercised to render statements obtained in breach of the Judges' Rules inadmissible on that ground only. That was the law at the time of those

> trials. None of the parties before us contended that this was a change of case law although all parties recognised that the standards of fairness had significantly altered as a result of legislative changes arising from PACE and from the Human Rights Act 1998.
>
> … all of the appellants accepted that the statements of admission were properly admitted applying the standards of fairness appropriate at the time of these trials."

[30] In the light of this the court went on to consider how a change in the standards of fairness and procedural safeguards may be material to the issues of admissibility and reliability.

[31] On this aspect the leading case on the approach which a court should take where there had been a substantial delay between the trial and appeal resulting in a change of law or standards of fairness and procedural safeguards was R v King [2000] 2 Cr App R 391.

[32] The Court of Appeal then quoted at length from Lord Bingham's judgment in that case in a passage which this court will set out taken from paragraph [23] of the Northern Ireland Court of Appeal's judgment in Brown:

> "Lord Bingham considered the general approach the court should take in such cases.
>
>> 'We were invited by counsel at the outset to consider as a general question what the approach of the Court should be in a situation such as this where a crime is investigated and a suspect interrogated and detained at a time when the statutory framework governing investigation, interrogation and detention was different from that now in force. We remind ourselves that our task is to consider whether this conviction is unsafe. If we do so consider it, section 2(1)(a) of the Criminal Appeal Act 1968 obliges us to allow the appeal. We should not (other things being equal) consider a conviction unsafe simply because of a failure to comply with a statute

> governing police detention, interrogation and investigation, which was not in force at the time. In looking at the safety of the conviction it is relevant to consider whether and to what extent a suspect may have been denied rights which he should have enjoyed under the rules in force at the time and whether and to what extent he may have lacked protections which it was later thought right that he should enjoy. But this Court is concerned, and concerned only, with the safety of the conviction. That is a question to be determined in the light of all the material before it, which will include the record of all the evidence in the case and not just an isolated part. If, in a case where the only evidence against a defendant was his oral confession which he had later retracted, it appeared that such confession was obtained in breach of the rules prevailing at the time and in circumstances which denied the defendant important safeguards later thought necessary to avoid the risk of a miscarriage of justice, there would be at least prima facie grounds for doubting the safety of the conviction—a very different thing from concluding that a defendant was necessarily innocent'."

Later in paragraph [23] Morgan LCJ indicated that the above approach was that which the Court of Appeal should follow.

[33] In following that approach the Court of Appeal then dealt with the application of the King approach to the defendant's case between paragraphs [47]-[54]. At paragraphs [53] and [54] Morgan LCJ commented:

> "[53] The learned trial judge recognised, however, that the appellant attended a special school and clearly suffered some form of mental handicap. The suggestibility of persons in the position of this appellant has been the subject of considerable research and it appears that Dr Nugent's opinion on this issue may well have had considerable substance.

> The learned trial judge stated that he preferred the evidence of the police officers who said that the appellant had dictated the written statements made in the fifth interview but it is necessary to take into account that there had been four previous interviews when all of these matters had been discussed at some length. One of the issues which now arises is whether that in itself provided the basis for the appellant's willingness to make the written statements recorded over a period in excess of 4 hours at the fifth interview.
>
> [54] There is now a considerable body of evidence to suggest that mentally handicapped young people are likely to be more vulnerable in police interviews because they may be suggestible. This much was recognised in R v Hussain [2005] EWCA Crim 31. The very case made on behalf of the appellant at trial was that he was suggestible. In those circumstances the absence of a solicitor or independent adult gives rise to real concerns about the reliability of the admissions. We are, therefore, satisfied that this conviction is unsafe and we allow the appeal."

Compensation

[34] The issue of the payment of compensation for miscarriage of justice is dealt with in Section 133 of the Criminal Justice Act 1988.

