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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

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Before: Morgan LCJ, Deeny LJ and Treacy LJ

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MORGAN LCJ

[1] This is an appeal from a decision of Maguire J refusing to quash the Department of Justice's decision refusing the appellant's application for compensation for miscarriage of justice. Ms Doherty QC appeared with Ms McCartney for the appellant and Mr McGleenan QC with Ms Finegan for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] The appellant is the son of Stephen McCaul who died in a road traffic accident on 13 October 1995. On 7 March 1979 Mr McCaul who was then almost 16 years old was arrested under the Northern Ireland (Emergency Provisions) Act 1978 in connection with the hijacking of two buses and two burglaries where shotguns were stolen. He was interviewed on five occasions between 7 and 9 March 1979 and charged with offences of hijacking, carrying a firearm with intent, arson, burglary and possession of firearms and ammunition.

[3] He was tried before His Honour Judge Babington QC. The prosecution case was that he had made oral admissions during his interviews and made written confession statements during the fifth and final interview. The admissibility of the interviews was challenged on the basis of breaches of the Judges' Rules and evidence that suggested that Mr McCaul was mentally disabled, could not read or write and had an IQ of between 50 and 60.

[4] The trial judge accepted that there had been breaches of the Judge's Rules but indicated that he was impressed by the evidence given by police officers who said that they did not observe any "mental defect" in the defendant. He preferred their evidence and ruled the statements to be admissible as voluntary confessions. Mr McCaul was convicted and sentenced to 3 years detention. His appeal against conviction was dismissed on 12 September 1980 as the court saw no reason to upset the conclusion which led the trial judge to admit the evidence. His sentence was reduced to one of 18 months detention.

[5] The Criminal Cases Review Commission ("CCRC") referred Mr McCaul's case to the Court of Appeal in Northern Ireland on the grounds that:

(i) the trial judge's decision to admit evidence that Mr McCaul had made oral admissions and his written statements notwithstanding that there had been significant breaches of the Judges' Rules was wrong;

(ii) the trial judge's decision to disregard Dr Nugent's evidence as regards Mr McCaul's vulnerability and suggestibility was wrong; and

(iii) in those circumstances his convictions were unsafe.

[6] In its consideration of the case the CCRC noted that evidence from Dr Nugent, a consultant psychiatrist, was called on behalf of the appellant. Dr Nugent gave his opinion that the appellant was "mentally retarded" with a mental age of seven years. That would give him an intelligence quotient of between 50 and 60. Anything below 80 was "subnormal". Dr Nugent also stated that anyone with an IQ of that level and intelligence of that level would be highly suggestible. He also gave his opinion that in light of his mental difficulties he would not have been able to dictate the statement that the police officers said was dictated by the appellant. The trial judge rejected the latter assertion as he preferred the evidence of the police officers as to what occurred during the interviews.

[7] The CCRC considered whether further evidence of Mr McCaul's psychological vulnerability should be sought in support of the application. Such an evaluation in these circumstances would be limited to interviews with the deceased's family. The Commission observed that the science of psychology had developed considerably since the trial and that there was now far greater understanding of the circumstances in which a person's psychological vulnerability might cause them to make false confessions but it considered that there was no real possibility that fresh psychiatric evidence would take matters significantly further than Dr Nugent was able to opine.

[8] The CCRC noted that this court had approved the approach by Lord Bingham CJ in R v Ashley King [2000] 2 Cr App R 391 where he stated that the issue for the court was whether the verdict was unsafe. The court must apply the statute law in force at the time of the trial but it must also apply current standards of fairness and a current understanding of the common law. If the only evidence against the defendant was his confession which he had later retracted and 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.

[9] The submission also relied upon the decision of the English Court of Appeal in R v Hussain [2005] EWCA Crim 31 which was a case involving the 1978 conviction of a 16 year old youth for murder. In that case the prosecution had relied heavily on a confession statement which the accused had made in the course of a police interview in relation to which he was not offered legal advice and during which no independent adult was present. The court encapsulated its approach to such evidence at paragraph [48]:

> "48. The fact, however, that the courts now have a greater general understanding of the vulnerability of juvenile offenders who make admissions or confessions is a matter which according to *Bentley* we ought to (and therefore do) take into account. What Lord Bingham CJ there called standards of fairness have significantly changed. It is, we think, unlikely in the extreme that to-day admissions by juveniles made in the absence of legal advice and without the present of an appropriate adult would ever be put before a jury, particularly when the juvenile has been effectively held incommunicado for a period of 9 hours and has then been woken up to undertake a third interview and make a statement at 11.30 at night."