[35] So far as relevant for the purposes of this judgment, Section 133 states:

> "(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 Department of Justice in Northern Ireland shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.

> (2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Department of Justice in Northern Ireland before the end of the period of 2 years beginning with the date on which the conviction of the person concerned is reversed or he is pardoned.
>
> (3) The question whether there is a right to compensation under this section shall be determined by the Department of Justice in Northern Ireland.
>
> (4) If the Department of Justice in Northern Ireland determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Department of Justice in Northern Ireland.
>
> (5) In this section 'reversed' shall be construed as referring to a conviction having been quashed—
>
> (a) on an appeal out of time; or
>
> (b) on a reference -
>
> (i) under the Criminal Appeal Act 1995; or
>
> (ii) under section 194B of the Criminal Procedure (Scotland) Act 1995 …"

[36] In this case, as referred to above, the applicant applied for a payment of compensation following the decision of the Northern Ireland Court of Appeal in May 2012 to quash the defendant's convictions. The decision constituted a "reversal" for the purpose of Section 133 (5).

[37] In declining to pay compensation the Department of Justice's initial view on 24 June 2015 was expressed as follows:

> "Under Section 133 … two issues are relevant in consideration of whether Mr McCaul is entitled to compensation. The quashing of an applicant's conviction must be consequent to a 'new or newly discovered fact' which shows 'beyond unreasonable doubt that there has been a miscarriage of justice'."

[38] As regards the issue of new or newly discovered fact, the letter went on to say:

> "In Mr McCaul's case we must … consider whether this new body of evidence as to suggestibility is a new or newly discovered fact, and, if it had been known at the time of his trial, would it have demonstrated that there was no case against him which would stand up to legal scrutiny."

[39] On this issue the Department concluded that:

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

[40] The response of the applicant's solicitors to the Department of Justice's stance was, as per a letter of 2 September 2015, that:

> "The applicant's case can be distinguished from cases wherein convictions have been overturned on the basis of a change in legal standards and standards of fairness relating to the interviewing of suspects, for the reason that his conviction was quashed on the basis of a body of evidence and scientific research compiled in the intervening decade relating to persons with a mental handicap and their susceptibility to be suggestible. … This body of evidence constitutes a fact which was only 'discovered' … for the first time on the subsequent appeal, and therefore it is prima facie a 'new fact'."

[41] The letter went on to submit that, in addition, this was a case of miscarriage of justice.

[42] The Department's final decision was communicated to the applicant by a decision letter dated 9 December 2015. This affirmed the Department's views as already expressed in its letter of 24 June 2015. The matter was put in the following way:

> "In your client's case the new body of evidence now available is a change in legal standards of fairness and procedural safeguards subsequent to his trial and

> conviction which was in accordance with the law at the time.
>
> … Even if the Department were to accept the subsequent advances in medical research was a new evidential fact we would not be persuaded beyond reasonable doubt that had this been know at the time it would have meant that the case against him was so undermined that no conviction could possibly be based upon it."

[43] Shortly after receipt of this letter the applicant's solicitors sent a pre-action protocol letter dated 8 March 2016. This was replied to by the Department of Justice on 24 March 2016. These proceedings then ensued.

The issues

[44] It seems clear from the foregoing, that there are two central issues which may arise in these proceedings. The first is whether the applicant's convictions were reversed on the ground, as required by the 1988 Act, of a new or newly discovered fact. If the answer to this question is in the affirmative the second issue would then have to be confronted *viz* whether that fact shows beyond reasonable doubt that there has been a miscarriage of justice. On the other hand, if the answer to the first question is in the negative, then compensation will not be payable, without more.

[45] As regards the first issue, the applicant's case was that the reversal of the defendant's convictions was due to the emergence of a body of evidence on the issue of suggestibility of the defendant in the context of his police interviews. The new evidence, it was submitted, arose out of research in respect of the reliability of confessions made by young and/or vulnerable people in the position of the defendant.

[46] Counsel argued that paragraphs [52]-[54] of the Court of Appeal's judgment when quashing the defendant's convictions supported this analysis. The matter was put in the following way at paragraph 58 of the applicant's skeleton argument:

> "Therefore, it is submitted, the reasons for reversal of the convictions was clearly the emergence of this new evidence, the product of research and development in the field since the date of the trial and in time appeal."

[47] The above approach was not, however, shared by the respondent which, through counsel, characterised the Court of Appeal's quashing decision quite differently – as not a case about any new or newly discovered fact but one about change to the standards of fairness affecting the safety of convictions. A different

view was taken in the out of time appeal to the same factual situation that had emerged at trial.

[48] At paragraph 28 of the respondent's skeleton argument, the matter was described pithily as one involving "known facts" which had been interpreted in a way which gave them "a different legal significance in the light of shifting standards".

[49] In respect of the second issue, there appeared to be a substantial area of agreement that it did not strictly arise for consideration if the first issue was determined in favour of the respondent. But it did arise if the first issue was determined in favour of the applicant.

[50] Both parties submitted that, if the second question had to be determined, the applicant had to show, beyond reasonable doubt, that either the defendant was innocent of the charges or that the evidence against him was so undermined that no conviction could possibility be based on it.

[51] In particular, the applicant submitted that the latter test was fulfilled if the first issue was answered in his favour as, in the light of the defendant's vulnerabilities, there existed real concerns about the reliability of the alleged confessions.

[52] On this point, the respondent disagreed, arguing that the Department was at liberty to form its own view of the likely impact of any new fact upon the prospects of a successful prosecution. Provided its view was reasonable, the court should not interfere.

New or newly discovered fact

[53] The requirement that the conviction be reversed on the ground that "a new or newly discovered fact" which shows beyond reasonable doubt that there has been a miscarriage of justice, has been a feature of compensation schemes in this area for some considerable time.

[54] It appears to originate from the terms of Article 14(6) of the International Covenant on Civil and Political Rights and was an element in the old *ex gratia* arrangements for compensation, such as the statement of those announced in the House of Commons in November 1985 by the then Home Secretary.

[55] When the 1988 Act was enacted, this wording was repeated in Section 133(1) as can be seen from the terms of the sub-section set out above.

[56] As an enduring element within the conditions which have to be satisfied in order to be eligible for compensation, the expression "new or newly discovered fact" has been the subject of substantial judicial consideration over the years.

[57] Thus those words were considered in R v Secretary of State for the Home Department ex pate Bateman and Howse on 5 May 1993 when Leggat LJ stated:

> "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 …"

[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:

> "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 (*i.e.* 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

[69] The court is of the view that the importance of meeting the requirement to show that the reversal of the conviction is on the ground of a new or newly discovered fact is well established and that a claim to compensation under section 133 in the absence of meeting that requirement is bound to fail.

[70] In this case the terms in which the convictions were quashed have been set out above. These must be read in the light of the terms of the reference made by the CCRC.

[71] At paragraph 65 of the reference, there is discussion of whether, in the defendant's case, there was a need to place before the Court of Appeal any further evidence in respect of the defendant's psychological vulnerability. At paragraph 67 the CCRC concluded that "there was no real possibility that fresh psychiatric evidence would take matters significantly further than Dr Nugent was able to opine in evidence *i.e.* that his clinical findings indicated that Mr McCaul was 'highly suggestible'". These, it was noted, were inconsistent with the contention that Mr McCaul had dictated the statements which were attributable to him. In line with

this, the CCRC concluded that "fresh expert evidence is unlikely to have significantly greater persuasive force than that [of] Dr Nugent's contemporaneous evidence".

[72] The above passages do not suggest to the court that the reversal in these circumstances was based on new or newly discovered fact.