[10] The CCRC summarised its position at paragraphs 94 and 95 of its report:

> "94. It follows that the contention that the statement should not have been admitted into evidence is not, of itself, new. As regards that contention, the Commission notes however:
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> (a) that it is apparent from the analysis of paragraphs 75 to 84 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; and
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> (b) that it is apparent from the analysis at paragraphs 85 to 90 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.
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> 95. Finally, the Commission recognises that the arguments set out in this Statement of Reasons are substantially the same as those which were previously considered by that court, 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. That this need not prevent an appeal succeeding is apparent from paragraphs 51 and 52 of the judgement in R v Hussain."

[11] Mr McCaul's appeal was determined in R v Brown and others [2012] NICA 14. The operative part of the ruling was contained in paragraphs [53] and [54]:

> "[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.
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> [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."

The Application

[12] On 26 July 2012 the appellant sought compensation on behalf of his father's estate under section 133 of the Criminal Justice Act 1988 ("the 1988 Act") which provides:

> "133. - (1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to, his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted."

[13] The Department of Justice ("the Department") was satisfied that the conviction had been reversed within the meaning of the legislation but was not satisfied that the reversal was on the ground of a new or newly discovered fact nor that the reversal showed beyond reasonable doubt that there had been a miscarriage of justice. In this appeal the only issue is whether the Department was correct in concluding that the conviction was not reversed on the ground of a new or newly discovered fact.

[14] Before the learned trial judge the appellant's case was that the conviction was quashed on the basis of the body of evidence and scientific research compiled in the intervening decade relating to persons with a mental handicap and their susceptibility to be suggestible. That was the body of evidence which constituted a fact which was only discovered for the first time on the subsequent appeal. The Department's view was that the new body of evidence now available was a change in legal standards of the fairness of procedural safeguards subsequent to the deceased's trial and conviction which was in accordance with the law at the time.

[15] The learned trial judge reviewed a number of the authorities dealing with the requirement for a new or newly discovered fact. He relied in particular upon applications made by Justin Fitzpatrick and Terence Shiels under the 1988 Act. These were applications which involved facts with marked similarities to this case as in each case what was at issue were convictions based upon admissions which led to convictions which on CCRC references many years later were quashed by the Court of Appeal because of breaches of the Judge's Rules in respect of the interrogation of young persons.

[16] At first instance Treacy J rejected the suggestion that the fact that the appellants were detained and questioned by the police in circumstances which breached the legal rules prevailing at the time was a newly discovered fact. On appeal Girvan LJ gave the judgment of the court ([2013] NICA 66) and his

consideration of the newly discovered fact argument commented on R v Brown and others:

> "It was recognised by the appellants in the case R v Brown and Others that the statements of admission were properly admitted applying the standards of fairness appropriate at the time of the trial. It was as a result of the changes in the standards of fairness and procedural safeguards that led to the quashing of some of the convictions in the case of R v Brown and Others and which led to the quashing of the convictions in the case of R v Fitzpatrick and Shiels. 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."

[17] Maguire J considered that the terms in which the convictions were quashed had to be read in light of the reference made by the CCRC. He noted that the CCRC assessment was that fresh expert evidence was unlikely to have significantly greater persuasive force than that of Dr Nugent's contemporaneous evidence. He noted that the CCRC had referred to the Maudsley Paper which outlined the contribution forensic psychology and psychiatry had made in recent years to the understanding of unreliable confessions. He concluded that the report as a whole was 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. It was not intended to be a document which constituted evidence to be applied in a particular given case and that point had been expressly acknowledged by the authors. The paper did not, therefore, contain any new or newly discovered fact for the purposes of section 133 of the 1988 Act. He found that this was not a case of a new or newly discovered fact.

The Appeal

[18] For the purposes of the appeal the appellant relied on the submissions it had advanced below together with observations on the reasoning of the learned trial judge. It was submitted that the definition of "newly discovered fact" was set out by Lord Phillips in R (on the application of Adams) v Secretary of State for Justice [2012] 1 AC 48 at [60]:

> "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".