[73] At paragraph 66 of the reference the Commission observed that the science of psychiatry had developed considerably since Mr McCaul's trial. It notes that there is now "far greater understanding of the circumstances in which a person's psychological vulnerability might cause them to make false confessions". At the end of the last quotation, there is a footnote – footnote 38. This says: "See generally, Maudsley Discussion Paper Number 2 Tab 36 Annex C".

[74] The court has considered the Maudsley Paper which was published under the names of two authors. It is undated. The paper, according to its abstract, "outlines the contributions that forensic psychology and psychiatry have made in recent years to the understanding of 'unreliable confessions'". In particular, the paper focusses on experts who can testify in such cases and the contribution which can be made by them. However, it seems to the court, that the report as a whole is about introducing those involved in the area of disputed confessions to a general description of the contribution which can be made by the disciplines of psychology and psychiatry. The paper is aimed at drawing attention to general factors which emerge from research and from experience in some cases. It is not intended to be a document which constitutes evidence which is to be applied in a particular given case, as all cases are different, a point expressly acknowledged by the authors. Each case rather must be considered on its own merits. In short, this publication while informative is not directed at the issues which arose in Mr McCaul's case and, on a proper analysis, is in the nature of useful background reading for someone who is dealing with the subject of disputed confessions.

[75] It is not the court's view that this paper should be viewed as containing any new or newly discovered fact for the purpose of section 133, as argued on behalf of the applicant.

[69] In the court's view, the present case falls to be determined in the same way and with the same result as the Court of Appeal's determination in Fitzpatrick and Shields. The court therefore adopts the approach of Girvan LJ at paragraph [24] cited above. Having done so, it concludes that this is a case at most of changing legal standards which have led to the reversal and it is not a case of a new or newly discovered fact which has been instrumental to the court's conclusion quashing the convictions.

[76] Given this conclusion, as an essential element in the applicant meeting what he has to show to be eligible for compensation has not been met, it follows that this judicial review must fail on this ground alone.

Proof beyond reasonable doubt that there has been a miscarriage of justice

[77] The second issue identified above does not strictly arise on the view the court takes of the first issue.

[78] The difficulty of determining how the term 'miscarriage of justice' should be interpreted has been the subject of exhaustive analysis in recent times, most notably by the Supreme Court in its decision in the case of R (Adams and Others) v Secretary of State for Justice [2011] UKSC 18.

[79] It now seems settled in the light of Adams that the correct approach is that which says that a 'miscarriage of justice' occurs for the purpose of compensation either where it can be said that it has been established to the requisite standard that the applicant for compensation by reason of a new or newly discovered fact is to be viewed as innocent of the offences for which he or she had been convicted or where such a new or newly discovered fact to the requisite standard shows that there has been a miscarriage of justice in that the evidence on which the convictions are based is so undermined that no conviction could properly be based on it. This appears to have been the majority view in Adams.

[80] This matter is discussed in detail in Fitzpatrick and Shields at paragraph [19] and the court respectfully agrees with the view of Girvan LJ therein set out.

[81] In the present case there can be and was no suggestion made at the hearing that the case of Mr McCaul fell within the category of one in which it has been demonstrated he was innocent. It is therefore a matter of determining whether (to use the categories discussed in Adams) it is a category 2 case, that is one in which the new fact or facts so undermines the evidence against the defendant that no conviction could be possibly based on it.

Assessment

[82] Given the court's conclusion that this is not a case in which the out of time convictions/reference were quashed by reason of the demonstration of a new or newly related fact, the court is not in a position to say more than that this is enough to cause this judicial review to fail. It would be an artificial construct for the court to seek to answer the question which might arise were the 'new or newly discovered' fact criterion satisfied. The court has indicated the test which would apply in that eventuality but no purpose would be served by speculation on whether this test would be fulfilled if, contrary to this court's holding, the antecedent test of 'new or newly discovered fact' had been satisfied.

Conclusion

[83] For the reasons the court has given, this judicial review application must fail.