The appellant also accepted the description in Re Fitzpatrick and Shiels [2013] NICA 66 by Girvan LJ at [23]:

> "…the discovery of a new fact can only refer to a fact of an evidential nature... There is a clear distinction between the correction of a conviction because of new factual material not known at the trial and the correction of a conviction because of a different view on the law applied to the same factual situation which was known to the trial court."

[19] The core submission made by the appellant was that the Court of Appeal in finding the conviction unsafe referred to the suggestibility of persons in the position of the appellant being the subject of considerable research and indicated that there was now a considerable body of evidence to suggest that mentally handicapped young people were likely to be more vulnerable in police interviews because they may be suggestible. It was contended that the reference to the body of evidence was itself a reference to a newly discovered fact.

[20] The appellant submitted that the judge misdirected himself by appearing to consider that fresh evidence directed specifically to the deceased's case was required. It was submitted that the reference to the body of evidence was sufficient. Secondly, it was submitted that the judge erred in his consideration of the Maudsley Paper. The appellant maintained that the paper was a clear illustration of the advances in the understanding of false confessions and set out the research and scientific developments since the early 1980s which showed the objective basis for those concerns.

[21] The respondent made three principal points. First, it was submitted that considerable weight should be given to the overriding approach of the Court of Appeal when dealing with the deceased's conviction at paragraph [19]:

> "[19] In their oral submissions all of the appellants accepted that the statements of admission were properly admitted applying the standards of fairness appropriate at the time of these trials. We consider that the question of admissibility has to be judged both now and then against the background of the legislative regime put in place under the emergency provisions legislation. We will now consider how a change in the standards of fairness and procedural safeguards may be material to the issues of admissibility and reliability. That will inform our decision on the safety of these convictions."

[22] Secondly, it was submitted that Maguire J did not state that fresh evidence specifically directed to the appellant was required as a matter of law. He did examine whether the CCRC had advanced any new medical or psychiatric evidence before the Court of Appeal and concluded correctly that it had not done so. There was nothing of clinical substance to add to what Dr Nugent had stated in evidence at the trial. There was, therefore, no new factual evidence before the Court of Appeal.

[23] Thirdly, the Maudsley Paper was an undated research document which was not expressly relied upon by the CCRC and to which no reference was made by the Court of Appeal. The learned trial judge noted that the paper focused on the nature of the experts who can give expert evidence in such matters. The respondent submitted that the judge's assessment was correct and that the paper did not contain any new or newly discovered fact.

Consideration

[24] It is common case that the determination of whether a new newly discovered fact was responsible for the reversal of the conviction is a matter for the Secretary of State. In making that decision the respondent is entitled to take into account all relevant information. In most cases that will include the observations of the Court of Appeal in the out of time appeal leading to the quashing of the conviction. As the cases make clear, however, the task of the criminal court is to determine whether the conviction is safe. The court is not required to deal with any of the issues under section 133 of the 1988 Act.

[25] As is clear from the submissions contained in the CCRC report no new opinion or factual evidence was introduced on behalf of the appellant in the out of time criminal appeal. In that appeal the court was invited to take a different view of the evidence which had been introduced at first instance. That reflected the submission from the CCRC at paragraph 94 of its report that the basis for holding the conviction unsafe was a change in the standards of fairness.

[26] The principal argument advanced on behalf of the appellant concerned the first sentence at paragraph [54] of the decision of the Court of Appeal where the court referred to the body of evidence suggesting that "mentally handicapped young people [were] likely to be more vulnerable in police interviews because they may be suggestible". It is clear, however, that the source for that comment was contained not in any material which was put forward on behalf of the appellant but rather on the comments of the English Court of Appeal in R v Hussain at paragraph [48]. It is also clear from the second sentence of that paragraph that what was at issue was a change in the standards of fairness.

[27] Support for that proposition can also be found in the comments of Girvan LJ in Re Fitzpatrick and Shiels. We agree with his analysis that this case is one where there was a change in the legal standards subsequent to the trial and conviction of the deceased. That did not constitute the discovery of a new fact. We do not consider that the Maudsley Paper adds anything to this analysis as it simply documents the process of change in legal standards.

Conclusion

[28] For the reasons given we consider that the learned trial judge was correct to conclude that the Department had made no error and that the reversal of the conviction was not on the basis of a new or newly discovered fact. The appeal is dismissed.